

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

Csaba Gyóry, Assistant Professor, Centre for Law and Society, ELTE Faculty of Law

Noémi Fanni Molnár, PhD Student, Centre for Law and Society, ELTE Faculty of Law

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 major narrative avenues in the rule of law discourse in general. To do this, it will source from literature in legal theory, comparative constitutional law, political science and law and society. 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.

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.

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.

Course Completion

To complete the course, students will be required to submit an essay. Submission deadline is the end of the term. Topics and further details 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.

Grading Policy

The final grade will have two components: essay/student paper (70%) and active contribution during the class (30%). A detailed grading policy will be made available on the moodle page of the class at the beginning of the term.

Themes and Literature

Part 1. Theoretical and Conceptual Foundations

1. 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:

Tamanaha, 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")

Shklar, Judith (1987): *Political Theory and the Rule of Law*. in: In Allan Hutchinson & Patrick J. Monahan (eds.), *The rule of law: Ideal or ideology*. pp. 1-16.

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

2. 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 (2020): *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.

3. Rule of Law vs. Constitutionalism: Does Rule of Law Equal Constitutionalism?

Required reading:

Loughlin, Martin (2022): *Against Constitutionalism*. Harvard University Press, Cambridge. (the chapters „introduction: what is constitutionalism" and „origins of constitutionalism")

Recommended reading:

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

Tushnet, Mark (1999): *Taking the Constitution Away from the Courts*. Princeton University Press, Princeton. (the chapters „against judicial review” and „populist constitutional law”)

Vermeule, Adrian (2020): *Common Good Constitutionalism*. Harvard University Press, Cambridge. (the chapters „progressive constitutionalism and developing constitutionalism” and „applications”)

Case Study: The Weimar Republic and its Dissolution

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:

Meierheinrich, 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”)

Dyzenhaus, D. (1997). *Legal Theory in the Collapse of Weimar: Contemporary Lessons?* *American Political Science Review*, 91(1), 121-134

4. Rule of Law vs. Rule of Majority: 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”)

Recommended reading:

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.

5. Rule of law vs. Community Values: is an Agreement About Fundamental Values in the Political Community a Prerequisite for the Existence of the Rule of Law?

Required reading:

Böckenförde, Ernst-Wolfgang (1967(2020): *The Rise of the State as a Process of Secularization*. In: Mirjam Künkler, and Tine Stein (eds): *Religion, Law, and Democracy: Selected Writings*. Oxford University Press (online edition)

<https://doi.org/10.1093/oso/9780198818632.003.0008>

6. Rules of law vs. Rule of Judges: Is Judicial Interpretation a Threat to the Rule of Law?

Required reading

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

Recommended reading:

Waldron, Jeremy (1999): *Law and Disagreement*. Oxford University Press, Oxford. (the chapter „Rights and Judicial Review“)

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: Emergency Powers in a Hybrid Regime

Required reading:

Csaba Gyóry & Nyasha Weinberg (2020): *Emergency Powers in a Hybrid Regime: the Case of Hungary*. *The Theory and Practice of Legislation*, 8:3, 329-353

7. Exception vs. Norm: Is There Rule of Law in the State of Exception?

Required reading

Schmitt, Carl (1923,1986): *Political Theology*. MIT Press, Boston. pp. 1-15. (the chapter „The Definition of Sovereignty“)

Agamben, Giorgio (2005): *The State of Exception*. The University of Chicago Press, Chicago, pp. 1-32. (the Chapter „ The State of Exception as a Paradigm of Government“)

Recommended reading:

Dyzenhaus, David (2006): *The Constitution of Law, Legality in a Time of Emergency..* Cambridge University Press, Cambridge. pp. 35-59. (the chapters „Carl Schmitt’s challenge“ and „Parliamentary of Judicial Supremacy“)

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? (Guest Lecture: Andras Jakab, University of Salzburg)

Required reading

András Jakab (2020): *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, *The American Journal of Comparative Law*, Volume 68, Issue 4, December 2020, Pages 760–800,

Recommended 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:

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?

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”)

Jakab, A., & Kirchmair, L. (2021). *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*. *German Law Journal*, 22(6), 936-955.

13. Conclusion: Finding a Common Language of the Rule of Law