



Title	<u>Discussions on the Rule of Law: Theoretical Debates and Practical Challenges</u>
Lecturers:	Dr. Dorjana Bojanovska Popovska Bojanovska Dorjana@alumni.ceu.edu
Brief description	<p>The aim of this course is to look at the foundation and theoretical considerations surrounding the concept of Rule of Law. Beyond traveling through historical accounts and development of the concept, as well as opposing theoretical debates capturing its meaning, the course will delve into contemporary practical difficulties of its definition and application in both national and supra/international contexts.</p> <p>By the end pf the course, the students will be able:</p> <ul style="list-style-type: none">• To understand the theoretical debates surrounding the concept of the Rule of Law.• To understand the difficulties the concept poses in the real world.• To be able to distinguish issues that revolve around or are closely connected to the concept of Rule of Law.• To understand the contemporary challenges that affect the understanding and definition of the rule of law.
Schedule	<p style="text-align: center;">Class 1.</p> <p style="text-align: center;">Early Considerations: Rule of Law vs. The Rule of Man</p> <p>In this class we will look at the concept of the Rule of Law as understood in ancient times, primarily in Greek thought. Additionally, we will look at the history of the elements that construct the Rule of Law.</p> <p>Assigned readings:</p> <p>F.D. Miller Jr, “The Rule of Law in Ancient Greek Thought”, in <i>Rule of Law in Comparative Perspectives</i>, ed. M. Sellers, T. Tomaszewski, Springer, 2010. pp. 11-18.</p>

Tamanaha, Brian Z. "The History and Elements of the Rule of Law", *Singapore Journal of Legal Studies*, 2012, pp. 232–47.

Class 2.

Rule of Law in Early Liberal Thought

As we continue on the journey to discover the theoretical underpinnings of the Rule of Law, we will look at the conception of the Rule of Law and limited government as construed in early liberal thought.

Assigned Readings:

"The Federalist 51", in *Constitutional Law*, ED. Geoffrey R. Stone et al., Eighth Edition, Wolters Kluwer, 2018., pp. 16 -20.

B. Z. Tamanaha, "Chapter 4: Locke, Montesquieu, the Federalist Papers" in *On the Rule of Law*, Cambridge University Press, 2012. pp. 47-59.

Class 3.

What is the Rule of Law? Formal and Substantive Aspects

In this class we will look at the definition and requirements that arise from the concept of the Rule of Law and its formula and substantive definitions.

Assigned readings:

Sajó, András, and Renáta Uitz, 'The Rule of Law and Its Executors', *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford, 2017)

P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", in *The Rule of Law and the Separation of Powers*, R. Bellamy, Routledge, 2005, pp. 95-115.

Class 4.

Rule of Law, Democracy and Separation of Powers

In this class we will look at the connection between Rule of Law, democracy and separation of powers.

Assigned readings:

J. Waldron, "The Rule of Law and importance of Procedure" *Nomos*, vol. 50, 2011, pp. 3–31. (**only specific excerpts to be determined**).

Bello Hutt, D. Rule of Law and Political Representation. *Hague J Rule Law* 14, 1–25 (2022).

Class 5.

**Contemporary Writings on the Rule of Law:
Rule of Law as Procedure**

In this class we will look at one of the classic and most important works on the Rule of Law, J. Raz, "The Rule of Law and its Virtue" as well as the critiques of defining Rule of Law as procedure.

Assigned readings:

J. Raz, "The Rule of Law and its Virtue" in *The Rule of Law and the Separation of Powers*, R. Bellamy, Routledge, 2005.

J. Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach', in Adam Etinson ed., *Human Rights: Moral or Political?*, Oxford Academic, 2018.

Class 6.

**Contemporary Writings on the Rule of Law:
Morality, Integrity and the Rule of Law**

In this class we will continue to delve into the classic and most important works on the Rule of Law, by looking at the writings of H.L.A Hart, Fuller and Dicey.

Assigned readings:

Excerpts from:

William C. Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 67 *Marq. L. Rev.* 673 (1984).

K. Rundle, "The Morality of the Rule of Law: Lon L. Fuller" in *The Cambridge Companion to the Rule*

of Law, J. Meierhenrich and M. Loughlin eds., Cambridge University Press, 2021, pp. 186-201.

Excerpts from Fuller on the Rex's state*

M. D. Walters, "The Spirit of Legality: A. V. Dicey and the Rule of Law" in *The Cambridge Companion to the Rule of Law*, J. Meierhenrich and M. Loughlin eds., Cambridge University Press, 2021.

Class 7.

Contemporary Writings on the Rule of Law: Critiques to the Rule of Law

In order to look at the problem that the definition of the Rule of Law poses we will look at two contemporary critiques of the Rule of Law: the Rule of Law as ideology and as a contested concept.

Assigned readings:

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

J. Waldron, "The Rule of Law as an Essentially Contested Concept", in J. Meierhenrich & M. Loughlin eds., *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 2011, pp. 119-258 (**just specific excerpts**).

Class 8.

Rule of Law in the Real World: Council of Europe's Rule of Law Checklist

In this class we will look at the Council of Europe's Venice Commission Rule of Law checklist and the critiques of their credibility.

Assigned readings:

Council of Europe's Venice Commission Rule of Law checklist (CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

K. L. Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not*

Work, Governance, Volume 26, Issue 4, October 2013, pp. 559-562

Class 9.

The Rule of Law in the Real World: Rule of Law Safeguards Within the European Union

In this class we will look at EU Rule of Law Safeguards, mainly the EU Rule of Law Framework and Mechanisms.

Assigned readings:

Rule of Law Framework:

https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en

Rule of Law Mechanism:

https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

Molly O’Neal, The European Commission’s Enhanced Rule of Law Mechanism: <https://www.swp-berlin.org/10.18449/2019C48/>

L. Besselink, “The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives”, in *The enforcement of EU law and values: ensuring member states’ compliance*, A. Jakab and D. Kochenov eds., Oxford University Press, 2017, pp.

Class 10.

Contemporary challenges to rule of Law: The Illiberal Challenge

As a continuation of the debate on EU Rule of Law Mechanisms, we will look a bit deeper into the challenges that the illiberal challenge poses on the Rule of Law in a national context.

Assigned readings:

F Zakaria, “Illiberal Democracy”, *Foreign Affairs*, 76 (1997) 22.

	<p>András Sajó, Juha Tuovinen, “The Rule of Law and Legitimacy in Emerging Illiberal Democracies” <i>OER Osteuropa Recht Jahrgang</i> 64 (2018), pp. 506–529.</p> <p style="text-align: center;">Class 11. Contemporary challenges to rule of Law: The Rule of Law and Private Power</p> <p>In this class we will look at a contemporary phenomenon that continues to test the way we perceive and define governance and power - the rise of private power and the shift in the definitions of the public sphere.</p> <p>M. Krygier, “The Ideal of the Rule of Law and Private Power”, CEU DI Working Papers 2023/09.</p> <p style="text-align: center;">Class 12. Unfinished business: The Debates That Made us Think (harder)</p>
Materials/Recommended readings	
Assessment/Exam	<p>The assessment and grading is tailored in a way to motivate students to read the assigned materials before class and to engage in in-class debates. Thus, 70% of the grade will be formed based on in-class participation, some of which will require home preparation.</p> <p><i>30% class participation</i></p> <p>Awarded based on in-class participation in debates linked to the readings and beyond.</p> <p>Assessment criteria:</p> <ol style="list-style-type: none"> 1. Displayed comprehension of the readings; 2. Critical assessment of the readings; 3. Capability of linking the readings to other literature discussed in previous classes and beyond.

20% in-class presentation (fun facts)

Every class we will have one or more assigned presenters (depending on the size of the class) that will have to provide a 10-15 min in-class presentation on the author of the paper assigned for that particular class.

20% class overview (due for class 12).

Class 12 will be devoted to reviewing the whole course and finish off discussions, debates and issues that ignited most attention during the course. For this class, students will have to prepare a list of their most engaging topics and offer novel perspective(s) on topics previously discussed, in light of the knowledge gained from the course as a whole.

30% written assignment (2500 words)

The final assignment is a written assignment of up to 2500 words (footnotes excluded).