



Title	<u>Rule of Law and Illiberal Democracies</u>
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Brief description	<p>Current-day politicians prefer to appear as rule of law compliant often cheating about the goals their laws pursue (e.g., claiming to relieve caseloads while actually engaging in court-packing) instead of using the (more repressive) resources to quell the discontent that may stem from an honest disclosure. This is especially pronounced with politicians in plebiscitary-leader democracies of an illiberal and populist kind, especially when “luckily” served by emergencies such as the COVID-19 pandemic and the attempted coup in Turkey. In this new reality, the rule of law is used to the benefit of illiberal regimes more subtly than occurred in Nazi Germany or the Soviet Union. As <i>Dyzenhaus</i> warned in the post 9/11 context, a ‘little bit of legality can be more lethal to the Rule of Law than none’. The missed occasions for constraining illiberal developments, even in EU states such as Hungary and Poland only confirm the difficulty of capturing the abuses of the rule of law undertaken in the name of it. The course will examine case studies of rule of law abuses, particularly in the contexts of constitutional amendments and judicial reforms. The promise of constitutional adjudication in countering the abuses will also be explored through examples.</p> <p>Applying a multidisciplinary approach, in brief, the course aims comprehensive understanding of:</p> <ul style="list-style-type: none">• How illiberal regimes come to power and rule.• How theories of Rule of Law relate to the new challenges.

	<p>Eventually, the course will offer students practical takeaways both in terms of deciphering abuses of the RoL and crafting appropriate legal techniques in response.</p>
<p>Schedule</p>	<p>Class 1. Preliminaries about Power and Historical Perspectives</p> <ul style="list-style-type: none"> • Brian Klaas (2021) <i>Corruptible: Who Gets Power and How It Changes Us</i>, pp. 16-21 • On Hitler: The Enabling Act 1933 (2 pages) • On Mussolini: C Delzell, “Remembering Mussolini.” <i>The Wilson Quarterly</i> (1988), pp. 124-127 <p>Class 2. Regime Types and Populism</p> <ul style="list-style-type: none"> • Rosenblatt H (2021) <i>The History of Illiberalism</i> in <i>Routledge Handbook of Illiberalism</i>. Routledge, pp. 24-28. • Dorsen (2022) <i>Comparative Constitutionalism: Cases and Materials</i>, Chapter 2, pp. 97-103. <p><i>Additional Readings:</i></p> <ul style="list-style-type: none"> • Sajó, A. (2021) <i>Ruling by Cheating: Governance in Illiberal Democracy</i>. Cambridge University Press, pp. 18–37 • A Ferrara (2018) Can political liberalism help us rescue “the people” from populism? <i>Philosophy and Social Criticism</i>, pp. 464-467, 470-475 • Ronald Inglehart and Pippa Norris (2017) <i>Trump and the Populist Authoritarian Parties: The Silent Revolution in Reverse</i>. <p>Class 3. Rule of Law: theoretical foundations</p> <ul style="list-style-type: none"> • Dorsen (2022) <i>Comparative Constitutionalism: Cases and Materials</i>, Chapter 2, pp. 37-41. • Sajó A, and Uitz R (2017) 'The Rule of Law and Its Executors' in <i>The Constitution of Freedom: An Introduction to Legal Constitutionalism</i>. Oxford, pp. 302-316.

- P. Craig (2005) “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 [excerpt]

Additional Readings:

- Fuller, *The Morality of Law* (revised ed, Yale University Press 1969), pp. 33-43.
- Stanford Encyclopedia of Philosophy on RoL <https://plato.stanford.edu/entries/rule-of-law/>

Class 4. Rule of Law Continued: Legal Process and Culture of Justification

- *Retroactive Criminal Legislation Case (Hungary)* in 2. Dorsen (2022) *Comparative Constitutionalism: Cases and Materials*, Chapter 2, pp. 44-46.
- Waldron J (2016) ‘The Rule of Law and the Importance of the Procedure’ in James E Fleming (ed), *Getting to the Rule of Law*, pp 3-16.
- David Dyzenhaus (1998) *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, *South African Journal on Human Rights*, pp. 11-37.

1st Mandatory Assignment:

Choose a jurisdiction from CoE member states (except Turkey) and critically assess at least 2 RoL problems in accordance with the [Venice Commission Checklist](#) [pp. 17- 46]. If applicable, discuss possible safeguards against abuse of power (without removing the source of those problems). **3-5 pages double-spaced**

Class 5. Abusing Inherently Imperfect Liberal Constitutions

Sajó, A. (2021) *Ruling by Cheating: Governance in Illiberal Democracy*. Cambridge University Press, pp. 37-55, 59-66.

Class 6. Illiberal Playbook

- Dorsen (2022) Comparative Constitutionalism: Cases and Materials, pp. 105-111; 113-117; 139-141; 146-147 (term limits)
- Karsai, Dániel (2020) The Curious and Alarming Story of the City of Göd: How the Hungarian Government misuses its power in their political fight against opposition-led municipalities, Verfblog - <https://verfassungsblog.de/the-curious-and-alarming-story-of-the-city-of-goed/>

Additional readings:

- Begadze, M. (2022) Playbook of Subnational Illiberalism: Autocrats Face the Opposition-led Local Governments. Hague J Rule Law 14, 309–330 <https://doi.org/10.1007/s40803-022-00184-8>

Class 7. Illiberal Judicial Reforms

Dorsen (2022) Comparative Constitutionalism: Cases and Materials, pp. 123-136

2nd Mandatory Assignment:

Is post-2017 Turkey an illiberal democracy? Include the discussion of 2017 constitutional amendments [see [translation](#) here]. Please set clearly what are the criteria you intend to apply. **3-5 pages double spaced**

Class 8: Domestic Judicial Response: Unconstitutional Constitutional Amendments and Legislative Process Scrutiny

- Y Roznai (2013) “Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea.” The American Journal of Comparative Law, vol. 61, no. 3, pp. 657-665, 682-684
- Stephen Gardbaum (2020) Comparative political process theory, International Journal of Constitutional Law, Volume 18, Issue 4, pp 1446-1448.
- Israeli Supreme Court’s recent decision - HCJ 5658/23 Movement for Quality Government v. Knesset <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/M>

[ovement%20for%20Quality%20Government%20v.%20Knesset--%20abstract.pdf](#)

Class 9. International Judicial Response to Illiberal Judicial Reforms

ECtHR, XERO FLOR w POLSCE sp. z o. o. v. POLAND 2021 (Excerpt)

ECtHR, DOLIŃSKA-FICEK AND OZIMEK v. POLAND 2021 (Excerpt)

CJEU, Case C-192/18 ECLI:EU:C:2019:924, 5 November 2019 (excerpt)

CJEU, Case C-619/18 ECLI:EU:C:2019:531, 24 November 2019 (excerpt)

Class 10. Judicial Response: past and future

Leloup, M. (2021) ‘Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR’, *European Constitutional Law Review*, 17(3), pp. 394–421

Class 11. Capturing Legal Cheating

- Sajó, A. (2021) *Ruling by Cheating: Governance in Illiberal Democracy*. Cambridge University Press, Chapter 8, pp 294-327.
- Pirro, A.L.P. and Stanley, B. (2022) ‘Forging, Bending, and Breaking: Enacting the “Illiberal Playbook” in Hungary and Poland’, *Perspectives on Politics*, 20(1), pp. 90-98.

Additional Readings:

- Kim Lane Scheppele, “Autocratic Legalism,” *The University of Chicago Law Review* 85, no. 2 (2018): 545–84.
- M Begadze. ‘Pretext as a legal matter’ in *Research Handbook on the Politics of Constitutional Law*, eds. M. Tushnet & D. Kochenov

Class 12. Unfinished business: Summative Discussions

- Sajó, A. *Militant Rule of Law*, pp 27-37
<https://democracyinstitute.ceu.edu/sites/default/files/article/attachment/2024-02/Andras%20Sajo%20Militant%20Rule%20of%20Law%20and%20Not%20so%20Bad%20Law%202024%2021.pdf>

	<p>Final Assignment:</p> <p>Using court decisions against Poland above and/or those discussed in the 2023 EU Commission RoL report on Poland identify 2 priority issues of concern for judicial independence in Poland, propose reforms and assess to what extent the proposed reforms comply with RoL standards? 5-10 pages double spaced</p>
Materials/Recommended readings	
Assessment/Exam	<p>There are 3 written assignments (80%) for this course. 2 mini essays (3-5 pages) are assigned 20% each and the Final paper takes up 40% of the grade. 20% of the grade will be formed based on in-class participation.</p> <p>.</p>