

**WOODROW WILSON SCHOOL
PRINCETON UNIVERSITY**

**WWS 516a and SOC 518: The Rule of Law
Fall 2007**

Professor Kim Lane Scheppele

COURSE OVERVIEW

What is required to have a “government of laws and not of men” (or women)? The short answer: A commitment to the Rule of Law.

The ideal of the Rule of Law appears so often in discussions of proper government that one would imagine that its contours are uncontroversial. But most of what has been written about it is platitudinous, romantic, idealistic or otherwise not particularly grounded in real-world concerns, however uplifting such discussions may be. To understand what the Rule of Law is, why it is valued and why it is so hard to achieve, we might learn more by setting off in the opposite direction: how bad is it to be *without* the Rule of Law? How much Rule of Law can one sacrifice before getting into real trouble?

To approach the topic this way, we will consider the role of law in government and ask: When should a state in fact be constrained by law and when it may legitimately change or ignore the law by which it is bound? We will consider moments when heads of state (or pretenders, generals or revolutionaries) have decided that there is some value more important than law and have used the rationale of expediency, war, emergency, epidemic or revolution to cast law aside. In short, we will consider the strong temptations in political life to go around the law in order to do better. Sometimes, the drive to do better makes things worse. But, importantly, not always. In considering these questions, we will work our way through a series of concrete case studies in order to figure out how law works in times of state stress with the aim of making more nuanced a theory of the Rule of Law and its application.

In large measure, our course will proceed by negative examples and hard cases. We will consider the troubled constitutional history of the US, the conflicted internal politics of countries ranging from Germany to Pakistan to South Africa, and the drive to establish new law by setting aside old law in the international arena:

- On the US side, we will examine the history of American emergency government, including Abraham Lincoln’s conduct during the Civil War, Franklin Roosevelt’s economic emergency, the exigencies of the Cold War, Nixonian exceptionalism, responses to natural disasters and the “war on terror” after 9/11 in the US.
- In comparative perspective, we will look at the collapse of the Weimar constitution and the resulting rise of Nazism in Germany, at coups throughout the developing world justified in the name of “revolutionary legality,” at the state of emergency and subsequent constitutional revolution in South Africa, and at the radical breaks from communism in the “refolutions” of 1989 and beyond.
- In the international arena, we will look at the Nuremberg Trials and consider more generally the uses of international trials to bring state leaders to justice. We will also consider whether there need to be legal justifications for war, with the Kosovar War and the current Iraq War as our key examples. And we will end by looking at the global move toward international security law and what it has done to domestic rule-of-law systems.

Depending on the news this semester, we will also bring into the class relevant current events. To understand the Rule of Law and its opposites, we will use a range of materials from fiction to court cases,

from legal theory to political history, as we ask to what extent the rule of law is a value in itself, and whether there are any legitimate exceptions to it.

The intent of the course is to raise *excruciating* questions. The readings bring us face to face with the very real temptation in times of crisis to think that law is too rigid, incapable of dealing with unexpected events, too formal, distant and bloodless. By contrast, in many of our cases, political leaders will often seem driven by noble principles or high-minded values – or at least (by their own lights) engaged in important political change. While some cases are morally obvious (who would do anything other than condemn in the strongest terms Nazi Germany or apartheid South Africa?), many of the cases we will examine are morally and politically complicated, and it is not at all clear that the formal law and Rule-of-Law values are on the right side of the question.

So, we will learn about the Rule of Law this term by staring its serious challenges in the face. As a result, there will be plenty of opportunity for disagreement and debate – and for all learning what we think about the subject from its hardest cases.

COURSE REQUIREMENTS

This is a seminar, which means you should do the reading **before** each class session and come prepared to discuss what you have read. Participation in the discussion is an important part of the course.

For one seminar session this term, you will be on the line to do extra preparation, reading behind the scenes of our main example for the week to have something more to say about it in class than others will know about it from the class readings. I will give you choices at the beginning of the term about which subject you'd like to take on for this special assignment.

You have two choices about writing assignments for the course:

1) You can write a midterm and a final essay, drawn from a list of topics I will hand out in class. Each essay will be 10-15 pages. This option gives you a way to explore the materials for the class in a constrained fashion, since the paper can be drawn entirely from class discussion and assigned readings. This is a good approach for those of you new to the material or pressed for time at the end of the course.

2) You may do an independent research paper. Before you select this option, you should clear with me the topic you would write on and the scope and methods of your project. This option is recommended for those who have some background or serious and sustained interest in the subject. This is a way to develop more specialized knowledge of the subject of the course.

COURSE MATERIALS

Books have been ordered for this class through the Princeton University Bookstore. All books and other materials for the course have also been put on reserve in the Stokes Library.

The books that have been ordered are:

- Giorgio Agamben, *State of Exception* (translated by Kevin Attell) (University of Chicago Press, 2005)
- Inga Markovits, *Imperfect Justice* (Oxford University Press, 1995).
- Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (The Bedford Series in History and Culture) (Bedford/St. Martin's Press, 1995).

- Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton University Press, 2004 [1948]).

Articles and excerpts of books in the reading list below are available either through the e-reserve system or on Blackboard.

COURSE OUTLINE – WEEK BY WEEK

Week 1. Introduction to the Rule of Law (19 September)

Film: Anne Aghion (director)
Gacaca: Living Together Again in Rwanda? (2002)

Week 2: The Rule of Law and Its Ambivalences

This week, we will introduce our semester's dilemmas by looking at some sympathetic lawbreakers and their reasons for breaking the law. Two are fictional – Chekhov's peasant in "The Malefactor" and Hasek's memorable character Schweik. Each has his own account of the law and expresses his own motivation in rule-of-law terms. But the authorities did not agree. Moving to the US context, Abraham Lincoln's Emancipation Proclamation is generally thought of as one of the world's great human rights documents. It just so happened that, with this document, Lincoln nullified the clear legal property rights of slaveholders and in so doing, put himself above the law.

So what is the rule of law supposed to value anyhow? This is the subject of our second set of readings by writers earnestly committed to rule-of-law principles. But do their theories cover the cases of our sympathetic lawbreakers?

Sympathizing with lawbreakers:

Anton Chekhov, "The Malefactor." Pp. 269-275 from Chekhov, *The Witch and Other Stories* (translated by Constance Garnett), *Tales of Chekhov Volume VI* (Ecco Press 1972).

Jaroslav Hasek, *The Good Soldier Schweik* (excerpt: Book I, Chapters 1-5, pp. 3-41). (William Heinemann, 1930).

Abraham Lincoln, Emancipation Proclamation, available at <http://www.yale.edu/lawweb/avalon/emancipa.htm> .

Theories of the Rule of Law:

E.P. Thompson, *Whigs and Hunters* (NY Pantheon, 1975), "The Rule of Law," pp. 258-269.

Clinton Rossiter, *Constitutional Dictatorship* (Princeton U Press 2005), Chapter 1: "Constitutional Dictatorship" pp. 3-14.

Jeremy Waldron, *The Law* (Routledge, 1990), Chapter 3: The Rule of Law, pp. 29-55.

Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616-645 (1949).

Week 3: American Emergencies

America, famously, has a written constitution that has survived for longer than any constitution in the world. One might think from this that the constitution “works,” even though the US has been tested with a number of difficult national crises. But from up closer at different moments in history, it has not been at all clear that the constitution was actually in effect during America’s worst crises, or that the constitution seriously constrained what leaders wanted to do when they found the constitution inconvenient. In this week’s class, we will consider the Lincoln’s actions during the American Civil War, Roosevelt’s declarations of economic emergency in the 1930s, and Nixonian exceptionalism.

Harold Relyea, National Emergency Powers, updated November 2006, Congressional Research Service Report, Code 98-505, available at <http://www.fas.org/sgp/crs/natsec/98-505.pdf> .

Clinton Rossiter, Constitutional Dictatorship, Part IV: Crisis Government in the United States, pp. 209-287.

John W. Dean III, Watergate: What Was It? 51 Hastings L.J. 609-659 (2000)

OPTIONAL READING:

Harold Relyea, A Brief History of Emergency Powers in the United States (U Press of the Pacific, 2005)

Week 4: Nazi Law

If any government has come to represent the embodiment of evil in the world, it is the government of Nazi Germany. But the important condemnation of the Nazis is likely to miss the extraordinary “law work” that went into justifying their rise to power, their hold on the state, and even their extreme actions of genocide, aggression and war crimes. Though the Nazi regime was brutal and immoral, it was not lawless. This week, we will examine the role that law played in holding the Nazi regime together and ask what sort of law could live alongside these state actions.

Carl Schmitt, Political Theology (U Chicago Press, 2005), Chapter 1, “Definitions of Sovereignty,” pp. 5-15.

Michael Stolleis, Law Under the Swastika (U Chicago Press, 1998), General Introduction pp. 5-22 + footnotes pp. 193-200

Clinton Rossiter, Constitutional Dictatorship (Princeton U Press, “Constitutional Dictatorship in the German Republic”, pp. 31-73.

Ernst Fraenkel, The Dual State (Oxford U Press, 1941). Introduction, pp. xiii-xvi, and Part I: The Legal System of the Dual State, pp. 3-103 + footnotes pp. 213-227.

Week 5: The Nuremberg Trials and the Example of International Tribunals

When the Nuremberg Trials were constituted in the immediate aftermath of the Second World War, there was one small problem. There was no preexisting law to use to judge the Nazi leadership, and many lawyers worried about the spectacle of making up the law after the fact. The principle that there shall be no law made only after the potential crime was committed, no *ex post facto law*, is one of

the deepest principles of the Rule of Law, and the Nuremberg Trials ran a very real risk of violating just that principle. In fact, international tribunals established after the fact of the crimes that they are charged with trying all run this risk of violating basic rule-of-law principles in order to establish justice.

Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (The Bedford Series in History and Culture).

Week 6: Revolutionary Legality and the Legitimation of Coups

Hans Kelsen, one of the most famous exponents of legal positivism, held that the foundation of every legal system consisted of a *Grundnorm*, or basic norm, that obtained its legitimacy through popular approval. So how could one tell whether the revolutionary overthrow of a government was legitimate? According to Kelsen, it was by looking at whether the people obeyed the new government. If the people seemed to believe that the new government had the power to make law, then new government in fact established a *Grundnorm* and its power was legitimate. A revolution could establish legality.

It was not long before some courts started to use Kelsen's theory to legitimate coups. The first such case was the *Dosso* case in Pakistan, which used an elaborate legal rationale to approve of the military coup of 1958. Citing Kelsen, the Supreme Court of Pakistan held that the coup was legitimate because the people followed the new law. Many other courts around the world followed this example in legitimating their own local coups.

But recently, there has been a successful repudiation of this argument. In Fiji, the coup of 2000 was declared unconstitutional by the Supreme Court which argued that Kelsen's principles were not met and – to the amazement of many – the government stepped down.

Hans Kelsen, *General Theory of Law and State* (1945). Excerpts.

Tayyab Mahmud, *The Jurisprudence of Successful Treason: Coup d'État and the Common Law*. 27 *Cornell International Law Journal* 49-140 (1994).

George Williams, *The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji*. 1 *Oxford University Commonwealth Law Review* 73-93 (2001).

Week 7: Natural Disasters

So far, we have looked at the reactions of governments to political crises. But not all crises fit that label. Natural disasters, floods, famines, hurricanes, epidemics, fires and other such catastrophes may also call for state action – action that might be limited if it had to follow the rules. This week, we will consider whether there are any better reasons for suspending ordinary law when the emergencies in question are “natural.” We will focus our attention on the legal framework for handling disasters in the United States.

Kim Lane Scheppele, *Small Emergencies*, 40 *Georgia Law Review* 835-862 (2005-2006)

Felice Batlan, *Law in a Time of Cholera*, 80 *Temp. L. Rev.* 53-122 (Spring 2007)

Congressional Research Service, *Hurricane Katrina—Stafford Act Authorities and Actions by Governor Blanco and President Bush to Trigger Them* (September 12, 2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/12sep05memo.pdf> .

Jennifer Elsea, *The Use of Federal Troops for Disaster Assistance: Legal Issues*. Congressional Research Service, Report Order Code RS22266. April 24, 2007.

Week 8: Revolution of the Rule of Law: East European Transitions

Major changes of government raise serious Rule of Law questions. Should a new government make a radical break with the old system, and in so doing, simply throw out the old law in order to make new and better law? What happens to people whose expectations and lives were built around the old order and its legal guarantees when a new order appears with different legal guarantees? This week, we will look at this question in the case of Eastern Europe, where governments in many newly liberated countries faced the question of what to do with the past and how to build a Rule of Law state in the transition.

Inga Markovits, *Imperfect Justice* (Oxford U Press, 1995).

Antal Örkény and Kim Lane Scheppele, "Rules of Law: The Complexity of Legality in Hungary" in Martin Krygier and Adam Czarnota (eds.) *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (Ashgate, 1999), pp. 55-76.

Decision 11/1992 of the Hungarian Constitutional Court, "On Retroactive Criminal Legislation." In László Solyó and Georg Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (U Michigan Press, 2000), pp. 214-228.

Week 9: South Africa – From Emergency to Constitutionalism

The new democratic South Africa currently has one of the world's most admired constitutions, along with an active constitutional culture, a highly respected Constitutional Court and a government committed to the Rule of Law. But the apartheid government that ran South Africa from 1948 until the early 1990s also claimed to be committed to the Rule of Law. The apartheid system was nothing if not legalistic. From the Group Areas Act to the system for classifying (and sometimes reclassifying) the population by race, the apartheid system was scrupulously legalistic even as it deprived a majority of the South African population of basic human rights. This week we will look at the apartheid system and the way it was held together by law, as well as at the Rule of Law challenges facing newly democratic African states.

Elizabeth Landis, *South African Apartheid Legislation I: Fundamental Structure*. 71 *Yale Law Journal* 1-52 (1961).

Elizabeth Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*. 71 *Yale Law Journal* 437-500 (1962).

Jennifer Widner, *Building the Rule of Law* (WW Norton, 2001), Introduction, pp. 23-40.

Week 10: Kosovo and Iraq

The wars over Kosovo and Iraq II were controversial in international law because, in both cases, the US bypassed the UN Security Council and did not get its permission to launch a war. In the Kosovo case, the rationale was humanitarian: Serbia was launching a potentially genocidal campaign against the Kosovars. As a result, the US – with NATO – intervened to stop the slaughter. In Iraq, the rationale was preemptive: the "gathering threat" could not be allowed to mature into a force that would be harder to stop. In neither case – humanitarian intervention or preventive attack – was the rationale for launching military action easily accepted as a matter of international law. Should that have mattered? This week, we will look at the debates among internationalists and international lawyers over these questions.

Kosovo:

Michael Glennon, "The New Interventionism," 78 Foreign Affairs 1-7 (May/June 1999)

"Sidelined in Kosovo?" Responses to Glennon by Thomas Franke, Edward C. Luck + Walter J. Rockler + Glennon's response to his critics, 78 Foreign Affairs 116-122 (1999).

Iraq:

Special Agora Discussion in 97 American Journal of International Law 553-642, July 2003.

- Editor's Introduction by Lori Fisler Damrosch And Bernard H. Oxman
- William Howard Taft and Todd Buchwald, Preemption, Iraq, and International Law
- John Yoo, International Law and the War in Iraq
- Ruth Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense
- Richard Gardner, Neither Bush nor the "Jurisprudes"
- Richard Falk, What Future for the UN Charter System of War Prevention?
- Miriam Sapiro, Iraq: The Shifting Sands of Preemptive Self-Defense
- Thomas Franck, What Happens Now? The United Nations after Iraq
- Tom Farer, The Prospect for International Law and Order in the Wake of Iraq
- Jane Stromseth, Law and Force after Iraq: A Transitional Moment

Week 11: Torture

Until September 11, 2001, there was general international agreement that torture was the one practice that no government could conduct without condemnation. It had risen to the level of a universally accepted legal norm, *jus cogens* in international law parlance. Not that all governments had stopped using torture. Those that still tortured their opponents, however, generally hid their actions so as not to generate an international outcry. But this public international consensus changed after September 11 as the US government openly advocated the need to engage in harsh interrogation techniques, methods that international bodies like the International Committee of the Red Cross later determined from site visits were "tantamount to torture." How can a legal norm come unraveled? Torture provides an interesting case study.

Memo, August 1, 2002: To Alberto Gonzales from Jay S. Bybee. Re: Standards of Conduct for Interrogation under 18 U.S.C. sec. 2340-2340A. Reprinted in *The Torture Papers* (Karen Greenberg and Joshua Dratel eds.) Cambridge University Press, 2005) at pp. 172-217.

Memorandum, December 30, 2004. To the Deputy Attorney General, James Comey, from the Assistant Deputy Attorney General, Daniel Levin. Re: Legal Standards Applicable under 18 U.S.C. sec. 2340-2340A. Available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> .

Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*. 105 *Columbia Law Review* 1681-1750 (2005).

Kim Lane Scheppele, *Hypothetic Torture in the War on Terrorism*. 1 *Journal of National Security Law and Policy* 285-340 (2005).

Week 12: International Security Law

Since September 11, there has been much discussion of the use of emergency powers, as the US government, along with many other countries, have been invoking special powers to deal with what they claim are special threats. This has generated new interest in understanding the logic of states of emergency. We'll end the course with two very different considerations of the subject of emergencies and their relationship to the Rule of Law. In particular, we will focus on the question of whether emergencies are to be conceptualized as "inside" or "outside" the normal legal system. Then we will consider the rise of international security law after September 11 and examine its effects on fragile Rule of Law states.

Giorgio Agamben, *The State of Exception* (Stanford University Press, 2005).

Kim Lane Scheppelle, *The International State of Emergency* (book manuscript excerpts).