Syllabus: Law and Legal Research beyond the Nation State

Doctoral course at the Faculty of Law, Stockholm University, 2018

Content and purpose

Law is today increasingly influenced and transformed by the forces of Europeanisation and globalisation. For legal scholars this development presents exciting research questions and opens up entirely new fields of enquiry. However, it also implies serious challenges in terms of theory and methodology. In an interconnected world our traditional conception of law based on hierarchical norm-production and enforcement within the confines of the nation state is being challenged. Likewise, the conception of inter-state agreements as the main form of governance of inter-state relations reveals itself as incomplete. In terms of methodology, the conventional tools of positive legal analysis (the legal dogmatic method) appear insufficient to answer all pertinent questions.

To better account for the changing reality of law beyond the state a variety of theoretical and methodological approaches have been advanced in the legal and social sciences. The course will introduce some of the most influential among these new approaches and will engage students in a critical debate as to their respective strengths and weaknesses.

This course will be of interest to doctoral students in European law, public international law, private international law, comparative law and jurisprudence as well as to students in other areas of law with an interest in global law. The course does not aim to present the basics in any of these fields but to provide a basis for thinking about these fields in an innovative and broad-minded way. It should therefore be complemented by subject-specific readings for these fields, at the discretion of the respective supervisors.

After completing the course, students should be able to:

- demonstrate knowledge and understanding about alternative theoretical and methodological approaches in European, comparative and global legal studies;
- critically analyse and evaluate the strengths and weaknesses of various approaches;
- reflect on the relevance of the various approaches for the student's own research;

- demonstrate ability to assess the implications of theoretical and methodological choices for research design and research outcomes;
- apply the acquired knowledge for designing a robust research project;
- write an independent and critical legal analysis based on theoretical frameworks and research methods presented in the course and of relevance for the student's research;
- orally present the analysis and engage in discussion with peer researchers.

General structure

After the first, introductory part, part two is devoted to various approaches, which are divided into dichotomies, to set them out more clearly. The third part focuses on various "domains" of law, like supranational or inter-state. Although some of these domains are typically analysed from one or two perspectives, this part will ask whether other perspectives can also be fruitful. Part four will bring up some problem areas. In order to facilitate the participation of doctoral students outside Stockholm, the seminars have been concentrated to five periods.

The course is based on seminars and group discussions. Students are required to actively participate in the seminars and to read and present selected works in which novel theoretical and methodological approaches have been developed by leading scholars in their respective fields. Students shall write short memos (around 2 p) before each seminar which summarises the readings for that seminar. The memos will be discussed during brief tutorials with a professor. In addition, for each seminar, a number of questions or issues will be distributed among the participants, and each participant will be required to present a discussion on his/her respective issue.

For the final seminar, each participant shall prepare a longer memo (10-15 p) which sets out the relevance of the selected theoretical and methodological approaches for her/his own research and comment on another doctoral students' papers.

The readings will comprise around 1000 pages in total.

The course will be examined through the short papers for parts II-IV, to be reviewed through tutorials, as well as a final paper. The final grade will be based partly on active participation in seminars and tutorials (50%) and partly on the papers. The following grades apply: pass or fail.

Detailed structure

I. Introduction, 11 April

10-12, Faculty Room, C824, *Pål Wrange*: Introduction. Law and globalisation**.** Traditional assumptions in and about law. Globalisation. Developments in the law to deal with globalisation (regulation, deregulation, harmonisation -- supranational, international, national, a-national).

Reading:

Berman, Paul Schiff, *Global legal pluralism: a jurisprudence of law beyond borders* (Cambridge: Cambridge University Press, 2012) 3-22 [E-book]

Merry, Sally Engle, 'Stateless Law' in Van Praagh, Shauna, and Helge Dedek, eds. *Stateless Law: Evolving Boundaries of a Discipline* (Ashgate Publishing, Ltd., 2015) 3-9

Held, David, 'Democracy and Globaliztion' in Archibugi, Daniele, Held, David & Köhler, Martin (eds.), *Re-imagining political community: studies in cosmopolitan democracy* (Polity, London, 1998) 11-27

Cohen, Jean L., 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in Besson, Samantha & Tasioulas, John, *The Philosophy of International Law* (Oxford University Press, 2010) 261-280.

Questions:

- How should we think about globalization? What influence do we as lawyers have over this development?
- Is it true that "law both reflects and constructs social reality" (Berman)? What is law based on – a norm or a fact?
- What is the main difference between Berman's and Cohen's approaches?
- What is legal pluralism? Hybrid legal spaces? What to make of this statement (Berman): "there is no external position from which one could make a definitive statement as to who is authorized to make decisions in any given case."
- Is there stateless law? Before, outside and inside the state?
- Cohen claims that her approach is "empirically more accurate and normatively preferable" (262). Comment!
- What is consitutionalization? Is constitutional monist or pluralist?

13-15, Faculty Room, C824, *Peter Wahlgren*: Different forms of regulation, including non-legal regulation (soft law, self-regulation, regulation through technological etc).

Reading:

http://www.scandinavianlaw.se/pdf/47-27.pdf

http://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/CodeAndRegulation/about.html
https://en.wikipedia.org/wiki/Nudge_theory
https://en.wikipedia.org/wiki/Behavioural_Insights_Team

II. Perspectives, 23-24 April

23 April, LexLab 1, 10-12, *Pål Wrange*: State-centric v. cosmopolitan. Which is the ultimate subject in law beyond the nation state? Whose good is to be served by law? If it is the individual, what does that entail for how we analyse law?

Reading:

Koskenniemi, Martti, "The Future of Statehood" in Vol. 32, No. 2, spring 1991, p 397-410.

Pogge, W Thomas, "Cosmopolitanism and Suvereignty" in *Ethics*, Vol. 103, No.1 (Oct 1992), p.48-75.

Bell, Daniel, "Communitarianism", from the fall 2013 ed. of the Stanford Encyclopedia of Philosophy, p.1-43.

Kleingeld, Pauline and Brown, Eric, "Cosmopolitanism", from the fall 2014 ed. of the Stanford Encyclopedia of Philosophy, p.1-37.

Vallentyne, Peter and van der Vossen, Bas, "Libertanianism", from the fall 2014 ed. of the Stanford Encyclopedia of Philosophy, p.1-27.

Questions:

- Which is the ultimate subject in law beyond the nation state?
- Whose good is to be served by law? (Is that the same question as the former one?)
- How should we think about the individual – as a sovereign subject, as a member of a community or as something else?
- If the individual, the community or some other unit is the ultimate subject, what does that entail for how we analyze law?
- What is cosmopolitanism? What sort of political system does it entail?
- How does cosmopolitanism relate to communitarianism and libertarianism? Are they contradictory – in principle and/or in practice?
- What are the advantages and disadvantages of retaining the state as the ultimate basis for international and other forms of law?
- What relevance do outlooks like cosmopolitanism, communitarianism and libertarianism have for our construction and interpretation of law.

13-15, LexLab 1, *Torben Spaak*: Constitutional v. sociological/anthropological (or Kelsen v Erlich). Is it possible to think of global law in a constitutional way? Is there a global constitution? A European constitution? "Constitutional magic"? Is law top-down or bottom-up? Are the true sources of law sociological/anthropological? What would that mean for our conception of law?

Reading:

van Klink, Bart, "Facts and Norms. The Unfinished Debate between Eugen Ehrlich and Hans Kelsen", No.06-03, August 28, 2006, p.1-35.

Ehrlich, Eugen, "Fundamental Principles of the Sociology of Law", Transaction Publishers, p.486-506.

Kelsen, Hans, "General Theory of Law and State", The Lawbook Exchange, Ltd., Union, New Jersey, 1999, p.24-28.

Kelsen, Hans, "The Law as a specific social Technique", p.75-97.

Kelsen, Hans, "What is the pure Theory of Law?", [Vol.XXXIV 1960], p.269-276.

Questions to ponder:

Law as we know it is typically the law of a nation state, though there is of course international law and EU law. One may therefore wonder whether law is necessarily (or conceptually) connected to the nation state: Could there be non-state law, or is the very idea of non-state law a contradictio in adiecto? In this seminar, we will take a look at writings by the legal sociologist Eugen Ehrlich, who argued that there is something called living law, which is conceptually independent of the state, and by well-known legal theorist Hans Kelsen, who thought of law as being conceptually connected to the state and therefore rejected Ehrlich's claim about living law. In order to gain a better understanding of the questions involved, we will also read Bart van Klink's paper on the Ehrlich/Kelsen debate. I think the best way into these questions is to begin with Klink's paper, which offers an overview of the debate, and then proceed to read Ehrlich's and Kelsen's texts, which treat parts of the debate but do not themselves give a clear picture of the debate.

1. What is the question discussed by Kelsen and Ehrlich, as van Klink presents it?
2. According to van Klink, Ehrlich believes that an important part of law is completely independent of the state. How does Ehrlich justify this claim?
3. What, according to Ehrlich (and Klink), is "living law"?
4. What is Kelsen's general position on the admissibility of something like juristische Tatsachen conceived as a source of law?

5. According to van Klink, what Kelsen's main objections to Ehrlich's line of argument? What do you think of these objections? Could Ehrlich come up with a convincing response to the objections?
6. According to van Klink, Ehrlich maintains that there were, among other things, marriages and contracts before there was law. Is he right? If he is right, what, if anything, does that show? What does Kelsen say about this?
7. van Klink distinguishes three different ways in which Ehrlich might have answered Kelsen's critique and argues that one of these ways would have been more promising. Describe the three responses and assess them. (van Klink is not crystal clear here.)
8. What is your own view of the relation between law and state? Give reasons for your view.
9. What, according to Kelsen, is the relation between law and state?
10. What does Kelsen mean when he says that "law regulates its own creation" and what, if anything, does this idea have to do with the Ehrlich/Kelsen debate?

15-17, LexLab 1, *Björn Lundqvist*: Comparative law. Is it possible to compare different legal orders? What is the Archimedean point for the comparison of various rules and institutes – the function, the role of the rule/institution in the legal order (the "internal perspective") etc? Legal cultures. For what knowledge interest (*Erkenntnissinteresse*) does one compare?

Reading:

Zweigert, Konrad and Kötz, Hein, 'The Method of Comparative Law', in: Introduction to Comparative Law, 3rd ed. (Oxford: Clarendon Press, 1998), 33-47.

Gerber, David, 'System Dynamics: Toward a Language of Comparative Law?', Am. J. Comp. Law, 1998, 719–738.

Dehousse, Renaud, 'Comparing National and EC Law: The Problem of the Level of Analysis', Am. J. Comp. Law, 1994, 761-781.

Teubner, Gunther, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', Modern Law Review, 1998, 11-32.

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24 April, 10-12, Faculty Room, C487, *Torben Spaak:* Feedback/tutorial

III. Legal domains, 7-8 May

7 May, 10-12, Faculty Room, C824, *Björn Lundqvist*: Supranational law. This seminar will focus on the EU as the most advanced form of supranational legal order. How do the various perspectives fit with the EU? How have judges and commentators approached EU law and which ideas and conceptions have guided their approaches? Among theories that will be discussed one finds multi-level governance and Europeanisation, deliberative supranationalism, constitutional pluralism.

Reading:

Reading: Scharpf, Fritz, Notes Toward a Theory of Multilevel Governing in Europe, MPIfG Discussion Paper 00/5.

Joerges, Christian, 'Deliberative Supranationalism' – Two Defenses, European Law Journal, Vol. 8, No. 1, March 2002, pp. 133-151;

Maduro, Miguel, Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism, Working Paper IE Law School WPLS08-02 05-02-2008.

13-15, Faculty Room, C824, *Mauro Zamboni*: Transnational (non-state) law This seminar will focus on the private regulation of affairs beyond national borders. How do the various perspectives fit with such law? How have judges and commentators approached transnational law and which ideas and conceptions have guided their approaches? This seminar will focus on international business transactions but will also look at other examples, such a private regulation of humanitarian assistance.

Reading:

Romano Cesare P.R. 1998-1999. The Proliferation of International Judical Bodies: The Pieces of the Puzzle. 710-751.

Gaillard Emmanuel. 2001. Transnational Law: A Legal System or a Method of Decision Making? In: The Practice of Transnational Law 53–65 (Berger ed.).

Wai Robert. 2002. Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization. Columbia Journal of Transnational Law 40: 209-274.

Daggett D. Susan. 2002. NGOs As Lawmakers, Watchdogs, Whistle-Blowers, And Private Attorneys. Colo. J. Int'l Envtl. L. & Pol'y 13: 99-113.

Buxbaum Hannah. 2004. National Courts, Global Cartels. German Law Journal 5: 1095–1106.

Questions:

1) What is transnational law? Find possible (if any) examples in your research field.
2) Is transnational law relevant for your research field?
3) Which are the main (if any) law-making private actors in your research field?

4) Should transnational law be treated as "real" law in your research field? Why yes? Why not?
5) What are the problems that private law-making can create in your research field?
6) Should a regulatory regime be effective or democratic?
7) Should the state (or state-based organizations, e.g. United Nations or supranational organizations) have the monopoly of law-making in your research field? Why yes? Why not?

15-17, Faculty Room, C824, *Michael Hellner*: Cross-national law (law involving several jurisdictions in a horizontal relation, like international private law). This seminar will focus on the interaction between domestic legal orders. How do the various perspectives fit with international private law? How have judges and commentators approached the subject and which ideas and conceptions have guided their approaches?

Reading:

A.T. von Mehren, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil Law Systems", *Collected Courses of the Hague Academy of International Law* 295 (2002), pp. 27-67.

M. Bogdan, "Private International Law as Component of the Law of the Forum", *Collected Courses of the Hague Academy of International Law* 348 (2011), pp. 34-70.

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8 May, 10-12, Faculty Room, C824, *Pål Wrange*: Inter-state law. This seminar will focus on international law (IL) and other forms of inter-state regulation. How has international law adapted to globalisation? How do the various perspectives fit with international law? How have judges and commentators approached international law and which ideas and conceptions have guided their approaches?

Reading:

Three articles from *Ruling the World? Constitutionalism, International Law, and Global Governance* (Dunpoff & Trachtman, CUP 2009) pp 3-87 (Trachtman's article, Kennedy's article and the first part of Paulus' article). The book is available as an ebook at SU library.

Questions and comments:

- How has international law adapted to globalisation? Constitutionalisation? Fragmentation?

- Is it plausible to talk about "constitutionalisation" in the context of international law? What is the relation between IL as a system and IL as being constitutionalised?
- Could a constitutional perspective fit with a cosmopolitan, communitarian or libertarian outlook?
- What legal and political consequences does it have if we think that IL is constitutionalised? What is the relation between procedure and substance?
- Why is Kennedy skeptical of constitutionalism? Is his skepticism political?
- Why is Kennedy preoccupied with knowledge and expertise?

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8 May, 13-15, Tutorials, *Mauro Zamboni*

IV. Collisions and contradictions, 21-22 May

10-13:15, Faculty Room, C824, *Pål Wrange*, Collisions and contradictions – vertical hierarchies.

Reading:

Erich Vranes, The Definition of 'Norm Conflict' in International Law and Legal Theory, EJIL vol 17 (2006) 395–418 http://www.ejil.org/pdfs/17/2/80.pdf

Martti Koskenniemi, Hierarchy in International Law: A Sketch, EJIL vol 8 (1997) 566-58, http://www.ejil.org/pdfs/8/4/785.pdf

Opinion 2/13 of the Court of Justice of the European Union on EU accession to the European Convention on Human Rights http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=266245

Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of the European Court of Justice, 3 September 2008, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0402&from=EN

Questions and comments:

The readings for this session have a clear logical structure:

Vranes sets out the concept of conflict in law. The distinction between contradictory and contrary is important and should be fully understood. Do you think that his conception is reasonable? Is it too wide, too narrow? What is the difference between

conflicts at the level of norms and the level of decision? Conflicts of obligation and conflicts of telos (purpose)? What relevance do concepts like fragmentation and regime have in this context? What is a "permission" in international law? Do conflicts between norms mean that the legal system is contradictory What relevance does this have for your work?

Koskenniemi's article is a classical deconstructive explanation of conflicts in international law, but in my view it applies – mutatis mutandis – to any field of law. This is so because of inherent epistemological problems (subjective/objective, etc) as well as inherent contradictions in our political systems (individualism/common interests, etc). Please do not skip footnote 2. Does it seem plausible to you? Is it relevant? What does it say about the way that (international) legal discourse deals with conflict?

The two texts from Luxemburg – both very controversial -- are included both because of their general interest at face value and in order to arguably demonstrate the relevance of the ideas in Vranes and Koskenniemi. Some of the issues are quite technical and can be fully assessed only by EU law geeeks; we will try to focus on the main issues, but, of course, sometimes the world appears most clearly in a grain of sand, so any technical, detailed analysis that you might have will be useful.

Which conflicts do you identify in the ECJ cases? Which hierarchies does the ECJ establish? In which domain of law do(es) the hierarchy(ies) rein? Could they have been conceived otherwise? Do you think that the Court's decisions are political? If so, in what sense? Can one use concepts like "constitutionalism", "cosmopolitanism" or "communitarianism" to discuss these decisions?

13-15, Faculty Room, C824, *Pål Wrange,* Collisions and contradictions – horizontal. This seminar will discuss how to resolve conflicts between different regimes. Lotus and comments. A case of regime collisions.

Reading:

Lotus judgment (see enclosed pdf)

Joint separate opinion of judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant Case, paras 49-52 http://www.icj-cij.org/docket/files/121/8136.pdf

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22 May, 10-12, C827 (Pål's office), *Pål Wrange,* Tutorials

13-15, LexLab 1, *Michael Hellner*: Cross-national law (law involving several jurisdictions in a horizontal relation, like international private law). This seminar will focus on the interaction between domestic legal orders. How do the various

perspectives fit with international private law? How have judges and commentators approached the subject and which ideas and conceptions have guided their approaches?

Reading:

A.T. von Mehren, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil Law Systems", *Collected Courses of the Hague Academy of International Law* 295 (2002), pp. 27-67.

M. Bogdan, "Private International Law as Component of the Law of the Forum", *Collected Courses of the Hague Academy of International Law* 348 (2011), pp. 34-70.

V. Final seminar, 7 June

10-15, IFIM Library, *Pål Wrange,* Final seminar: During this seminar, students will present their final papers of around 10-15 pages. Each paper will be commented on by another student and by a lecturer.

Please submit your paper to the whole group two days in advance.