

International Law

Academic year 2020-2021

Law without the State

DI037 - Autumn - 6 ECTS

Thursday 14h15 - 16h00

Course Description

Most lawyers, indeed most people, think that law is necessarily something created by states. National law is created by one nation-state, international law by several. In principle at least. But just why? Why do we think of law as a creation of states? Can we disconnect law from states? Would this be a good idea? Does it matter that law is anything specific? Non-state actors, generally speaking, have become stronger in creating or pushing for norms. Does this and should this mean that law - the very idea of law - will change? At some stage in the past, there weren't any states, but surely there was law. If something similar were to happen again, what would we be calling law? Nothing at all? Just anything? When lawyers describe the law in a given field, they normally focus on legislation and cases, on state and administrative practice, on treaties and other forms of state activity. This works in practice for most people and most situations. But is it quite 'correct' intellectually?

> PROFESSOR

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Syllabus

Objectives and approach

Methodologically, this course is an exercise in deconstructing classic, doctrinal legal thinking; it encourages students to think about law from different perspectives. On substance, the course deals with the question of what law is and why, focusing on the relation between law and state. It offers a discussion of abstract analytical questions underpinning and structuring real-world examinations such as the politics or sociology of current global law-making or the role of the state in the global normative arrangements.

At the end of the course, students are expected to have a better understanding of the role of law, and thus of international law, in society, and a clearer view of the stakes and determinants of what counts as law. The objective is to equip students with analytical tools to deal with these matters,

rather than provide off-the-shelf answers or review the existing literature.

The course is not designed for students interested primarily in black letter law discussions of the sources of international law or of its specific branches ('what is international law' from a black letter law perspective).

Course requirements and marking

Written exam

The standard evaluation method for this course is a 1h45m open-book written exam, taking place during the last week of the semester.

The students are offered four essay-type questions, of which they answer two. It is expected that the students answer the questions using ideas and/or material discussed in class, including the Research Papers (see below). The answers are expected to contain the students' own, original thoughts. Mere regurgitation of knowledge is not considered favourably.

Open-book means that any and all material can be used during the exam. Communicating with other students or with external individuals during the exam is, of course, prohibited. Exam copies can be handwritten or typed on a computer or tablet.

Research Papers

A limited number of 12 students (on a first come first serve basis) can choose to write and present a research paper instead of sitting for the written exam.

Papers are discussions of an existing scholarly work (article, book chapter, book, etc.) relevant for the course. The work discussed in the paper will be identified and selected by the student and cannot be taken from the reading list of the course.

Papers presented during Class 7 should ideally deal with works that relate, broadly, to the themes covered by the course in Classes 1-6 (logical fallacies in scholarly legal argumentation, historical perspectives, socio-legal perspectives). Papers presented during Class 13 should ideally deal with works that relate, broadly, to the themes covered by the course in Classes 8-12 (legal philosophy). The works selected for discussion in the papers do not have to be agreed with the professor.

Papers should be roughly 1'500 words in length (including footnotes, references, and everything else). They are due one week before they are presented; at that point they are to be circulated to the class.

The presentations of the papers should last around 10 minutes, followed by a 5-minute discussion with the class and the professor. This means that a maximum of 6 papers will be presented in Class 7 and 6 papers in class 13.

A student who writes and presents a paper can choose to also sit for the written exam and keep the better of the two grades.

For the written exam and for research papers, the criteria for evaluation are lucidity of reasoning, originality, exhibited capacity by the student to think by himself/herself, and overall substantive interest of answers.

Miscellanea

- Requirements to register for the course: none.
- Mid-term examination: no.
- Feedback to students on performance in exam: two or three lines of feedback in writing will be given for the research paper and for the written exam.

Class 1

Introduction to contents and method

This class will clear administrative matters, explain the contents and purposes of the course, stress the importance of critical thinking in the course's methodology, and offer an introduction to such reasoning by way of a discussion of common types of analytical and argumentative fallacies.

Readings

- Thomas Schultz, "Doing Law and Thinking about Law" 4 *Journal of International Dispute Settlement* 217 (2013)
- Pierre Schlag, "A Comment on Thomas Schultz's Editorial" 5 *Journal of International Dispute Settlement* 235 (2014)
- Thomas Schultz, "Life Cycles of International Law as a Noetic Unity: The Various Times of Law-Thinking" in L. Pasquet, K. Polackova Van der Ploeg, & L. Castellanos Jankiewicz (eds.), *International Law and Time: Narratives and Techniques*. Springer, (Ius Gentium: Comparative Perspectives on Law and Justice), forthcoming
- Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher" in Joost Pauwelyn, Ramses Wessel and Werner Wouter, *Informal International Lawmaking*, (eds.) (OUP 2012), chapter 9, 200-215.
- Seán Patrick Donlan and Lukas Henckendorn Urscheler, "Concepts of Law: An Introduction" in Seán Patrick Donlan and Lukas Henckendorn Urscheler (eds), *Concepts of Law: Comparative, Jurisprudential and Social Science Perspectives* (Ashgate 2014), chapter 1, 1-17

Optional, for those looking for an introductory text in legal philosophy

- Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, OUP 1st edition 2006, 2nd edition 2014 (either is fine)

Questions to frame discussions:

- Does every ordered society have law?
- How widely shared should an understanding of law be? For instance, should we strive for a universal agreement on what law is?
- Define international law. Explain what makes your definition valid. Do as many logical regressions as you can (i.e. explain any statement you make, including the statements made to explain other statements).

PART I: HISTORICAL AND SOCIO-LEGAL STUDIES

Class 2

The idea of the state as the sole lawmaker: origins and confusion

Most people believe that law is necessarily something produced by states. But it hasn't always been like that. When did this start? And why? What are the relations between this idea and today's dominant tradition of legal thought – legal positivism? This class will discuss the basic geopolitical events that led to the association of law and state, its subsequent translation into analytic thought, and the limits of the conventional wisdom about what this thought has become.

Readings

- Stéphane Beaulac, "The Westphalian Legal Orthodoxy—Myth or Reality?" 2 *Journal of the History of International Law* 148 (2000)
- Immanuel Wallerstein, *World-Systems Analysis: An Introduction*, Duke University Press 2004, chapter 3, 42-59
- Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, OUP 2006, chapter 2, 18-39.
- Michael Wood, Second Report on Identification of Customary International Law, International Law Commission, A/CN.4/672, 2014.

Optional

Thomas Schultz and David Holloway, "Retour sur la comity I: les origines de la comity au carrefour du droit international privé et du droit international public" 138 *Journal Droit International* 838 (2011).

Possible questions for discussion:

- What do you make of Michael Wood's definition of customary international law in the ILC report? Good? Bad? Good or bad *for whom*? How would you have defined it?
- Is it the same thing to be a legal positivist and to be a black letter lawyer? If it's not identical, are there similarities?
- The responsibility of states continues to grow (e.g. guarantee adequate education, limit unemployment, control diseases, secure medical care, offer all sorts of protection from misfortunes and deprivation). Does that warrant the view that law can only be state law?
- What in your view are the links between nationalism and the idea that law is necessarily state made? And between ever-tighter integration of humankind and this same idea about what law is?

Class 3

Why is the idea of the state as the sole lawmaker still dominant?

The idea that law has a necessary connection to the state still pervades contemporary legal thinking, despite innumerable attempts to show that it is inadequate. Why? This class will discuss and deconstruct analytic arguments in modern legal positivism that make stateless law impossible. It will then introduce other forms of resistance to stateless law, including: as descriptive theories go, law as state law isn't such a bad theory; state law is in fact only shorthand for 'most-important-institution law'; law is all about legitimate dominance; paradigms don't like change anyway; political prudence and political ideology may oppose stateless law; various form of vested interests, including in the practice

of law, make stateless law unpalatable; and the anti-intellectualism that permeates many law schools opposes the required sort of thinking.

Readings

- Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014), chapter 4.
- Simon Roberts, "After Government? On Representing Law without the State" 68 *Modern Law Review* 1 (2005).
- Thomas Schultz, "Non-Analytical Obstacles to Stateless Law" 43 *North Carolina Journal of International Law* 182 (2018).
- Joseph Raz, "Why the State?", Singapore Symposium on Legal Theory 2015.

Optional

Christophe Jamin and Mikhail Xifaras, "De la vocation des facultés de droit (françaises) de notre temps pour la science et l'enseignement" [2014] *Revue interdisciplinaire d'études juridiques* 107

Possible questions for discussion:

- How does, in your view, the idea of law relate to the idea of dominance?
- Is thinking about the relation between law and state all about conceptual janitoring?
- Could you (yes, YOU) make law?
- Why do you think most law schools barely teach anything else than state-made law?

Class 4

Being realistic about the sources of the law: Beyond the states' official rules, within its systems

(Even) lawyers aren't robots. Yet the classic account of the sources of the law, which sees the law as flowing only from official state sources, tends to treat them as just that. Even a simple humanist – or 'natural' – understanding of the workings of the law places a significant part of its sources beyond the state and its formal discourse. The class will introduce American legal realism, which is often misunderstood or set up as a straw man.

Readings

- Brian Leiter, *Naturalizing jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, OUP 2007, chapter 2, 59-81.
- Thomas Schultz, "Arbitral Decision-Making: Legal Realism and Law & Economics" 6 *Journal of International Dispute Settlement* 231 (2015).
- Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy' 4 *Journal of International Dispute Settlement* 1 (2013)

Optional

- Daniel Bodanski, "Legal Realism and its Discontents" 28 *Leiden Journal of International Law* 267 (2015)
- Thomas Schultz and François Ost, "Shakespearean Legal Thought in International Dispute Settlement" 9 *Journal of International Dispute Settlement* 1 (2018).

Possible questions for discussion:

- "Law is either a set of rules or it's all about what the judge had for breakfast": what do you think about that (fairly common) point of view?
- Some people say that Shakespeare created English law. How is this possible?
- What would the syllabus of a course on [pick any international law subject] that takes legal realism seriously look like?

Class 5

Agendas behind the disconnect of law and state

Certain understandings of law do not seek to advance knowledge. This class will discuss situations in which the idea of law has been defined, in regard to its relation to the state, in ways that seek to further certain political, economic or axiological ends. These include the avoidance of war, the pursuit of justice beliefs, the protection of cultural diversity, socialism and economic liberalism, and authoritarian nationalism.

Readings

- Anna di Robilant, "Genealogies of Soft Law" 54 *American Journal of Comparative Law* 499 (2006).
- Mario Prost, "All Shouting the Same Slogan: International Law's Unities and the Politics of Fragmentation" 17 *Finnish Yearbook of International Law* 1 (2006).
- Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy" 32 *Journal of Legal Education* 591 (1982)

Optional

- Pierre Bourdieu, "Social Space and Symbolic Power" 7 *Sociological Theory* 14 (1989)

Possible questions for discussion:

- You are a human rights lawyer. How do you define international law?
- You are an environmentalist. How do you define international law?
- You are a comparative lawyer. How do you define international law?
- You are a star lawyer at the bar. How do you define international law?
- You are a feminist. How do you define international law?

Class 6

The idea of law between epistemological projects and social reality

Certain understandings of law do seek to advance knowledge. This class will discuss five types of determinants that shape and orient epistemological projects about the idea of law (and international law), namely paradigm shifts, schools of thought, community fragmentation, self-interests as epistemological obstacles, and irrational beliefs. It then puts them in tension with the basic idea that law (and international law) is just what people treat as such at grass-roots level.

Readings

- Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014), introduction (1-6) and chapter 3, sections 3-4 (62-71)
- Thomas S. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press 1962, reprinted 1996, preface and chapters 2, 6, 7
- Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism" 27 *Journal of Law and Society* 296 (2000)
- Karl Popper, *The Logic of Scientific Discovery*, Springer 2013, Chapter 1, "A Survey of Some Fundamental Problems", pp. 1-26.

Optional

- Sergey V. Tretyakov, "The Non-Scalability of the Concept of Law – A Reply to Thomas Schultz", Working Paper WP BRP 46/LAW/2015, Basic Research Program, National Research University Higher School of Economics, Moscow, 2015.

Possible questions for discussion:

- Can a theory about what law is really be shown to be wrong (i.e. can a statement about the identity of law be falsified)?
- Law is whatever people treat as law. Which people?
- How can we create new norms of international law without states doing anything at all? What would it take to do it?

Class 7

Presentation of Research Papers – Session 1

PART II: ANALYTIC LEGAL PHILOSOPHY

Class 8

Does it matter if it's law? Part 1

Does it actually matter what exactly we call law, beyond settling the semantics? This class will discuss certain ways in which affixing the label of law may be meaningful, and will thereby clarify several analytic aspects of what it means to call something law. This will in turn help understand the role of law for society and its basic functions. The hypotheses of the label of law's relevance discussed here will include: determining what is justiciable; determining what has access to a system's rules of interpretation and enforcement mechanisms; and triggering legitimacy and respect.

Readings

- Joost Pauwelyn, "Is It International Law Or Not and Does It Even Matter?" in Joost Pauwelyn, Ramses Wessel and Werner Wouter, *Informal International Lawmaking* (eds.) (OUP 2012), chapter 6, 125-61.
- Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration*, OUP 2014, chapter 1, 7-31.
- Scott J. Shapiro, *Legality*, Harvard University Press 2013, chapter 1, 1-34.

Possible questions for discussion:

- Is law superior to other types of norms?
- PhD supervisors often tell their students that they shouldn't make the law say what it doesn't say. What does this really mean? (Think, for instance, about secondary rules.)
- Can law exist outside of a legal system?
- "International law is nothing but power relations". What do you think – right, wrong, partly so? What does this statement mean anyway? What would its implications be for our work as international lawyers?

Class 9

Does it matter if it's law? Part 2

This class will continue the discussion started in the previous class. The hypotheses of the label of law's relevance discussed here will include: creating moral and prudential reasons to obey what is labelled as law; having an impact on power relations; drawing the contours of our field of work; and promising predictability.

Readings

- Lon L. Fuller, "Eight Ways to Fail to Make Law" reprinted in J. Feinberg & J. Coleman (eds), *Philosophy of Law*, Thompson 2000, 91-4.
- W. Michael Reisman, "Soft law and Law Jobs" 2 *Journal of International Dispute Settlement* 25 (2011).

- Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, OUP 2009, chapter 2.
- Matthew H. Kramer, "For the Record: A Final Reply to N.E. Simmonds" 56 *American Journal of Jurisprudence* 115 (2011).

Optional

Thomas Schultz, "Against Consistency in Investment Arbitration" in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice*, OUP 2014, chapter 8.

Possible questions for discussion:

- What's the use of law *qua* law? In other words, what is the purpose of having something distinct called law?
- "Let's kill all the lawyers" (Shakespeare, Henry VI). Why not?
- "What is law?", "Is *this* law?", "What is the proper view on the meaning / interpretation of this norm?". Tease out the relations between these three questions.
- Academic lawyers focusing on black letter law often say that their job is to clarify the law. Under what conditions is this a worthwhile pursuit? How do the conditions that make it a worthwhile pursuit determine how black letter law analysis should be conducted? For instance, is the internal coherence of a legal system an objective that has value of its own?

Class 10

Stateless arbitration law?

International arbitration is a classic example of a private legal system created beyond the state – the so-called "arbitral legal system". This class will discuss this hypothesis, focusing on a popular account of the theory that supports it, by E. Gaillard. It will examine how that account fares as a meta-theory about scholarship, as a descriptive theory, as a prescriptive theory, and as a rhetorical theory. This examination will lead to testing a significant proposition, advanced by L Fuller and M Kramer, regarding the essential normative features that legal systems should exhibit if they are to be more than muddled systems of guidance and fulfil their function as guideposts for self-directed action.

Readings

- Emmanuel Gaillard, *Legal Theory of Arbitration*, Nijhoff 2010, introduction and chapter 2.
- Thomas Schultz, "The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences" 2 *Journal of International Dispute Settlement* 59 (2011)
- William W Park, "Explaining Arbitration Law" in *Selected Topics in International Arbitration, Chartered Institute of Arbitrators: Centennial Liber Amicorum* (2015).

Optional

Horatia Muir Watt, "Economie de la justice et arbitrage international: réflexions sur la gouvernance privée dans la globalisation" *Revue de l'arbitrage* 390 (2008).

Possible questions for discussion:

- Some people say that private dispute resolution mechanisms, such as arbitration, are progressively creating a global legal system separate from states, parallel to them as it were. Good thing? Bad

- thing? Neutral state of affairs? Any implication that this would be a *legal* system?
- “Law isn’t predictable, or barely anyone would ever go to court. So law isn’t about predictability.”
What do you make of this argument?
- What makes a definition of law a good definition?

Class 11

Stateless eBay law?

The Internet is another classic example where law without the state is expected to live. This class will discuss the specific example of eBay. This example will help understand how a legal system may progressively evolve from an unqualified normative system to something that bears a striking resemblance to a state’s legal system. This in turn helps articulate a proposition as to what any legal system should look like (its architecture as it were) if it is to be a legal system of its own – separate from the state.

Readings

- Graf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Hart 2010, chapter 3.
- Thomas Schultz, “Private Legal Systems: What Cyberspace Might Teach Legal Theorists” 10 *Yale Journal of Law & Technology* 151 (2008).
- Graf-Peter Calliess, “Transnational Consumer Law: Co-Regulation of B2C-E-Commerce” in Olaf Dilling, Martin Herberg & Gerd Winter (eds), *Responsible Business: Self-governance in transnational economic transactions*, Hart 2006

Possible questions for discussion:

- Should we call eBay’s normative universe “law”?
- Assume eBay has indeed created a separate legal system that “breaches” the mandatory laws of certain states. Is this acceptable? Inacceptable? Why?
- You are sent to a poor suburb in South Africa at the time of apartheid, in which the state can be said to be powerless and altogether absent. Your mission is to introduce the rule of law in the suburb. What do you do?
- Much of the literature on the fragmentation of international law and much of the literature on global legal pluralism deals with ways to accommodate and articulate different legal regimes applying to the same questions, so that “the law” gives you only one answer, as opposed to a range of contradictory or conflicting answers. Aren’t we, then, undermining all their efforts by opening up the idea of law? But do we ever live in a world where all normative orders that apply to us give us the same answer in all or even most situations? If that isn’t the case and we live with normative pluralism on a daily basis, what makes the need to coordinate *legal* regimes different? What makes *law* different?

PART III: POLITICAL PHILOSOPHY

Class 12

Law without the state in political philosophy: An introduction

If law is disconnected from the state, does this help promote or undermine the societal projects defined by some of the main traditions in political philosophy? This class will introduce philosophical liberalism, communitarianism, and global justice, in order to provide a philosophical framework to determine what law without the state is good and bad for. This is then followed by group discussion that ties these political projects to law without the state.

Readings

- John S. Mill, *On Liberty*, 1859, reprinted 1978, chapter 1 and 4.
- Michael Sandel, "The Procedural Republic and the Unencumbered Self" 12 *Political Theory* 81 (1984).
- Joshua Cohen and Charles Sabel, "Extra Rempublicam Nulla Justitia?", 34 *Philosophy & Public Affairs* 147 (2008)

Optional

- Raymond Geuss, "Liberalism and its discontents" 30 *Political Theory* (2002) 320.

Possible questions for discussion:

- In what ways could law without the state be used to better realize philosophical liberalism?
- In what ways could law without the state be used to better realize communitarianism?
- In what ways could law without the state be used to better realize global justice?

Class 13

Presentation of Research Papers – Session 2

Class 14

Final written exam