

Lawfare as a Bridge Between Socio-Legal Theory and Practice

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These are political operatives that I'm dealing with right now. (...) This is political lawfare, they've got a lot of names for it. Usually, it takes place in third world countries, in banana republics, but nobody's ever seen it to this extent, we've never seen it here.

Former President Donald Trump speaking to reporters at his civil fraud trial in New York City, Nov. 6, 2023

Introduction

In recent years, the concept of lawfare has moved from the periphery of public discourse to a central role in our understanding of political power dynamics and contemporary socio-legal conflict. While still controversial—questions abound on whether the term actually has analytical value or is simply a new buzzword—I suggest that lawfare is a fruitful concept for scholars working on the intersection of politics, law, and society, and use the theoretical framework of Anthony Giddens' concept of double hermeneutic to argue why.

Originally coined to critique Western law's punitive nature, lawfare has often been viewed academically as a military concept. In line with newer conceptualizations of the concept (see Pinos and Hau 2022), I argue for a broader understanding of lawfare as a complex tool used by various actors in different contexts to achieve political goals. The discussion highlights the continuous feedback loop between theory and practice, showing how legal strategies both influence and are influenced by the socio-political environment.

Drawing from legal anthropology, international relations, and social theory, I argue in favor of lawfare's analytical potential and explore its possible implications for studying the intersections between law and politics. The goal is to provide a better conceptual framework for understanding the dynamic interaction between legal practice and socio-political realities, promoting a critical perspective that acknowledges the inherent political and strategic dimensions of legal actions.

Lawfare in Public Discourse

Using Google Trends, which tracks online searches, we see that, from 2004 to 2009, public interest in lawfare was virtually non-existent in the US (and elsewhere), with the search interest^[1] consistently at zero. As a concept, lawfare had clearly not yet entered mainstream public discourse (see figure 1).



Figure 1, author's own elaboration from Google Trends data

While 2010 marked the beginning of broader public awareness, the most significant shifts in public interest occurred between 2017 and 2020, with the Trump presidency. The data shows sharp spikes in searches for lawfare, with the search interest peaking at 100, the maximum value, during key events in US politics. This timing aligns with the politico-legal initiatives of the Trump administration, involving legal battles, executive orders, impeachment proceedings, and other high-profile political controversies.

Importantly, we see lawfare gaining in popularity in discussions about the early part of Trump's presidency from 2016 to 2017, which was marked by numerous legal challenges to executive orders, such as the first executive order on immigration, or 'travel ban'. As both critics and supporters debated Trump's legal strategies in politics, the use of lawfare increased. However, interest in the term seems to peak in 2018 with Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election and was spurred by the 2019-2020 impeachment proceedings against President Trump, where lawfare was frequently used to describe the strategic legal battles surrounding the impeachment and its broader political implications.

Both during his presidency and later campaigns until the present date, Donald Trump has commonly used lawfare on Twitter when discussing his ostensible legal persecution, increasing the public interest in the term. This usage has been adopted by his political allies and family, with Eric Trump using the term in a recent Fox interview (The Guardian, 2024) and Rep. Marjorie Taylor Greene repeatedly accusing the Biden administration of lawfare against Trump on Twitter.

Public interest in lawfare has declined somewhat since the peak during the Trump presidency but continues to be high compared to pre-2010 levels. Particularly, the Capitol insurrection on January 6, 2021, and subsequent legal proceedings against participants and political figures for their involvement in it, has led to a noticeable uptick in interest. Lawfare is now commonplace and has completely entered public usage, with examples from outlets such as The Washington Post (2024), Wall Street Journal (2024), or USA Today (2024). Here, it not only refers to President Trump but also to other politico-legal struggles. Lawfare seems to gain particular attention during periods of political instability or controversy, reflecting the public's concern with the use of legal mechanisms in political conflicts. Simply put, as an analytical term outside of academia, lawfare is quite popular.

That lawfare is a point of public concern is the jumping off point for the next section, in which I lean on Anthony Giddens' double hermeneutic to argue that, as scholars, we should follow contemporary public debates and include the discussions and conceptualizations of the terms used in these debates in our academic writings. By this logic, it is upon us as academics to reflect on what a term as popular as lawfare means (and could mean), and how we might make use of it analytically.

Double Hermeneutics and Legal Theory

In his seminal 1984 work 'The constitution of society', Anthony Giddens posits that there exists a mutual interpretative interplay between the social sciences and the subjects they study, a phenomenon he terms the double hermeneutic (Giddens 1984: xxxii). This interplay highlights the impossibility of maintaining a strict separation between theoretical constructs and the lived realities in society which they seek to describe.

Giddens emphasizes the continuous feedback loop between academic reflection on social processes that—through theories and observations—continually influences, and is influenced by, the events it describes (Ibid.: xxxiii). According to Giddens, the best and most interesting ideas in the social sciences foster a climate of opinion intertwined with the reflections of 'lay' actors, and academic theory must be grounded in societal articulations: 'Theories in the social sciences have to be in some part based upon ideas which (although not necessarily discursively formulated by them) are already held by the agents to whom they refer' (Ibid.: xxxiv). Theories help constitute the realities they interpret or explicate because

social science is inherently a critique practically engaged with social life. Due to the double hermeneutic, the development of critical theory is not optional for social scientists, as theories inevitably carry practical and political consequences, regardless of the author's intentions (Ibid.: xxxv).

In practice, this means that theoretical and practical knowledge and usage are intertwined, particularly in analyses of politics, society, and law. There is a constant exchange of meaning between lay concepts and scientific language, and this is not only a given, but is highly productive. As our objects of study move, so must we as scholars move with them.

Giddens' proposed feedback loop operates bidirectionally. Just as theories help reshape the social world, the practical insights and experiences of actors involved in lawfare form the foundation for theoretical understanding. As philosopher William James (2008) observed, 'Theories (...) become instruments, not answers to enigmas, in which we can rest. We don't lie back upon them, we move forward, and, on occasion, make nature over again by their aid' (James 2008: 26).

In a similar vein, anthropologist Clifford Geertz has distinguished between experience-near and experience-distant concepts. Experience-near concepts, such as 'love', are naturally used and understood by people to describe their experiences, emotions, and thoughts. In contrast, experience-distant concepts, like 'object cathexis', are employed by experts to achieve scientific, philosophical, or practical objectives, requiring specialized knowledge (Geertz 1983: 55). This distinction echoes Giddens' double hermeneutic, illustrating how science forms part of reality in a theoretical, sociological, philosophical, and indeed practical sense (Ibid.: 260).

It is precisely in the porous field of tension between these two sets of categories that the most interesting, empirically grounded, and novel analyses take place. In lawfare, there is no strict separation between the perspectives of practitioners and the analytical frameworks of scholars. Instead, there's a continuous feedback loop between them. This suggests that these perspectives, rather than being mutually exclusive, exist in a dynamic and interconnected field. Thus, when Former President Trump claims he is a victim of lawfare, it behooves us to reflect upon the meaning of this term, and to offer a constructive critique of it. This is where I turn next.

Multidimensional Meanings of Lawfare

Lawfare's popular use has long overshadowed its academic influence. The term lawfare was coined by John Carlson and Neville Yeomans (1975); the authors, however, did not provide their new creation with a precise definition, lawfare only appearing once in their text as an off-hand wordplay. The lack of conceptual clarity has followed lawfare ever since, which has, on one hand, complicated its inclusion into academic analysis,

and, on the other, allowed a multitude of societal actors to appropriate the term according to their own interests. This is of course part of what makes the term so interesting.

Earlier influential academic analyses of the phenomenon discuss lawfare as primarily occurring in military contexts, where it is used as an instrument of defense or foreign policy (see Dunlap 2001). This connects well with the understanding of lawfare as a legal ‘weapon of war’ (Kennedy 2006), but accounts for just one dimension of lawfare: what we have termed ‘geopolitical lawfare’ (Pinos and Hau 2022). It is clear, however, that the term today carries a host of other meanings. Lawfare is a concept with multiple dimensions and, crucially, with multiple users. An inclusive definition does not challenge existing, narrower, conceptualizations, but instead aims to incorporate—and acknowledge—various dimensions of lawfare. To that end we have defined lawfare broadly as ‘*a multifaceted law-based instrument that can be used by a wide range of actors in both military and non-military contexts to pursue political objectives.*’ (Pinos and Hau 2022:2). We outline four dimensions or subtypes of lawfare to capture permutations of political and legal conflict and to conceptualize why many different actors in public discourse use lawfare and what they mean by it (see figure 2). Instead of privileging a single, narrow, definition of warfare as the correct one, we regard a range of definitions as referring to different phenomena involving political struggle and legal instruments, reflecting contemporary societal debates in the spirit of Giddens’ double hermeneutic.



Figure 2, reproduced from Pinos and Hau, 2023

The emergence of new and broader understandings of lawfare inevitably generates a discrepancy between the original—and arguably still dominant—military-grounded definition and some contemporary applications, like that employed by Former President Trump and his allies. With a few notable exceptions (Comaroff and Comaroff 2006; Gloppen 2018), the semantic diversity of lawfare in public discourse has so far not prompted rigorous academic reconceptualization. Like other concepts, lawfare is susceptible to a range of interpretations, applications, and transformations as the meaning of the concept mutates by virtue of changes in social practices and political context. A broad reconceptualization reveals multiple applications in different analytical contexts and allows researchers to study the concept in light of how political actors actually use it.

Analytically, all dimensions of lawfare share a common element: they involve conflictual dynamics between political actors, typically occurring in the context of deeply asymmetrical power relationships. This may help to explain why lawfare has had an impact beyond the realm of academia to become a popular term in contemporary political debates across the globe. In recent years, the term has become far more widespread than related concepts such as 'judicialization' and 'abusive constitutionalism'.

Typologically, lawfare is differentiated on the basis of three key factors:

- a) Who applies lawfare?
- b) In which context?
- c) What political objective lies behind it?

The common element running through all dimensions of lawfare is the instrumentalization of legal means to pursue political objectives. In this conceptualization, any actor—regardless of motive and power potential—can resort to lawfare; lawfare, in other words, is not restricted to 'evil', autocratic regimes or nefarious actors. However, not all actors are equally successful in its use, as lawfare is deeply patterned on already existing power structures, institutions, and resources.

Currently, the most popular understanding of lawfare appears to be what we would term 'domestic lawfare', implying a systematic effort 'to exert control over and/or to coerce political subjects by recourse to the violence inherent in legal instruments' (Comaroff and Comaroff 2006: 49). In domestic lawfare, actors often seek to consolidate their power by undermining and neutralizing opponents through the judiciary (as Former President Trump alleges occurred in his case).

Lawfare: Analytical Value and Avenues Forward

Its increasing global prevalence suggests that the concept of lawfare will continue to influence social, political, and academic debates for some time to come. Lawfare's popularity outside of academia does not by itself establish its potential analytical value. However, several additional factors indicate that it represents a fruitful concept in socio-legal research.

Firstly, the composite structure of lawfare, combining the terms 'law' and 'warfare', clearly conveys the idea of the weaponization of legal instruments in conflictual dynamics. This makes it an accessible and intuitive heuristic for understanding the strategic use of law and alerts us to how legal tools are often deployed, rather than simply existing as inert, neutral constituents of 'the law'. Its martial metaphor underscores the often adversarial and high-stakes nature of socio-legal interactions.

Secondly, lawfare is a flexible and elastic concept that can be applied to different contexts where actors use legal means to pursue political aims.

This versatility allows it to capture a wide range of phenomena instrumentalized by a range of actors. From a socio-legal perspective, the term encourages us to study the power struggles embedded within ostensibly impartial legal systems, revealing how juridical norms and processes are routinely weaponized to advance particular interests. For example, another useful term, legal mobilization, typically refers to how social movements push for social change through law. Lawfare is broader, including a wider range of actors and motivations, including those seeking to maintain power or protect hegemonic interests.

Thirdly, the term 'lawfare' is agent-centered and processual, focusing on legal and political conflict as it evolves in practice. This makes it analytically valuable in a number of academic contexts, such as studies of legal mobilization, democratic backsliding, judicialization, securitization, great power competition, and internal territorial conflicts. By centering the actions and strategies of various stakeholders, the concept of lawfare provides a useful lens for analyzing the dynamic interplay between law and politics. For example, where 'judicialization' denotes a process of courts increasingly deciding 'political' questions, 'lawfare' more broadly highlights the strategic use of legal tools by political actors. Lawfare thus complements judicialization by examining the agency and intent behind legal actions.

But is law not always political?

The answer is of course 'yes', and the concept of lawfare serves as a critical lens for understanding how political actors use legal strategies to achieve political, economic, and social objectives. The term highlights the conflict elements in legal systems, where legal actions are strategically deployed to exert power, influence public opinion, hamstring political opponents, and generally shape political environments.

In conclusion, the concept of lawfare provides a valuable lens for analyzing the intersections of law, politics, and society. With its spread beyond academia into political discourse worldwide, lawfare is poised to remain a vital resource for scholars, policymakers, and citizens seeking to critically analyze the role of law in shaping the world.

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[1] Google Trends uses search interest as a normalized value on a scale from 0 to 100. 100 represents the peak popularity of the term within the given time frame, and other values are scaled relative to this peak.

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Suggested Citation: Mark Friis Hau, "Lawfare as a Bridge Between Socio-Legal Theory and Practice," MCLR+ (crimlrev.net) (Oct. 28, 2024) (<https://crimlrev.net/2024/10/28/lawfare-as-a-bridge-between-socio-legal-theory-and-practice-mark-friis-hau/>).

