



## **RULE OF LAW**

### **Dichotomies of the Rule of Law: Theoretical Foundations and Contemporary Challenges**

#### **Lecturers:**

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#### **Description**

##### *What is this course about?*

This course offers an interdisciplinary take on the concept of the rule of law. Instead of limiting itself to a single disciplinary discourse such as the one in comparative constitutional law or law and society, it will attempt to map out mayor narrative avenues in the rule of law discourse in general. In order to do this, it will source from literature in legal theory, comparative constitutional law, political science and law and society. In order to showcase the multifacetedness and ambiguity of the term, the major themes will be presented in dichotomies. This theoretical discussion will be aided by in-depth case studies.

##### *Who should take this course?*

The course is aimed at students with interest in constitutional law, political science and law and society. The level of discussion will presuppose a good understanding of basic constitutional concepts on which domestic and EU institutions are based. It does not require, however, any advanced knowledge of EU and comparative constitutional law and legal theory.

This is a course that requires relatively intense work from participants (including homework: reading and – voluntary – student paper preparation).



## **Materials**

All relevant literature (required and recommended) is available in the reader, which is accessible on the moodle page of the course. As the course progresses, I will make the ppt presentations and/or outlines also available there.

## **Attendance Policy**

Regular attendance is required. Guest lectures might take place at different times and a different location than the scheduled weekly class.

## **Assignments**

Students will be required to read the compulsory reading material. The recommended readings are aimed at students with particular interest in the topic. The reading of this is voluntary. There will also be assignments for short student papers on a voluntary basis on select topics and materials. These will be discussed at the beginning of the course. A completed assignment relieves the student from the requirement to submit an essay at the end of the term.

## **Exam, Evaluation and Grading**

In order to complete the course, students will be required to submit an essay. Submission deadline is the end of the term. Topics and further details, including a detailed grading policy will be made available on the moodle page of the course at the beginning of the term. The grade received for the essay will constitute the final grade, except for those who have completed an assignment during the course. The latter will be graded based on the assignment.

## **Themes and Literature**

### **1. Rule of law vs. Rechtsstaat (vs. l'état de droit)**

#### Required reading:

McLoughlin, Martin (2010): *The Foundations of Public Law*. Oxford University Press, Oxford. pp. 312-342. (The Chapter "Rechtsstaat, Rule of Law, l'Etat de droit")

#### Recommended reading:

Tamanaha, Brian Z. (2004): *On the Rule of Law. History, Politics, Theory*. Oxford University Press, Oxford. pp. 47-73. (The chapters "Locke, Montesquieu, the Federalist Papers" and "Conservatives Warn")

Böckenförde, Ernst Wolfgang (1991): *The Origin and Development of the Concept of the Rechtsstaat*. in: Böckenförde, Ernst Wolfgang: *State, Society and Liberty. Studies in Political Theory and Constitutional Law*. Berg, New York. pp. 47-70.



Heuschlink, Luc (forthcoming): *État de droit: Why Import the German Term Rechtsstaat?* In: Meierhenrich, Jens; McLoughlin, Martin (eds.): *The Cambridge Companion to the Rule of Law*. Cambridge University Press, Cambridge.

**2. Thick vs. Thin: Is Rule of Law a Formal or Substantial Concept?**

Required reading

Raz, Joseph (1983): *The Rule of Law and its Virtue*. In: Raz, Joseph: *The Authority of Law*. Oxford University Press, Oxford. pp. 208-227.

Recommended reading:

Tamaha, Brian Z. (2004): *On the Rule of Law. History, Politics, Theory*. Oxford University Press, Oxford. pp. 47-73. (the chapters “Formal Theories” and “Substantial Theories”)

Bingham, Thomas (2011): *The Rule of Law*. Penguin, London.

**3. Rules vs. Rights: Does Rule of Law Imply the Protection of Fundamental Rights?**

Required reading

Dworkin, Ronald (1978): *Political Judges and the Rule of Law*. in: *Proceedings of the British Academy*. pp. 248-271.

Recommended reading:

Grimm, Dieter (2007): *The Interpretation of Fundamental Rights by the German Constitutional Court*. in: Grimm, Dieter: *Constitutionalism. Past, Present, Future*. Oxford University Press, Oxford. pp. 345-357.

**Case Study: The Weimar Republic and its Dissolution**

**(Guest lecturer: Zoltan Szente, Professor of Constitutional Law, National University of Administration)**

Required reading

Fraenkel, Ernst (1941/2017): *The Dual State. A Contribution to the Theory of Dictatorship*. Oxford University Press, Oxford. pp. 3-101. (“Part I. The Legal System of the Dual State”)

Recommended reading:

Meierhenrich, Jens (2018): *The Remnants of the Rechtsstaat. An Ethnography of Nazi Law*. Oxford University Press, Oxford. pp. 95-159. (The chapter “The Debate About the Rechtsstaat in Nazi Germany”)

**4. Rule of Law vs. Democracy: Is Rule of Law Compatible with Democracy?**

Required reading

Schmitt, Carl (2008): *Constitutional Theory*. Duke University Press, Durham. pp. 167-249. (selected sections) (“Part II. The Rechtsstaat Component of the Modern Constitution”)



Schmitt, Carl (2004): *Legality and Legitimacy*. Duke University Press, Durham. pp. (The chapters “The Legislative State and the Concept of Law” and “Legality and the Equal Chance for Achieving Political Power”)

Heller, Hermann (1934;2000): *The Essence and Structure of the State*. in: Jacobson, Arthur J.; Schlink, Bernhard (eds.): Weimar. A Jurisprudence in Crisis. University of California Press, Berkeley. pp. 265-279.

Recommended reading:

Griffith, John (1979): *The Political Constitution*. in: Modern Law Review, Vol. 41 pp. 1-21.

**5. Rule of Law vs. Populism. Is Populism a Threat to the Rule of Law?**

Required reading:

Lacey, Nicola (2019): *Populism and the Rule of Law*. in: Annual Review of Law and Social Science Vol. 15. pp. 79-96.

Recommended reading:

Gidron, Noam; Bonikowski, Bart (2013): *Varieties of Populism. A Literature Review and Research Agenda*. Weatherhead Working Paper Series. Weatherhead Center for International Affairs, Harvard University.

**Case Study: Emergency Powers in Turkey**

**(Guest Lecturer: Noemi Levy-Aksu, researcher, London School of Economics)**

Required reading:

TBD

**6. Rule of Law vs. Constitutionalism. Does the Rule of Law Equal Constitutionalism?**

Required reading:

Stimson, Stanon C. (2008): *Constitutionalism and the Rule of Law*. in: Dryzek, John S.; Honig, Bonnie; Phillips, Anne (eds.): The Oxford Handbook of Political Theory. Oxford University Press, Oxford. pp.

Recommended reading:

Baer, Susanne (2019): *The Rule of – and not by any – Law*. On Constitutionalism. in: Current Legal Problems. Vol. 71. Nr. 1. pp. 335-368.

**7. Rule of Law vs. Instrumentalism: Is the Rule of Law Compatible with the Modern Administrative State?**

Required reading:

Hayek, Friedrich A. (1994): *The Road to Serfdom*. Chicago University Press, Chicago. pp. 80-111.

Unger, Roberto Mangabeira (1977): *Law in Modern Society. Towards a Criticism of Social Theory*. The Free Press, New York. pp. 192-223. (The Chapter “The Disintegration of the Rule of Law in Postliberal Society”).



## Case Study: Singapore

### Required reading:

Rajah, Rothie (2012): *Authoritarian Rule of Law. Legislation, Discourse and Legitimacy in Singapore*. Cambridge University Press, Cambridge. pp. 1-55; 267-298. (The chapters “Law, Illiberalism and the Singapore Case” and “Legislation, Illiberalism and Legitimacy”)

### Recommended reading:

Thio, Lee-Ann (2004): *Rule of Law Within a Non-Liberal “Communitarian” Democracy: The Singapore Experience*. in: Peerenboom, Randall (ed): *Asian Discourses on the Rule of Law. Theories and Implementation of rule of law in twelve Asian countries, France and the U.S.* Routledge, London. pp. 180-221.

## 8. Rule of Law vs. Authoritarianism: Are Rule of Law and Authoritarian Regimes Mutually Incompatible?

### Required reading

Meierheinrich, Jens (2018): *The Remnants of the Rechtsstaat. An Ethnography of Nazi Law*. Oxford University Press, Oxford. pp. 225-253. (The chapter “Authoritarian Rule of Law”)

Hale, Henry (2015): *Patronal Politics. Eurasian Regime Dynamics in Comparative Perspective*. Cambridge University Press, Cambridge pp. 19-39. (The Chapter “Patronal Politics and the Great Power of Expectations”)

### Recommended reading:

Moustafa, Tamir, Ginsburg, Tom (2008): *Introduction: The Functions of Courts in Authoritarian Regimes*. In: Ginsburg, Tom; Moustafa, Tamir (eds): *Rule by law. The Politics of Courts in Authoritarian Regimes*.

## 9. Rules vs. Culture: Is Rule of Law a Question of Written Rules or of Legal Consciousness/Institutional Practice?

### Required reading

Meierheinrich, Jens (2008): *The Long-Running Consequences of Legal Development in South Africa, 1652-2000*. Cambridge University Press, Cambridge pp. 314-329. (the chapter “Conclusion”)

Hendley, Kathrin (2017): *Everyday law in Russia*. Cornell University Press, Ithaca. pp. 18-57. (The chapters “Introduction: Lawlessness in Russia? Rethinking the Narratives of Law” and “Legal Consciousness(ess) in Russia”)

## 10. Universality vs. Diversity: Is There a Universal Common Core to the Concept of the Rule of Law?

### Required reading

Peerenboom, Randall (2004): *Varieties of Rule of Law*. in Peerenboom, Randall (ed): *Asian Discourses on the Rule of Law. Theories and Implementation of rule of law in twelve Asian countries, France and the U.S.* Routledge, London. pp. 1-54.

### Recommended reading:



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Grimm, Dieter (2016): *Levels of the Rule of Law. On the Possibility of Exporting a Western Achievement.* in: Grimm, Dieter: *Constitutionalism. Past, Present, Future.* Oxford University Press, Oxford. pp. 345-357.

## 11. Centrum vs. Periphery: Is the Rule of Law Discourse a Tool of Global Domination?

### Required reading

Mattei, Ugo; Morpurgo de Marco (2009): *Global Law and Plunder: The Dark Side of the Rule of Law.* Bocconi School of Law Research Papers.

### Recommended reading:

Humphreys, Stephen (2010): *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice.* Cambridge University Press, Cambridge pp. 219-233. (the chapter "Conclusion")

Mattei, Ugo; Nader, Laura (2008): *Plunder. When the Rule of Law is Illegal.* Wiley-Blackwell, London. pp. 196-216. (the chapter "Beyond an Illegal Rule of Law?")

## 12. Qualitative vs. Quantitative: Is the Rule of Law Measurable?

(Guest lecturer: Nyasha Weinberg, research fellow, The Bingham Centre for the Rule of Law)

### Required reading

Moller, Jorgen; Skaaning, Svendt-Erik (2014): *The Rule of Law. Definitions, Measures, Patterns and Causes.* Palgrave-MacMillan, London. pp. 41-80. (the chapters "Evaluating Extant Rule of Law Measures" and "Exploring the Interchangeability of Rule of Law Measures")

### **Case Study: Hungary and Poland**

#### Required reading:

Sadurski, Wojciech (2019): *Poland's Constitutional Breakdown.* Oxford University Press, Oxford. pp. 162-192.; 242-267. (the chapters "Why Did it Happen?" and "Illiberal Democracy or Populist Authoritarianism?")

## 13. Domestic vs. International: Can and Shall Rule of Law Standards Be Enforced Against Sovereign States?

(Guest lecturer: Pál Sonnevend, Professor of European Law, Dean, ELTE University Faculty of Law)

### Required reading:

von Bogdandy, Armin; Carlino Antpöhler; Michael Ioannidis (2016): *Protecting EU Values - Reverse Solange and the Rule of Law Framework.* In: Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series Nr. 4. pp. 1-22.

### Recommended reading:

Kochenov, Dimitry (2017): *Busting the Myths Nuclear: A Commentary on Article 7 TEU.* EUI Working Paper No. LAW 2017/10; University of Groningen Faculty of Law Research Paper 2017-08.