

The Rule of Law:

Law, Philosophy, Sociology, Politics, and Reality

Centre for Social Studies, Warsaw

July 2020

Course outline

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Introduction:

Discussion of the rule of law has a long history, and large literature, though in the main primarily among only lawyers and political theorists. However, from the early 1990s rule of law took on an iconic aura, up there with justice, freedom, democracy. It became an international hurrah term, on the lips of virtually every political leader, development agency and world body, offered as a support for economic growth, democracy, human rights, and much else. Rule of law (RoL) promotion boomed. Thousands of people and many organizations were contracted to work on it, billions of dollars were spent on it, platoons of academics came to write about it. A problem left for citizens, and indeed pretty well anyone, to puzzle over was what people were talking about and why.

Once a concept has acquired such an aura, it will be invoked. Nothing surer. That presents some dangers. One is that it will be used as an alibi to cover shady practices or worse. Another, that, apart from deliberate abusers, it might draw bands of partisans, whose enthusiasm for it is not matched by an understanding either of what it is, what it depends upon or of what it can be expected to offer. All this has happened to the rule of law, and that has tended to muddy our understanding and appreciation of it.

This is not a 'merely academic' problem. Since 'rule of law' is now a term in the world, verbal abuse of the term, or excessive enthusiasm for whatever it is taken to be, are not merely the stuff of quarrels among professors. In recent years, the rule of law has been said to be under great challenge: from terrorism and the responses to it, from indifferent results of development projects, from the rise of what has been called the 'new populism' in many countries in the world, among them Hungary, Poland, Venezuela, Turkey, the Philippines, the USA. If the '90s were thought by some to represent the triumph of western rule of law democracies, and 'the end of history' we have entered, in the words of a recent book title, 'no one's world', where these values are increasingly contested by various forms of national and international illiberalism, recent surges of populism-in-power and, most recently, opportunistic attempts to bend the global catastrophe of COVID-19 to authoritarian advantage.

This course will address these issues and developments, by clarifying what appeals to the rule of law are about, whether and if so why it might matter. It will then confront our understanding with a number of contemporary real-world challenges: some such as those that come from terrorism, the rise of 'the new populism' and the current pandemic, which have been alleged to threaten the rule of law, or raise questions about its purpose, nature and value.

The Course:

In the first two classes, students will approach the rule of law by examining a variety of places and circumstances in which it seems to be lacking or altogether absent. The question is: *what* is it that is lacking or absent? In classes 3 and 4, we will discuss classic accounts of the nature of what the rule of law is. In class 5 we will ask why it matters, if it does.

Many discussions of the rule of law do not venture beyond writings of philosophers or lawyers. However, if the rule of law is important at all, does any useful work, it must do that *in society*, not just in official offices and chambers. However, philosophers and lawyers have no special expertise in what goes on, or how law works in society. So the course will move in classes 6-7 to discuss some of the ways law does its social work, that might surprise those who share widespread and conventional notions of the ways law, and the rule of law, work in the world. In class 6, we will discuss some *sociological* facts and circumstances that complicate the predominantly legal and philosophical accounts that have dominated discussion of the rule of law. We examine the significance of what is called 'legal pluralism' for our understanding of the place of formal legal institutions in the real world. Drawing this discussion together, class 7 will introduce a different approach to the rule of law, which seeks to go beyond the limitations of traditional approaches.

The last three classes consider contemporary challenges to the rule of law. Class 8 will bring these general considerations to bear on a current and controversial element of public policy that centrally involves the role of the rule of law: terrorism and counter-terrorism. The rule of law is vulnerable to erosion, attack, and destruction, from social forces hostile to it, but also even from ostensibly well-meaning political and administrative attempts to counter such hostile forces. Thus it is vulnerable to contemporary opponents as terrorists, and to counter-terrorists as well who are often tempted to compromise the rule of law in what is often called the 'war on terror'. In this class, we will explore some sources of such vulnerabilities and dangers, and how they affect and are affected by the rule of law.

In class 9, we will examine some of the challenges and opportunities to the rule of law ideologies and ambitions, that dominated in post-communist Europe and elsewhere, at least since the 1990s: what is known as 'populism'. One of the least predicted challenges to the rule of law has been the rise of parties in many countries in both the east and west of the continent of Europe and in many other parts of the world as well, often described as 'populist'. We will examine the implications of these political developments for the strength, and even perhaps persistence, of the rule of law.

Finally, class 10 will explore some of the most recent challenges to the rule of law represented by the COVID-19 pandemic, and governmental responses to it world wide.

Classes and Readings:

The Readings:

Each class has compulsory set readings and several have a supplementary reading or readings as well. The former is required reading for everyone in each class. The others are for those interested to take things a little further, and where we have more than one reaction paper in a class, the second might draw from them. If you can do a bit of both from time to time, it will add to the intellectual variety and vitality of the class, which will discuss both compulsory and additional readings as well as other relevant material that participants bring to the discussion. It is crucial that students read the compulsory readings carefully before each class, **including the first class**. Their class participation grades will include their responses to questions in understanding of these texts.

1. & 2. Introduction to the Course;

What is **NOT** the Rule of Law?: Some Examples

You can learn a lot about the rule of law from looking at circumstances where it's missing. So we will begin by looking at some examples where many people would agree the rule of law is absent, or at least not in good shape. But if the rule of law is not in good shape in any of these examples, it's not in the *same* bad shape in all of them. Students should read the extracts from the readings listed for each class, and ask themselves, and be prepared to discuss in class, what is it about each example which raises 'rule of law' issues, and how each one differs from or is similar to the others.

(Those with page references can be accessed in the online course materials. Those with a URL can be accessed directly.) What does the absence of the rule of law in these examples tell you about what it is, what it depends upon and what it is worth?

Readings for classes 1 and 2: (extracts from):

Class 1:

Compulsory:

Nick Cheesman, *Opposing the Rule of Law. How Myanmar's Courts Make Law and Order*, Cambridge UP, 2015, pp. 182-90

Sida Liu, Terence C. Halliday, *Criminal Defence in China*, Cambridge UP, 2016, pp. 44-50

Karl Schlögel, *Moscow 1937*, Polity Press, pp. 125-27; 136-41; 491-97; 502-4; 523-25

Additional:

Alexander Solzhenitsyn, *The Gulag Archipelago*, William Collins 1974, pp. 281-98

Class 2:

<https://www.hrw.org/legacy/reports98/police/uspo14.htm>

<https://www.nytimes.com/2019/12/20/world/americas/brazil-police-shootings-murder.html>

https://www.hrw.org/sites/default/files/report_pdf/gambia0915_4up_0.pdf

<https://www.thenation.com/article/arbitrary-rule/>

3. What IS the Rule of Law?: I. 'Thin' and 'Thick' conceptions

Even among supporters of the rule of law, there are great differences on what is being supported and why? Is the rule of law primarily there as a barrier to nasty possibilities or as a bridge to valuable ones?

Readings:

Compulsory:

Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* Oxford UP, 1979, 210-29.

Ronald Dworkin, 'Political Judges and The Rule of Law,' in *A Matter of Principle*, Harvard University Press, Cambridge, Mass., 1985, 9-32.

Additional:

Philip Selznick, 'Legal Cultures and the Rule of Law', in Martin Krygier and Adam Czarnota, eds., *Law after Communism*, Ashgate, Aldershot, 1999, 21-38.

Judith N. Shklar, 'Political Theory and the Rule of Law,' in her *Political Thought and Political Thinkers*, University of Chicago Press, 1998, 21-37.

4. What IS the Rule of Law?: II. Institutional (anatomical) accounts

The most common way to answer the question, 'what is the rule of law?', is to identify institutional features of state legal systems that allegedly need to exist for the rule of law to exist. Among legal philosophers, Lon Fuller's account of such formal features has been highly influential, while Jeremy Waldron's more recent additional of 'procedural' elements is a significant supplement. But even if you combine the two accounts, do you have enough?

Reading:

Compulsory:

Lon L. Fuller, *The Morality of Law*, Yale University Press, 1961, chapter 2.

Additional:

Jeremy Waldron, 'The Rule of Law and the Importance of Procedure,' in James E. Fleming, ed., *Getting to the Rule of Law*, Nomos no.50, New York University Press, 2011, 3-30.

5. Why Care?

The Rule of Law is not just a description of a legal system; it is an aspiration, an ideal. What is that ideal? Why should anyone worry about the rule of law? What might be at stake?

Readings:

E. P. Thompson, *Whigs and Hunters*, Penguin, Harmondsworth, 1975, 258-69.

Morton, Horwitz (1977), 'The Rule of Law: An Unqualified Human Good?' 86 *Yale Law Journal* 561-66

6. Complications for traditional accounts: Legal Pluralism, and the Rule of Law

Reading:

Compulsory:

Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law,' (1981) 19 *Journal of Legal Pluralism*, 1-35.

Additional:

Martin Krygier, 'Legal Pluralism and the Value of the Rule of Law' in Andrew Halpin and Nicole Roughan, eds., *Jurisprudence without Borders*, Cambridge University Press, 2017, 294-325.

7. An Alternative Approach: Start at the end

Discussion of the rule of law is commonly the province of lawyers and philosophers of law. Rarely have legal sociologists explored it. But quite obviously if law is to rule it must count in society, and if it is to rule well it must count for good. But what are the conditions for such good things? Lawyers and philosophers have little to tell us on these matters, because all they speak about is the character of the official law. So what makes them listen? The answer to such questions can only come from sociological investigations yet to be done.

Reading:

Martin Krygier, 'What's the Point of the Rule of Law?' The Baldy Center's 40th Anniversary Conference: Tempering Power, (2019) 67, 3 *Buffalo Law Review* 743-91

8. Terror, Counter-Terror and the Rule of Law

One of the great challenges to the rule of law is terrorism. It is so directly and explicitly, since it combats it. It is arguably so indirectly as well, in the responses it generates, some deliberate, some unintended. Opponents of terrorism argue that it represents an exception so great to 'business as usual' that defenders of democracy must trade-off usual rule of law constraints to combat it. This class will examine that argument.

Reading:

Compulsory:

Extracts from Stephen Holmes, 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror' (2009) 97(2) *California Law Review* 301-55.

Additional:

Jeremy Waldron, 'Security and Liberty: The Image of "Balance"', (2003) 11, 2, *The Journal of Political Philosophy*, 191-21.

9. Populism and the Rule of Law

In recent years, an increasing number of states, including Poland, Hungary, the United States, have come to be governed by parties that are democratically elected, on the one hand, but have little time for established elites, the independence of major public institutions such as courts, civil service, mass media, or oppositional activities in civil society. Such parties are often called populist. Their supporters believe they are restoring democracy to countries that have been corrupted by elites, non-national values, and globalisation. Their opponents claim they threaten the rule of law. We will examine some of these debates.

Reading:

Compulsory:

Bojan Bugarić, Alenka Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?' (2018) 10 *Hague Journal on the Rule of Law*, 21–33

Gabor Halmai, 'Populism, authoritarianism and constitutionalism' (2019) 20 *German Law Journal* pp. 296–313

https://www.demdigest.org/democracy-on-pandemic-pause-why-populists-understand-eastern-europe/?fbclid=IwAR2JGoal6yAWLuuV3T-mgXBtFzkWRPYMkrp54ETU1jBcmdIF_4sK5Oxvxz4

Additional Reading:

Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding,' <http://ssrn.com/abstract=3103491>.

10. The Pandemic and the Rule of Law

Around the world, governments have had to respond urgently to the unprecedented spread of the COVID-19 virus. Some have done so successfully, others less so; some have sought to do so in ways that respect and draw on the rule of law; some have sought to exploit opportunities to expand their powers. What do these different reactions tell us about the virtues and limitations of the rule of law?

Reading:

[a guide to resources] <https://www.democratic-decay.org/databases>

<https://pursuit.unimelb.edu.au/articles/how-covid-19-is-hitting-some-democracies-harder-than-others>

https://www.politico.com/news/2020/05/06/hungary-no-longer-a-democracy-report-239807?fbclid=IwAR1M9JnztU9kY4BbGMzppgtQV92zkwFensvaP41_4DvAwNSE8A8SMxis-mI

<https://www.theglobeandmail.com/opinion/article-authoritarian-leaders-thrive-on-crises-so-why-do-wannabe-tyrants-fear/?fbclid=IwAR1SKmBGJFo7Tt06mi75UntOhjBaD866sFe3cjM9dQjRGo1-bo9gNTaNvy4>

Webinars:

<https://www.ucl.ac.uk/european-institute/news/2020/may/states-emergency-liberty-authority-and-law>

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Assessment:

Assessment will be by way of one term essay (ca. 3500 words; 70%). In addition students will write reaction papers to at least one of the readings, and be prepared to discuss what they have read in class (reaction papers should not be longer than 1 standard page, single-space 12 font maximum: they should not be summaries but be truly *reactions* to something they thought particularly good/bad, clever/silly, useful/useless that the article discussed has to say). Reaction papers **AND** class participation will be worth up to 30% of the assessment in this subject.

Academic objectives: The principal aims of this course are to:

1. Furnish students with an awareness of some of the central and continuing traditions of thought about the rule of law, its nature, its virtues and vices;
2. Enable them to think both *within* the paradigms of such traditions of thought, as well as critically *about* them;
3. Encourage them to step beyond narrow disciplinary boundaries to take in the variety of sources that focus on common problems, among them from sociology, law, history, political science and philosophy;
4. Focus the general themes on the course on contrasts between characterizations of law that emphasize its role as the servant of power, and those that see it as a force that constrains it;
5. Focus them also on those who see society as an inert recipient of law and those that emphasize it as an active source of law;
6. Examine the ways these different conceptions play out in the context of communist and post-communist societies;
7. Acquaint students with major shifts and changes in the character of law and its social and political environment in the West and in the world.

Learning outcomes: By the end of this course, students should be able to:

1. identify the sociological, political and legal assumptions underlying contemporary writings about the rule of law;
2. evaluate the strengths and weaknesses of different perspectives on these matters;
3. participate in discourses on these matters versed in empirical, theoretical and normative material relevant to them;

4. bring to bear what they know from their own life experience to the matters under discussion;
5. apply what they have learnt to their own societies and legal orders.