

The Rule of Law: Philosophy, Sociology, Reality

Course outline

2009

Introduction:

The rule of law is today the beneficiary, sometimes the victim, of enormous rhetorical enthusiasm. No one is against it. Once upon a time, and not too long ago, it had a lot of enemies. Marxists and others of radical temper used to deride it all the time. Many rulers, too, have had no time for the rule of law, and have not been shy to say so. These days, however, even when states or rulers abuse the rule of law, they don't stop speaking well of it. That is no accident. For just as democracy, justice, peace, and many other good things are honorifics, hurrah words, so today the rule of law is an honorific phrase.

Once the preserve only of lawyers and legal philosophers, now the phrase is on everyone's lips. Long marginalised in theories of economic development, the rule of law is now at their core. A scarcely noticed cliché with little resonance in the imperious rhetoric of human rights, it now is often said to be a key to achievement of those rights. In post-communist societies, it has become what the Bulgarian Ivan Krastev has called 'the white myth of transition. After some years of flirting with the ideas of democracy and market economy, now rule of law is the magic phrase in Eastern Europe. It is rule of law and not democracy that brings foreign investors, it is rule of law that secures development and protects rights. It is the lack of rule of law that explains the spread of corruption and it is the march of rule of law that will guarantee success in the fight against corruption.'

Indeed, it is difficult to find anyone, anywhere, who has a bad word for the rule of law. And where the rhetoric goes, the money follows: rule of law packages are standard, central and pricey elements of international aid to benighted countries. Indeed, more and more international aid packages are *conditional* on institutional moves being undertaken to achieve the rule of law. That is true of the World Bank and the WTO. And it is true of the enlarged EU too. It is estimated that over \$1 billion per year is spent on rule of law promotion projects around the world.

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 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 dons, and dons talking to other dons will not always help to clarify public confusion. Moreover, since the values encompassed in the phrase are arguably precious ones, such confusion needs to be addressed. This course will address them.

The Course:

The course will begin by examining writings from political and legal philosophy within which the concept of the rule of law, and allied concepts in other languages - *Rechtsstaat*, *l'état de droit*, *stato diritto*, *państwo prawa* - developed. Students will be introduced to classic arguments for the rule of law, debates about its nature, preconditions and consequences, and the important connections and distinctions between the concept of 'law' and that of 'the rule of law'. They will also meet criticisms, both of the concept and of its worth.

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*. However, philosophers and lawyers have no special expertise in what goes on, or how law works in society. So the course will move to discuss some writings from sociology of law, which examine some of the ways law does its work that might surprise those with widespread and conventional notions of the ways law works in the world.

In the last 20 years, in large part as a response to the collapse of European communism but also now spread throughout the world, 'rule of law promotion' has become enormously fashionable. Questions arise about the relationships between the understanding of 'rule of law' by 'rule of law' promoters and the philosophical traditions out of which the term developed. There are further questions of an urgent practical nature about what the rule of law depends upon, what needs to happen for the rule of law to develop, what 'rule of law promotion' can do to succeed, whether it can succeed at all. The last two classes will focus on such questions.

Class topics:

1. Introduction: Law and the Rule of Law. What's the difference? What's the point?

This first class will introduce the central concepts of the course, and discuss their interrelationships. What do we understand the concept of 'law' to include? What is distinctively 'legal' as distinct from customary, moral etc.? What is the rule of law? How does it relate to law? The class will be introduced to some of the conventional notions of the rule of law in the first introductory reading, and to some more recent developments that involve the rule of law in the second reading.

Readings:

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

Martin Krygier, 'The Rule of Law' *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier Science, Oxford, 2001, vol.20, 13403-408.

2. The Rule of Law versus the *Rechtsstaat* traditions

The phrase 'rule of law' was coined in England. In recent years, English being the international language it has become, the phrase is heard around the world. However, it is arguable that the English concept is not the same as allied concepts found in other languages. The reading for this class develops that argument. Apart from discussing it, students will be asked to reflect upon the relevant terms in languages known to them, and relate them to Palombella's argument.

Reading:

Gianluigi Palombella, 'The Rule of Law and its Core,' in Palombella and Neil Walker, eds., *Relocating the Rule of Law*, Hart, Oxford, 17-42.

3. The Rule of Law and its (alleged) virtues

This class presents an overview of some of the major arguments advanced in favour of the rule of law, and examine how they differ.

Readings:

Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law', in Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law*, Hart, Oxford, 3-15.

Blandine Kriegel, *The State and the Rule of Law*, Princeton University Press, 1995, 3-10.

4. What's the Point of the Rule of Law?

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? This class will consider the first alternative; the next will discuss the second alternative.

a) 'Negative' Conceptions

Readings:

Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* Oxford UP, 1979, 210-29.
Judith N. Shklar, 'Political Theory and the Rule of Law,' in her *Political Thought and Political Thinkers*, University of Chicago Press, 1998, 21-37

5. What's the Point of the Rule of Law?

b) 'Positive' Conceptions

Readings:

Ronald Dworkin, 'Political Judges and the Rule of Law,' in *A Matter of Principle*, Harvard University Press, Cambridge, Mass., 1985, 9-32
Philip Selznick, 'Culture and the Rule of Law', in Martin Krygier and Adam Czarnota, eds., *Law after Communism*, Ashgate, Aldershot, 1999, 21-38.

6. Controversies about the Rule of Law: Constraint on Power or Legitimation of Power?

According to many of its advocates, the rule of law is a great, some say universal good. Some critics deny that it is a great good, while others deny that it is good at all. Marxists denied both, Michel Foucault denied that it added up to much, and many feminists have considered that whatever good it might do for men was not shared with women, and that this was no accident.

Readings:

E. P. Thompson, *Whigs and Hunters*, Penguin, Harmondsworth, 1975, 258-79.
Morton Horwitz, 'The Rule of Law: an unqualified human good?' (1977) 86 *Yale Law Journal*, 561ff.

7. Sociology and Law

It is common for lawyers to think of law almost exclusively in relation to the official activities of state organs, and there is clearly a special association between law and state. However, a lot that is most important about law is transacted elsewhere, by other agencies, whether official or non-official or counter-official. How much real normative work is done by official 'legal' agencies varies enormously between societies, and within them as well. It has been the work of legal sociologists, many of them deriving from anthropology, to fill in some of the gaps and connections between state and society in an understanding of law. Very little of that understanding has yet filtered into discussions of the rule of law.

Readings:

David Nelken, 'Law in action or living law? Back to the beginning in sociology of law' (1984) 4 *Legal Studies* 157-174

Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law*, 1-47

8. Sociology and the Rule of Law

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. If no one is listening, however, it may not matter too much what the law is saying. So what makes them listen? The answer to such questions can only come from sociological investigations yet to be done.

Readings:

Martin Krygier, 'Teleology, Sociology, and the Rule of Law,' in Palombella and Walker, eds., *Relocating the Rule of Law*, Hart, Oxford, 45-70

Martin Krygier, 'The Rule of Law and "the Three Integrations"', (2009) 1,1 *Hague Journal on the Rule of Law*, 21-27.

9. Promotion of the Rule of Law

The rule of law has today become one of the prizes everyone claims to want. Those who believe they have it boast of it. Those thought to need it are swamped with advice on how to get it. The trouble is that the rule of law is less understood than it is praised. Where the rule of law has long been secure, it might not matter too much that it is poorly understood. It runs on its own steam. However in much of the world, the struggle is to generate the rule of law, often against the odds, often for the first time. In such societies, more important than a package of legal techniques is a salutary outcome: one where, at a minimum, law counts as a restraint on power. What do you need to know to do the right thing? What is the right thing???

Reading:

Amichai Magen, 'The Rule of Law and its Promotion Abroad: Three Problems of Scope', (Winter 2009) 45, 1 *Stanford Journal of international Law* 51-116.

10. Communism, Post-communism and the Rule of Law

Communism represented one of the most comprehensive and radical challenges to the rule of law, both in theory and practice. Post-communist states are, at least in their press releases and commitments to the European Union, dedicated to achieving it. But doing so is no small matter, in large part because the distance between legal decrees and socially significant changes in the roles law plays in society are substantial. What accounts for this distance? What occupies the terrain between the one and the other?

Readings:

Marina Kurkchian, 'The Illegitimacy of Law in Post-Communist Societies', in Galligan and Kurkchian, eds., *Law and Informal Practices. The Post-Communist Experience*, Oxford University Press, 2003, 25-46.

Antal Örkény and Kim Scheppele, 'Rules of Law: the Complexity of Legality in Hungary' in Martin Krygier, Adam Czarnota (eds.) *The Rule of Law after Communism*, Ashgate/Dartmouth, Aldershot, 55-76

Instructor: Professor Martin Krygier, Law School, University of New South Wales, Australia.

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.