



Russia, Ukraine, Constitutionalism, and the Rule of Law

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[00:00:00] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. This week, we're turning our attention to the invasion of Ukraine and what it's taught us about core principles of liberal democracy, constitutionalism, and a rule of law.

[00:00:34] Joining me to explore these urgently important questions are two of America's leading experts on the rule of law and constitutionalism in Russia and Ukraine and abroad. Kim Lane Scheppele is the Laurance S. Rockefeller professor of sociology and international affairs in the Princeton School of Public and International Affairs and the University Center for Human Values at Princeton. She co-edited 9/11 and the Rise of Global Anti-Terrorism Law. Kim, welcomed back to We The People.

[00:01:03] Kim Lane Scheppele: Lovely to be here.

[00:01:04] Jeffrey Rosen: And Jeffrey Kahn is the Professor of Law and Gerald J. Ford Research Fellow at Southern Methodist University. He is author of Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists. Jeff, thank you so much for joining.

[00:01:18] Jeffrey Kahn: Thank you for the invitation. It's good to be here.

[00:01:20] Jeffrey Rosen: This is an urgently important topic, and you both can cast such important light on it. Jeff, let's begin with you. You have an article, The Search for the Rule of Law in Russia [2006] in which you identify three features of the rule of law and discuss how Russia is and is not living up to them. Tell us what is the rule of law and does Russia have a rule of law?

[00:01:46] Jeffrey Kahn: I wish I could give you a definition that everybody would agree to, but probably all I could do is give you some labels that everybody would agree to. I think that most scholars who study this topic would say, you've gotta have an independent judiciary. That's important for the rule of law. You've gotta have separate of powers. That's important for the rule of law. You've gotta have some understanding of individual rights. That's important for the rule of law. But when you start to get down into what those things mean, what do you do with the judiciary that you think has gone off the rails? What do you do when your legislature obstructs everything the president wants to do, or vice versa? What do you do when the democracy can't

have its will expressed because of these awkward things called individual rights? People start to get upset and they start to disagree.

[00:02:33] I've been searching for the rule of law in Russia for a while. And what I've discovered in the journey is that sometimes you can see aspects of the idea that if only allowed to bear fruit could really create a wonderful system. What we forgot in the '90s, I think, is that developing the rule of law is not something that you just create with a statute or you vote on in a referendum. It takes time. And a lot of the institutions are not the sort of thing that are created by the state. The rule of law needs a population that believes in the concept. The rule of law needs accountants and journalists, and editors, and lawyers, and a well educated citizenry.

[00:03:17] So there's a lot of metaphors that people use to describe the rule of law. And I'll just conclude this introductory comment here by saying, the big problem in Russia is that Russia still believes in the rule of law like a, like in an instrumentalist way, as a tool, as a sword, or as a shield. Human rights, uh, advocates love to talk about the rule of law is a shield and that the state is using the rule of law oppressively as a sword. There's a great metaphor in the play by Robert Bolt about Sir Thomas More and A Man for All Seasons, where Sir Thomas More says, "The law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it, a citizen may walk safely."

[00:04:03] And what I think is lost in some of these metaphors of instrumentalism, is that what you really need to know is what are the rules of the game? Where can I go safely? And when I step off the path, what can happen to me? When we think of the rule of law that way in a more holistic way where we're not weaponizing it or in an adversarial posture of citizen against state, I think we're in a much better place.

[00:04:29] Jeffrey Rosen: Thank you very much for that. Kim, Jeff just said that an independent judiciary separation of powers and respect for individual rights are necessary for the rule of law. You've written about the way that illiberal autocracies may formally respect the rule of law without having an independent judiciary separation of powers or respect for individual rights. Would you have a different definition of the rule of law, or do you believe that we need something else, like liberal constitutionalism in order to protect individual rights?

[00:05:00] Kim Lane Scheppele: Well, let me just say that I agree with everything Jeff just said. And I also wanna say that I think what he defined was not just the rule of law, but was something more like constitutionalism. So one of the problems with rule of law is that people assume if you just have rules and somebody enforces them, then that's all you need. [laughs]. And it's pretty clear that's not true. In fact, one of the things we see happening in the growth of these kind of illiberal states around the world is that so many of them are committed exactly to using law in the instrumental fashion that, that Jeff just described. So I think it's really interesting that at the helm of many of these liberal autocracies now, are lawyers. So people forget Putin's a lawyer. His whole inner circle was, were, are lawyers.

[00:05:48] When Putin engineered that legalistic way around the term limit in the original Russian constitution, he'd hit two terms. He had to leave. He arranges to have his loyal, uh, prime minister step into the president's job and they switched places. Now, the one who stepped

in was also a lawyer, also someone... And a lot of the people in Putin circles are lawyers, which is to say the stuff that they do in Russia is very often formally legal. That doesn't mean it really abides by the spirit of the rule of law.

[00:06:19] So what I always wanna do is I think exactly what Jeff did, which is to say, it's not enough to have rules and follow them, because the great thing about these legalistic autocrats, right, is they can change the rules from one day to the next and then say, "Everything we're doing is legal," and that doesn't help you if you're the one trying to figure out which path is safe and what happens if you step off it, you know? So I do think you need something like constraints on the kind of law that's possible.

[00:06:47] So one of the reasons for having constitutionalism, right, is that a constitution sets out what we might think of as the rules of the game. Who's allowed to do? You know, what can citizens expect? How are citizens protected? How does an overreaching executive come to be checked by others who have the power to actually pull him back? That's all the stuff that I think of as the rules of the game. And a game played within that is a constitutionalists rule of law system.

[00:07:18] You know, so what we're seeing now in a lot of these illiberal democracies and, and Russia just got there first, you know? I mean, Russia, there was this moment when a lot of us thought Russia could actually build a democracy. And I don't think that was an illusion. And the collapse of Russia into an autocracy didn't happen overnight. It was this gradual kind of merging of the rules of the game into the game, so to speak, you know, where the people in power got to unilaterally change the rules. And as you do that over a long period of time, essentially what collapses is the distinction between the rules of the game and the game. And then all you're stuck with is just whatever the ruler wills this morning is, might be what gets enforced in the afternoon. And it all might be changed at night. And that's what happens when you get autocracy.

[00:08:07] Jeffrey Rosen: Jeff, what is constitutionalism and how does it apply in Russia? Russia has a formal written constitution, and yet it doesn't have the separation of powers that both you and Kim have, are necessary to constrain executive power and have liberal constitutionalism. So how, how should we think about constitutionalism in Russia?

[00:08:26] Jeffrey Kahn: You're absolutely right, Jeff, the Russian Federation does have a constitution. Uh, one was drafted, um, with a bit of a curfuffle in 1993, but the Soviet Union had a constitution as well. In fact, it had several, 1977, 1936, 1918, and one constitution was better than the next. If you wanted to get a list of all the rights that the citizens could enjoy, boy, you could put the Soviet constitution up against the constitution of the United States. And if you were an alien coming down from Mars, you'd think, "I'd better go to Russia because that's where I'm going to be the freest." But it's precisely this separation of powers that is the guardian, you might say, of a constitution.

[00:09:08] The written constitution isn't enough. You not only need rules of the game, but you also need attitudes in place where the players in the game realize that if they lose around or two or three, they can come back and play it again. That it's an iterated game. And when you don't

have the separation of powers, when you do have this very formalistic positivistic attitude that what you need is a certain number of people in the legislature, then pen authority by the president and voila, you've got the rules.

[00:09:40] And when you've got enough of the rules, you've got the rule of law. What you find is that the rules will change to keep the losers perpetually down and the winners perpetually in, because the winners know or think they know that if they ever lose power, they're gonna suffer the same fate. So one of the most important things that you need is this understanding that we're gonna play an iterated game, and we're not going to go after each other in ways that wreck the system.

[00:10:09] And so I, I guess I would conclude by saying, it's not enough to have something on paper. You've also gotta have this spirit of the law idea. Uh, and also, and, and I think o- of the justices on the Supreme Court who've spoken most passionately about this, Justice Scalia is often the person to whom, uh, this argument goes that the bill of rights is all well and good, but it's structural protection that gives you the most liberty. And the that's something that the United States fortunately has and nothing, going back to the Romanovs in 1648, doesn't have.

[00:10:45] Jeffrey Rosen: Fascinating. Kim, do you agree or not that structural protections are more important than a written constitution to ensure liberal constitutionalism? And tell us about the ways that structures of autocracy have grown in Russia to put Putin on top of presidential administration in a way that's unconstrained by separation of powers and, and checks and balances.

[00:11:10] Kim Lane Scheppele: Well, you know, so here too, I mean, you know, I think that the structural features of constitutions are most important. You look back to the drafting of the U.S. Constitution in which the framers failed to include, uh, bill of rights. I mean, the bill of rights was added as amendments because that's what the states demanded mostly as a way of protecting themselves against the national government themselves and their, their citizens. But, you know, the framers of the U.S. Constitution thought the structural provisions were most important.

[00:11:38] You know, one thing to say about the Russian constitution is that probably the most influential constitution in drafting the Russian one was the American one. It's a presidential system. There are two houses of parliament. The upper house represents the states, and there are two representatives per state. The lower house represents the population, and then they're supposed to be independent courts, right? So the basic structure of Russia, um, on paper looks very much like the U.S. right? So what went wrong?

[00:12:11] Well, you know, the first thing that went wrong was that in the '90s, I mean, I think we, especially those of us living here, like the Russians will never forget the '90s nor will the Ukrainians. And I hope we get to them too. But when the Soviet Union fell apart, it was as if, I mean, you can imagine this, this happened in the U.S. Imagine if U.S. federalism suddenly failed and, you know, New York was its own country, and Pennsylvania was its own country, and New Jersey. And on and on. These were, this was an integrated economy. And when the Soviet Union fell apart, the economic catastrophe that resulted was really extreme.

[00:12:47] So I'll just give you one statistic. The average life expectancy for Russian men fell by 10 years in 10 years. Fell by 10 years. It was the only time we'd seen such an implosion like that. People's lives were completely disoriented. The currency became worthless. Russia became a barter economy. The entire industrial economy basically collapsed. And it was even worse in Ukraine. In fact, in Ukraine, they still haven't gotten back to the GDP per capita that they had in 1991 when the Soviet Union fell apart. So it's very hard to construct a stable political system when your economy is falling apart. And frankly, Boris Yeltsin, you know, he was the favorite of the U.S. and his reelection was very much supported and some Russians will say engineered from the U.S. He was not a lawyer. He was, he was the master of chaos.

[00:13:39] In the 1990s, if you were a judge, the law consisted of decrees that he issued sort of off the top of his head. Judges famously had little shoe boxes in which they'd store these decrees 'cause they were not even properly published. Trying to figure out what the law was in the 1990s as the economy fell apart, was something that was nearly impossible to do. So when Putin came in, and I think everybody forgets this, he's the lawyer and he's, he actually [laughs] present events notwithstanding, actually was the, the order guy over chaos. He came in, he worked with the parliament to pass a whole series of framework statutes.

[00:14:19] That's when I was living in Russia. I was, I was working as a researcher at the constitutional court. I can tell you, the judiciary was thrilled with Putin because finally there were published laws. There were published laws that actually didn't conflict with each other and you could actually tell what people's legal rights were for the first time. So, you know, Putin was the great reformer. A lot of us were very enthusiastic about him at the start. And then what happened? Well, Russia is famous for impatience, you know, as Jeff earlier said, which is that, that it would've taken time for all of that to become a culture and for people to get used to it as something they could rely on.

[00:14:59] And the big thing that happened in Russia was that the war in Chechnya, which had been started by Yeltsin and then continued by Putin, disrupted the Russian space because there were terrorists in Chechnya who came into Russia proper and started blowing up things and killing people. And all of that was blamed on the reforms that Putin had made. And so he starts changing. He starts undermining the laws that he had already passed in order to centralize power. So this is... And I won't go through the entire story, we'd be here for, for weeks. But the crucial thing to say is that we didn't just have one revolution in 1991. The dislocation in the '90s was so profound and every Russian, and every Ukrainian remembers those times.

[00:15:47] Putin tried to actually create rule of law at the start. I actually think he didn't start as a bad guy. But in the end, the entire system unraveled because it didn't have the culture, it didn't have the, the underpinnings that would actually sustain those reforms. And gradually the system has gotten more and more centralized until finally we have a president with no checks.

[00:16:09] Jeffrey Rosen: Absolutely fascinating. And the learning that the judiciary was initially thrilled with Putin is striking and sobering. Jeff, tell us about the ways that the constitutional regime that we see in Russia today dates back, not only to the 1990s, but as far back as you've argued, as 1918.

[00:16:32] Jeffrey Kahn: Uh, absolutely. And just to underscore what, uh, Kim has said, there's a fascinating anecdote about those courts. And, uh, in the early '90s, uh, there was a visit by the Russian Constitutional Court to the United States Supreme Court. And the reporter of decisions for the United States, Frank Wagner, reported that at one point, Valerie Zukin, the Chairman of the Russian Constitutional Court, took him aside and said, "So tell me, how do you keep the press and your enemies from lying about what you've decided in important cases?" And Wagner was kind of stunned by this. "What, what do you mean keep them from lying?" And then he realized that Zukin didn't quite understand how our system worked. He had it formally on paper, but Wagner responded, "Well, we publish our decisions and we disseminate them as broadly as we can so everybody can read them, openness and transparency."

[00:17:27] And so, so these sort of things are not things you can mandate in a law. We shall be transparent, you've gotta believe it. So it's absolutely true what you say, Jeff, that, um, the roots of this conflict go back, way back. And I'll just go back to the Russian Revolution. There were a lot of lies that the Bolsheviks told. But I think the lie that probably had the support of the most technical legal mechanism was the lie that revolution would result in the release from the Prison House of Nations. That the Russian Empire was a prison house of nations. And if you would only follow the Bolshevik cause, all of the multiethnic peoples of the empire would free. Not so.

[00:18:10] The first commissar of nationalities was Joseph Stalin. And working with Soviet demographers, he very carefully created a system of Soviet federalism that was never expected to do what our system, which is part of our structural separation vertically of checks and balances recreating what we see whole horizontally in the federal government. It was, it was intended for just the opposite effect. It was to prevent any sort of release of non-Russian peoples. And so borders were very carefully crafted so that non-Russian ethnic groups would always be islands in a sea of Russia. Now, one of those islands didn't get the memo and Chechnya, uh, actually thought that they could declare independence at the collapse of the Soviet Union and get away with it. And they suffered a brutal, brutal repression.

[00:19:00] Ukraine also, although tied to Moscow for centuries, uh, also thought to go its own way. And it's astonishing, the resonance between today and 1991, that you see. So when the Ukrainian started to threaten the declaration of independence, Yeltsin reminded them that there were a lot of border issues that they might be concerned about and Russia would wanna reconsider, well, the gift, as he put it, of the Crimean peninsula to Ukraine in 1954. And you know that Donbas region in the east, that, that line there is a little bit disputed. And what he was doing was warning them that I'm going to undermine the foundational pillar of international law, UTI Possidetis, that the borders we have are the borders we're going to live with.

[00:19:51] And I can't think of a more brilliant rendition of the importance of this than Kenya's ambassador to the United Nation Security Council gave, uh, when he gave a, a, a speech about two weeks ago, uh, explaining why so many African nations, although deeply frustrated with the horrible colonial borders that divided so many peoples and languages and cultures in Africa, have realized that it's a Pandora's box to open that all up.

[00:20:17] Well, to conclude this story from 1991, Ukraine had a card in its back pocket that it could only play once. And that was at about a third of the Soviet Union's nuclear arsenal was located on the territory of Ukraine. And this was something that perked up the attention of people in Washington, D.C. and in London and in the capitals all across the world, including Moscow. Trading that arsenal away in exchange for recognition of its borders, the integrity and inviolability of its borders, was what the 1994 Budapest Memorandum was all about.

[00:20:56] Now, there's a dispute about whether that's a political statement or a legal document, but it was, whether one thing or the other, claimed to be a promise. Uh, and the promise that was made in 1991 to respect borders that nobody really expected to be respected in 1918 or 1922 or 1936, is what's coming back to haunt us today. We are seeing the recognition of frozen conflicts. And so I would say that this conflict is really the continuation of the collapse of the Soviet empire. Empires are terrible things, and their dissolution are terribly messy.

[00:21:38] Jeffrey Rosen: The recognition of frozen conflicts is a powerful way to put it. Kim, let us talk about structures and constitutionalism on the Ukrainian side. I was in Ukraine about six years ago when, when the state was beginning to draft a constitution. And the judges who were drafting a constitution said the most important thing was an independent judiciary. And yet Ukraine struggle to create an independent judiciary in recent years. Tell us about that story and what it can teach us about constitutionalism.

[00:22:14] Kim Lane Scheppele: Yeah. So Ukraine has had a huge constitutional struggle since its independence. It brought in a new constitution in 1995. And I happened to be actually teaching constitutional law in Ukraine at the time that that happened. I feel little bit like, you know, Zelic appearing at all these historical moments. Um, but, uh, I was teaching constitutional law, at that time, Ukraine had no economy. I was literally teaching in a law school that had no electricity and no heat, and it was March and it was freezing. And, um, you know, my students would come in and they were disappointed that I showed up with mater else for the class that were printed on both sides of the paper, 'cause they were kind of hoping to have something to write on [laughs] during class 'cause they had literally no papers. So I mean just the devastation of the economy of Ukraine in the '90s is just hard to imagine.

[00:23:05] But that new constitution in 1995 was, and this says again, when we go back to rule of law and constitutionalism, one of the things rule of law, democracy and constitutionalism are not, are simply majority rule. Ukraine, as it was, you know, sort of carved out from the Soviet Union, had many ethnic minorities. So we're focused on the Russian ones in the east and in, and in Crimea, but there's a Hungarian minority in the west, and there's a Polish minority in the north, and there's, there's a whole bunch of ethnic groups that are especially around the edges of Ukraine. And the constitution that was enacted in 1995 refused to recognize the ki- I mean re-refused to recognize that pluralism.

[00:23:52] And so it was a winner take all very centralized constitution in which all the ethnic minorities objected at the time. And the winner take all government that presided over that constitutional framework said, you know, "If we get a majority nationwide," which the sort of ethnic Ukrainians were always going to do, they could do whatever to their regional minorities.

Now, it turns out that Ukraine actually adapted a whole series of institutions to this pluralism. In particular, they had multiple official languages. So both Ukrainian and Russian. And actually, again, I know the Hungarian speaking part, you could also use Hungarian in official state offices in the west.

[00:24:36] They set up a system across the country that had bilingual education so that almost everywhere in Ukraine, you had to take your sort of K-12 equivalent education in more than one language. And, you know, if you were in Kiev, you could pick French, you know? But if you were in the Hungarian part, you had Ukrainian and Hungarian. If you're in the Russian part, you had Russian and Ukrainian. Um, and all of that was sort of made up for the fact that there was no federalism in Ukraine, which was always from the beginning, probably what they should have had.

[00:25:07] So fast forward to 2014, there's a kind of revolution. Many people may remember the tens of thousands, hundreds of thousands of Ukrainians that showed up in Maidan Square in Kiev, and basically toppled the corrupt Russian-backed government. But what that government, since 2014, has done [laughs] is to eliminate all of those pluralistic institutions. So they made Ukrainian only the official state language. They obliterated bilingual education across the country. And they did other things to lean in on the fact that their constitution was very centralized and in a majority rule system would always have a majority of Ukrainians. That's the thing that triggered Russia. [laughs]. I mean, there were plenty of other grievances Russia had, but I think that was the thing that freaked Russia out.

[00:25:56] That's one reason why they grabbed Crimea when they could, it's Russia's only warm water port. It was where the, you know, the Russian Black Sea Fleet was located. Um, and this region in the Donbas, this, this Russian speaking region that borders Russia in the east, had this uprising in protest against all of those policies. And that's really where we got the unsettled border and the conflict that has now broken out into war today.

[00:26:23] Let me just say, we're focused on the Russia-Ukraine conflict, 'cause that's what's caused the war, but let me just tell you that, again, the Hungarian part, 'cause I work on Hungary, I know the Hungarian part, Viktor Orbán, you know, who was no democrat himself really, um, was playing the nationalist card by objecting to all of this stuff happening in Ukraine also because it meant that the Hungarian language was no longer an official language. It meant that all these Hungarian speaking kids had to go to school in Ukrainian, et cetera.

[00:26:53] So ever since, I guess he started in 2018, Orbán has been blocking high level contacts between NATO and Ukraine, because any expansion of high level contacts within NATO requires a unanimous decision of NATO's existing member states. And Orbán has been blocking that ever since for the same reason that Putin was upset about what was happening in the West. Right? So if I can just say one thing about off-ramps. Before this conflict started, all of us, I think, who have been following the region, I mean, Jeffrey may disagree with me, but I think most of the experts said, "Look, there's an obvious solution here." Right? And it was an obvious solution built into the Minsk Agreement, which ended the fighting in 2014, '15 between Russia and Ukraine. And that required constitutional reform in Ukraine to include federalism.

[00:27:49] It was, you know, from that first debate in 1995, you know, you could see it coming that unless you had federalism in Ukraine, you were gonna get these border conflicts because there weren't, it was not just Russia, but other neighboring states that were worried about the fates of their, their majorities in certain regions that were minorities in the country. And so the Minsk Agreement called for federalism, you know? And actually Zelensky tried, the parliament refused, and here we are. So, you know, again, constitutional reform is once again on the table, and unless Ukraine is a federal system, it will become ramp-Ukraine, I'm afraid.

[00:28:30] **Jeffrey Rosen:** Wow. Thank you so much for all of that. Uh, Jeff, Kim just said that federalism along with separation of powers is necessary for the protection of individual rights. Tell us more about the culture of constitutionalism in Russia. Is there such a culture since 1918 or before? And to what degree was Russia's accession and withdrawal from the Council of Europe, promising in creating pressure for legal reform in Russia? In other words, was there ever any hope that Russia could develop a constitutionally constrained, uh, um, state or does it lack the culture of constitutionalism necessary to support such a state?

[00:29:16] **Jeffrey Kahn:** You know, this is a great tie into our earlier conversation about the influence of the United States on Russian constitutional development. Uh, my first book was called, uh, Federalism, Democratization, and the Rule of Law in Russia. But the subtitle that I wanted, that I really don't think the publisher would've agreed to was Totally Messed up Federalism, Democratization, and the Rule of Law in Russia. Uh, and one of my takeaways from doing that work was if there's one aspect of American constitutionalism that you do not want to follow in Russia or frankly, in, in Ukraine, uh, it would be our federal structures, uh, because those were devised in a environment that is really very, very unusual and, and different than just about any other place in the world, with the exception of maybe Canada and Australia.

[00:30:07] If you look at a map of the United States, one thing that would strike you if you're not from the United States, is the number of straight line borders that we have. I'm sitting in Texas and I count differences in some students here, four, four and a half or five straight line borders that just go on for miles. And the farther west you go in the United States, the more straight line borders you see. Well, those are the physical manifestation of the fact that we don't have what Kim so carefully and accurately described. We don't have linguistic conflict in the origin story of this country. We don't have religious conflict in the origin story of this country. We don't have ethnic conflict in the origin story of this country.

[00:30:52] I mean, we have some, but not nearly to the degree that you have in the part of the world that we're talking about today. And that's because when we arrived here at what we called "the new world", um, we pretty much obliterated the, uh, indigenous peoples so that the, the winning side wasn't fighting over any of those issues, and voila, straight line borders.

[00:31:21] You don't have straight line borders in Ukraine, Russia, Eastern Europe, Western Europe. Uh, they are, uh, they are an effect of a, of a situation on the ground that is just not there. And so imposing American structures on that is a mistake, I think. This is not to say that federalism is a mistake, it's just, let's not be so American-centric about it. And I don't think that that's what Kim was suggesting at, at all.

[00:31:49] Uh, the, the second question that you asked about, uh, the Council of Europe is a fascinating story. When the Soviet Union collapsed, Russia was desperate to join any international organization that would have it. And so they kind of went from a Karl Marx philosophy to almost a Groucho Marx philosophy, "I wouldn't wanna be a member of any organization that would have me," uh, but they really did, uh, and there were good reasons for it. And this coincided with a moment when the Council of Europe was feeling kind of the second sister to the European Union, which was very ascendant, clearly going to be the dominant economic force in Europe and looking for a mission.

[00:32:26] And the Council of Europe found it in expansion and sharing some of what Kim and I have described, this hope of, of cultural attitudinal ideas about what the rule of law would mean. And so this was supposed to be a shared organization, sharing principles of the rule of law, human rights, fundamental freedoms. And this changed when Russia sought membership to, "Maybe we can teach these to people who don't really have them yet." I think this was a mistake. A lot of good came out of this because a lot of reform in Russia, and a lot of reform that happened in President Putin's first term is directly connected to the Council of Europe as a catalyst. More so I'd say than to the United States. But it had some real painful effects as well.

[00:33:19] Russia so burdened the Council of Europe and the European Convention of Human Rights, which is its mainstay founding treaty that its court, which is supposed to provide, uh, remedy for violations of fundamental human rights, was totally overwhelmed. Uh, Russia today has 17,000 pending cases before the European Court of Human Rights. Last year, it had 232 judgements against it. It leads the league tables in every way. Finland, for example, had 16. Ukraine has quite a few, uh, but Russia is far away the leader. And that's because they have never been able to make the systemic changes that were necessary to, um, comply with its international legal obligations under the European Convention for Human Rights.

[00:34:07] This had effects for the rest of the Council of Europe community because Russia overwhelms the court. It also pushes the standards down for what would constitute a, a violation. And not to put too fine a point on it, um, cast doubt on the legitimacy of some of these obligations. And so the council has finally come to the conclusion, forced by events, for the first time in its history, I think the Greek case is a, is an exception, to invoke Article 8 of its statute and suspend Russia's rights in its voting bodies.

[00:34:42] Russia is still a member of the council. It hasn't withdrawn, although I predict that it will, and it is still obliged under the convention on human rights. Although I doubt that they will, uh, pay much attention to, um, judgements of the court anymore. But this is, this is a profound shift now, and it may be connected to the fact that Russia probably was, was just not ready for membership when it started in '92 and finally agreed to it in 1998. The legal advisors to the Council of Europe told the political body this very thing, "Russia does not comply with the requirements for membership." But parliament and the committee of ministers decided, uh, and, and here I'll quote from what was, uh, said in the report, "That integration is better than isolation. Cooperation is better than confrontation." Now, who could deny that. But what I don't think they figured in is it came at quite a cost to the Council of Europe and maybe to progress in Russia as well.

[00:35:47] Jeffrey Rosen: Kim, Jeff raises the question, uh, whether integration is better than isolation. And I wanna ask you about international regimes for responding to the Russian invasion. There are, uh, war crimes prosecutions that are being, uh, begun. Are there any international sticks that could meaningfully constrain Putin or is the international legal system powerless to constrain Putin?

[00:36:16] Kim Lane Scheppele: Well, the international legal system isn't powerless, but it's at its lowest degree of power when the guns are firing. I mean, basically right now, what you see is, Russia is ignoring a lot of legal obligations that it would have in war time. Uh, nobody seems to be able to call it off. Um, and I think what we're seeing, you know, is the culmination of a gradual collapse of constitutionalism in Russia, so that there are no constraints against, you know, on Putin domestically. And we're also seeing the weakness of the global system.

[00:36:54] And so, uh, let me just give you one example in Russia, and then I'll give you an example from international law. So if you read the Russian constitution, it, again, it looks so much like the U.S. Constitution, right? I mean, they were clearly like copying pieces. So there's this part where they say, "Well, the president may be, um, removed for health reasons among others." And then it says, "The prime minister then steps in." Okay. So then I was reading this and thinking, "Yeah, but what's the process through which the president could be removed for health reasons. What if his inner circle thinks he's just mentally unstable?" And so, uh, it's not there in the constitution. So I start flipping through statutes, you know, last week looking for like, where did they fill this thing in, and I didn't find any.

[00:37:38] So I wrote to a person I know in Russia who is, uh, who worked on the most recent set of Russian constitutional amendments, giving Putin even more power. So I figured he would know. I said, "So, like, what's supposed to happen, you know?" [laughs]. And he wrote, and he said, "Well, we decided not to include anything." So there's a provision in the Russian constitution that permits the president to be removed from office for health reasons, but it says nothing about who's allowed to invoke it, what's the procedure, or how you would [laughs] know when the president was disabled. Right? And so, and, and from the reaction I got from this constitutional scholar in Russia that I wrote to, it was clear they saw the gap and that Putin didn't wanna fill it. Right?

[00:38:21] So one thing that's happening at home is that you'd have to have a palace coup that violated the law to remove him. I mean, given what's happening a little violation of the constitution seems pretty minor, but nonetheless, it, it means that nobody bears responsibility for it. Right? And so that's the problem at home. So then we ask like internationally, so then what? Well, you know, so one of the problems with international law is that it's very hard to be bound by something you haven't consented to.

[00:38:51] And so, for example, Ukraine has now brought Russia to the International Court of Justice, um, for border violations. There was a case last week, uh, argued at the International Court of Justice. And what I think many of us expected was that Russia would withdraw. The U.S. has done that. Other countries that are challenged before the ICJ can withdraw either from individual proceedings, you know, I mean in, in... Anyway, so you have to consent to be sued

essentially in the Hague. And Russia didn't even bother to withdraw. And I think that's because the lawyer they had defending them at the ICJ when Crimea was annexed, refused the week before the hearing, to defend them at all. And I think they simply didn't have a lawyer there to do it.

[00:39:36] So they're not even at this stage [laughs] getting their act together in international fora to even just go and make the formal withdrawal. Right? There's already been a case at the Court of Human Rights asking for so-called provisional measures or interim measures, which, you know, means like the fighting should stop while we sort out all this stuff. And that order has issued and nobody paid any attention. Um, so essentially what you're seeing is that courts can't stop guns. Okay? Courts might be able to prevent shooting, and they do a lot to clean up the mess when it's over. But while the thing is going on, it's very hard to see how you leverage international agreements to stop the fighting.

[00:40:16] Jeffrey Rosen: Courts can't stop guns. You said they can prevent shooting and can clean up the mess when it's over. Jeff, do you agree what role, if any, could courts, domestic or international, play in this conflict now that it's begun and in cleaning up the humanitarian catastrophe when it's over?

[00:40:38] Jeffrey Kahn: Famously in the, uh, Federalist papers, uh, were told that the court is not to be of such concern because it will have neither the power of sword nor purse. Uh, and we're really talking about the power of the sword here, aren't we? I think it was so telling that at the International Court of Justice hearing, not on the merits of Ukraine's, uh, applications, but, uh, in seeking the same sort of preliminary measures that were sought and, and ordered by the European Court of Human Rights, Russia didn't have a representative there, and they didn't show up.

[00:41:12] It made me remember that in *Marbury versus Madison*, which is our foundational case for constitutional judicial review in a domestic setting, Madison never showed up. And it was initially a hearing where the Great Chief Justice Marshall had to ask, uh, "Let's, uh, have a show of cause hearing to see why I shouldn't enter a particular order." And, and we kinda forget that procedural dimension as we go onto the merits. That could have presented a terrible constitutional crisis at the start of the American constitutional experiment if the executive branch would simply ignore the judicial branch.

[00:41:50] Here, we have a different reason for a, a problem. It was because Russia's arguments are so bad, uh, that if the lawyer in question was Elaine Parlay, and I don't know if it would've been, uh, he issued just last week, an open letter on EJIL Talk, which is the blog of the European Journal of International Law, in which he said, "I can't represent Russia anymore, even on positions I disagree with..." Lawyers sometimes disagree with positions that they can plausibly argue in court. And the last sentence of his letter reads, "It has become impossible to represent in forums dedicated to the application of the law, a country that so cynically despises it."

[00:42:32] That's a powerful thing to say by someone who signed himself as counsel for Russia before the ICJ and other international tribunals until 23rd, February, 2022. And I think that what that shows us is that these tribunals are very powerful when everybody agrees, as we said at the

beginning of our conversation, to play by the rules of the game. It's an iterated game. And if we want people to follow the rules when we win in court, we're gonna have to follow the rules when we lose in court. But if we reach a tipping point where one of the parties says, "You know what, the game is just not worth the candle anymore. I'm not showing up," the court has neither the power of sword nor purse. Now, that's not to say that there isn't something that can be done.

[00:43:19] The, uh, prosecutor for the International Criminal Court, which is an international body that deals with international crimes, uh, war crimes, crimes against humanity, genocide, and to a much more limited extent, the, the crime of aggression, these are crimes that individuals are alleged to commit, and individual are prosecuted. He, uh, which is to contrast with the ICJ, the world court which deals with interstate disputes, state versus state, uh, uh, the prosecutor, uh, Mr. Khan has said that, um, "Thanks to, uh, some referrals that have been received by members of that, uh, Rome Statute body, I'm gonna begin an investigation."

[00:44:00] And the UN Human Rights Council voted 32 to 2, with 13 abstaining, about 10 days ago, that they would authorize a second, uh, body joining one that already exists in Ukraine, to start gathering facts and information. And so one thing that courts can do is build and evaluate a record. Uh, and that's something for the future that can have a deterrent effect if soldiers on the ground, uh, were aware of this. And I think it's very important to, to consider that if you're living in Russia today, you're not hearing about the war the way I'm hearing about the war unless you've got a VPN connection.

[00:44:42] Uh, these are very different stories being told, but they can have, uh, an effect on morale, an effect on decision making, uh, going forward. But these are very difficult investigations to conduct. And preservation of evidence, chain of evidence, chain of custody, especially in an era where so much of the evidence might be with a video clip from a cell phone and accusations of deep fakes and, and other claims about the evidence, uh, raised, um, one thing that these tribunals can do is build the record with an idea that in the future, we might have an iterated game again.

[00:45:20] Jeffrey Rosen: Well, we began this very rich discussion with first principles, and I wanna return to them. Kim, we start it off by saying that an independent judiciary and separation of powers are necessary to protect the rule of law and liberal constitutionalism. I wanna ask you, what do the rule of law and liberal constitutionalism protect? Is it human rights and freedom from arbitrary power? Is it life, liberty and the pursuit of happiness? What are the foundational principles that liberal constitutionalism is supposed to protect?

[00:45:54] Kim Lane Scheppele: Well, that's such a good question and a good place to take the conversation. So I think one of the things we've seen particularly in Russia, right, is what happens when a state does not prevent the concentration of power in the executive, that basically everything else becomes meaningless. You can't guarantee rights, you can't guarantee free and fair elections. You can't guarantee, you know, the rotation of power on which democracy depends.

[00:46:24] So if one person is determined to stay in power, and if they have all the power of the state before them with no one who can say no, eventually that state collapses. And states collapse

in one of two ways, they either collapse the way we're seeing in Russia, which is that it gets into a completely unjustified war that cannot end well for anybody. Or what we see is in Venezuela, where, you know, we saw this power of, of, you know, all this sort of power concentrating in the hands of the executive and that ended in an economic collapse.

[00:47:00] So basically the reason why we have, you know, checks and balances, the reason why we have individual rights, the reason why we have democratic structures that guarantee the rotation of power, is that, you know, concentration of power in the hands of one person, one party, one circle that refuses to let it go, is not just the only evil you're preventing, it's that that kind of governmental structure winds up committing, you know, the spectacularly destructive suicide for itself and everybody around it, you know?

[00:47:36] So I think, you know, the separation of powers or checks and balances, individual rights and so on, are important principles precisely because we know from history that these are the best guarantees against exactly what we're seeing now in Russia, against what we're seeing now in these other dictatorships, like Turkey, like Venezuela, where the concentration has gone on for so long that essentially the leader can take the country, you know, into a suicidal mission, um, and then it's hard to talk about law at all.

[00:48:11] Jeffrey Rosen: Wow. Uh, Jeff, uh, Kim just said that separation of powers and checks and balances protect dictators from committing state suicide. Do you agree, or do you have other principles that separation empowers checks and balances and constitutional protect?

[00:48:29] Jeffrey Kahn: Uh, I, I agree completely with Kim. Uh, and I think that one of the things that we have, uh, seen, um, and seen in, in, in looking at Ukraine, uh, which is by no means a state that has a well developed institutions, is just how fragile institutions are. I think that sometimes our fellow citizens take for granted the existence of our institutions. Um, they look at these big marble stone buildings, they think how long we've had a constitution, and we don't really worry so much about how fragile they are. Uh, and I hope that in watching how fast, literally in hours and days, life can completely change in a state.

[00:49:19] Americans take pause and realize that our institutions are potentially also fragile. It was a collapse of the Soviet Union that led me to want to go into, uh, graduate school and, and study its collapse a little more before I went on to law school, because I worried that, uh, there was some 18-year-old kid in Moscow who had his trajectory all planned out in 1990, um, and those institutions just weren't there anymore at the end of 1991. Could that happen to me?

[00:49:49] So as I watch what has happened in our own country recently, I worry that sometimes we think we can, we can abuse these con- these constitutional institutions a little bit, and they're gonna, they're gonna be strong and resilient, but they're only as strong as the people who are in those buildings, in those marble palaces, uh, and who are making these laws with attitudes and cultures and norms, uh, that go beyond the mere formalism and positivism of, of writing things down in laws and passing them by majority rule.

[00:50:25] Jeffrey Rosen: Kim, the last word in this memorable discussion is to you. What are your concluding thoughts about what We the People listeners can learn from the catastrophic aggression and suicide of Vladimir Putin?

[00:50:41] Kim Lane Scheppele: Well, I guess, you know, what a lot of us who are experts in this field, I think might say is that this has been a long time in coming. Um, and there were so many moments earlier on when I wish the U.S. and constitutional experts, and our European colleagues and so forth, had realized that this is a slippery slope to nothing good. And, and I'm afraid that instead of engaging with Russia, which I think might have helped, the U.S. and its allies proceeded to alienate and exclude Russia from many conversations that, you know, we can't guarantee those would've led somewhere good.

[00:51:23] But for example, the expansion of NATO to Russia's doorstep, the refusal to include Russia in a conversation about European security, um, trying to figure out ways to allow Russia to work with the Council of Europe to be able to improve its own track record on human rights. That instead, you know, we let Russia into institutions that bashed it over the head, and didn't let Russia into institutions that might have given it a seat at the table where we could have engaged it in helping it figure out, you know, how to create a, a democratic and prosperous future.

[00:51:58] Uh, and so looking back, you know, I wish we'd done a lot of things [laughs] since the collapse of the Soviet Union, differently. Um, and I think that, you know, now that we're in this particular place, you know, I think all the options going forward are terrible. Um, and so, you know, I think a lot of us are trying to figure out what's the off-ramp, you know? Is there some way we can simply stop the fighting?

[00:52:21] And, you know, I, I think looking at this conflict, looking at this horrible war that we see on our screens every day, the only off-ramp is going back to thinking about a federal Ukraine in, in an effort to try to preserve it, a neutral Ukraine that Russia doesn't see as a threat, and a Ukraine and a Russia in which outsiders, you know, can try to help the populations of those countries try to figure out how to establish a kind of democratic system after this, out of the rubble that remains. I have no idea where to start. A lot depends on how, how much is sort of left standing when this fight is over. A lot of us saw this coming from a long way off, and I'm just so sorry that we were right.

[00:53:12] Jeffrey Rosen: Thank you so much. Jeffrey Kahn and Kim Lane Scheppele, for casting such light on such an urgently important question involving human rights, the rule of law constitutionalism, and the future of the international system. On behalf of all the We The People listeners, thanks for your insights, your scholarship, and for teaching us, uh, so much today. Kim, Jeff, thanks so much for joining.

[00:53:39] Kim Lane Scheppele: Thanks for having the conversation with us.

[00:53:41] Jeffrey Kahn: Thank you very much.

[00:53:42] Jeffrey Rosen: Today's show was produced by Melody Rowell, and engineered by Greg Sheckler. Research was provided by Kevin Klose, Ruben Aguire, Sam Desi, and Lana Urich. Please rate, review, and subscribe to We the People on Apple podcasts, and recommend

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