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Non-Analytical Obstacles to Stateless Law

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Abstract: This article reviews legal scholars' key prudential and moral reasons to oppose the view that law can exist without the state. After a discussion of the real-world impact of views on what counts as law, the article discusses the following grounds for resistance to stateless law: law as something necessarily produced by states scores quite high on criteria to determine how good a theory is; paradigms intrinsically resist change; certain forgotten prudential political rules are wrongly remembered as analytical precepts; there is sheer political resistance to the emancipation of powers outside the state; attempts are made by those who shape our understanding of law to please their constituencies; the pursuit by academics of a legal practice interferes with rigorous legal thinking; there are important vested interests in the current state-centred system; and a sense of anti-intellectualism dominates certain areas of the legal academy.

Keywords: concept of law; stateless law; epistemology; determinants of scholarship; vested interests in understandings of law.

A few years ago, John Ruggie, the Harvard human rights advocate, drafted a set of human rights principles that corporations should respect.¹ These so-called "Ruggie Principles" set in motion an international movement to put pressure on corporations to comply with these principles. Major companies around the world, including Coca-Cola and General Electric, started to reconsider some of their business practices, no doubt projecting significant costs. A real movement was catching on.

But then South Africa and Ecuador, supported by Bolivia, Cuba and Venezuela, along with almost 600 NGOs,² banded together in the hope to turn Ruggie's principles into a proper

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¹ UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK, HR/PUB/11/04, 2011. See John Ruggie, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY- GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES: UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, A/HRC/17/31 (Mar. 21, 2011).

² See Treaty Alliance, Global Movement for a Binding Treaty, <http://www.treatymovement.com>.

international treaty creating proper binding obligations for corporations³ – against Ruggie’s own earlier⁴ and subsequent warnings.⁵ Negotiations ensued. Ruggie’s diplomatic efforts were replaced by state-centered, classic diplomacy. A plethora of quite expectable disagreements erupted, almost immediately.⁶ They seem unlikely to abate any time soon.⁷

Today, many believe that the effort is losing itself in the shifting sands of these diplomatic negotiations.⁸ As Ruggie puts it, “a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places”.⁹

Businesses, of course, rejoice: the dissensus alleviated a good deal of the pressure on them: their legal human rights obligations are on hold, so to speak, pending the outcome of these negotiations, which may never come to fruition.

Is it not ironic? The businesses were “saved” from inconvenient human rights constraints by an idea about what law is. Ruggie’s principles most likely lost authority because of an attempt to turn

³ STATEMENT ON BEHALF OF A GROUP OF COUNTRIES AT THE 24RD [SIC] SESSION OF THE HUMAN RIGHTS COUNCIL (Sept. 2013), <https://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> (statement made on behalf of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador).

⁴ John Ruggie, *Treaty Road not Travelled*, ETHICAL CORPORATION, May 2008, at 42.

⁵ John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (Jan. 23 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726, at 1 (“I strove to achieve what Professors Pauwelyn, Wessel and Wouters describe as ‘thick stakeholder consensus,’ in contrast to the ‘thin state consent’ that so often emerges from intergovernmental negotiations” [referring to Joost Pauwelyn Joost, Ramsel A. Wessel, and Jan Wouters Jan, *The Stagnation of International Law*, LEUVEN CENTRE FOR GLOBAL GOVERNANCE STUDIES, WORKING PAPER No. 97, Oct. 2012]), 3 (“From the outset I rejected the voluntary/mandatory dichotomy that had paralyzed creative thinking and policymaking for too long”) and 5 (“my best guess is that if the current parameters of the resolution and the intent of the treaty sponsors hold fast, one of two outcomes is likely to occur: either the process will drag on like the 1970s UN Code of Conduct for Multinational Corporations negotiations, which were finally abandoned in 1992; or Ecuador and its allies gather enough votes and ratifications from small states to produce an equivalent to the Migrant Workers Convention, which entered into force in 1990 but has not been ratified by a single migrant worker-receiving country—the equivalent in the present case being the major home countries of multinational corporations.”) See also JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013).

⁶ Ruggie, *supra* note 4, at 4 (“Virtually every major home country of multinationals either voted against the proposal [of a treaty on international business and human rights, in the Human Rights Council] or abstained. China was an exception, but its explanation of vote made it clear that its position hardly differed in substance from other home countries. ... the proposal essentially would start the process all over again with the aim of producing a single, overarching legal instrument that, like a silver bullet, promises the resolve business and human rights challenges once and for all.”)

⁷ *Id.* at 5 (“Ecuador, the main force behind the proposal, estimates that negotiations could take a decade or more.”)

⁸ *Id.* (reporting on opinions voiced during a symposium on the Ruggie Principles).

⁹ *Id.* at 5.

them into “proper” law. The attempt to use law as a means to engineer social progress is, in this case, on a bad track, possibly failing altogether, because of the idea that social engineering through law means social engineering through *state-made* law. For most lawyers, transnational non-state law, like the Ruggie Principles, just will not do.¹⁰

But just why? Whence this idea, this resistance to transnational non-state law as “proper” law, as law that will do as law?¹¹ Why, when we want to achieve something through law, through legal regulation, do we tend to think that a state, or several states, have to get involved and stamp the effort with its formal seal of approval? Why do we associate law with the state?

These questions take us to a deeper, or more general, set of musings: Why do we think of law the way we do? What is it that incentivises and constrains, orients and shapes the practice of how we think about law? How do the interests we pursue, for ourselves and for others, influence our epistemology of law? What are the likely determinants of our conduct when we carve out or simply use a certain idea of what law is?

My essay builds on the postulate that law, as Paul Bohannon puts it, is a noetic unity: it is a concept not represented by anything except our ideas about it.¹² Nothing is intrinsically of a legal nature or not of that nature. What we are willing to recognize as law effectively creates law. Law is whatever we make it be. Our discourse about law is what makes law *law*. If we change our discourse about law, we change what law itself is. That, as I said, is a postulate, and as such I will assume it to be true without engaging in vigorous intellectual grappling of any sort. If the reader cannot accept this postulate, he will find little joy in the essay. So be it. But if the postulate is accepted, an intriguing question follows: whence our discourse?

¹⁰ For a discussion of these questions in the specific context of international law, see Joost Pauwelyn, *Is it International Law or Not and Does it Even Matter?* in INFORMAL INTERNATIONAL LAWMAKING 125 (Joost Pauwelyn, Ramsel A. Wessel and Jan Wouters eds, 2014) and Joost Pauwelyn, Ramsel A. Wessel, and Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT. LAW 733 (2014).

¹¹ Just to make this clear, I am not arguing that resistance is the whole story of legal theory today, or that *everyone* resists law without the state. Similarly, I am not arguing that states have no, or should have no, role to play in the construction of legality.

¹² Paul Bohannon, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33 (1965).

Let me say it again: we have choices in thinking about law, and these choices are choices about what law effectively is. So why do we exercise these choices the way we do? Or rather, because this is a philosophical work and not a sociological study, the question I want to deal with is this: what are the reasons-for-action of the variegated actors of the discourses about what law is? Reasons-for-action are here understood as “factors that actually do motivate people, but also ... factors that would motivate them if they were to understand the serviceability of those factors for the furtherance of their general objectives”.¹³ In other words, the prevalence of these factors in the actual determinants of the discourses is not a question I investigate, or even could investigate through philosophical reasoning: this is an empirical point which would require a lot of social-scientific research, which would lead to a contribution to the sociology of professions. Interesting as this may be, this is not what I do or probably even could do: the research would be shrouded in complications and would require a great number of qualifications, since the actual determinants of such discourses are “a matter that will hinge on contingent features of human psychology and sociocultural influences.”¹⁴

Accordingly, any implicit argument I may make about the actual importance of the reasons-for-action I discuss, I submit to validation by rational assent, and not by empirical verification.¹⁵ And finally, in order not to make the prose too cumbersome, I will not reiterate, directly or implicitly by choice of terminology, the explanandum of my essay – namely that the determinants, incentives and constraints that I will discuss are reasons-for-action, which motivate or would motivate if understood. The explanandum is not their actual practical strength.

1) Legality is meaningful

¹³ M Kramer Matthew, *On the Moral Status of the Rule of Law* (63) CAMBRIDGE LJ 63, 65 (2004).

¹⁴ *Id.*

¹⁵ DAVID HARTLEY, OBSERVATIONS ON MAN: HIS FRAME, HIS DUTY AND HIS EXPECTATIONS 324 (1749) (‘rational assent . . . to any proposition may be defined as readiness to affirm it to be true, proceeding from a close association of the ideas suggested by the proposition, with the idea or internal feeling belonging to the word truth; or of the terms of the proposition with the word truth’). On validation by rational assent of propositions in the science of law as a theoretical corpus, see François Ost, *Science du droit*, in DICTIONNAIRE ENCYCLOPEDIQUE DE SOCIOLOGIE ET DE THEORIE DU DROIT 540 (André-Jean Arnaud ed., 1993).

Before we properly enter this discussion, we need to make it clear that the idea of law has some real-world importance. Discussing what to call law, determining where to affix the label of law, taking an epistemological stance is not just conceptual janitoring. It has real-world consequences.

We can first of all think of the fact that legality (in the sense of “being law”, of the label of law being affixed to something) conveys authority. Legality – “*this* is law” – accords authority. As Robert Paul Wolff puts it, authority is about “what men believe they ought to do.”¹⁶ What is characterised as law, then, we believe we ought to obey.¹⁷

Law has a specific form of authority among social norms: affixing the label of law to a given regime grants it that special authority, that additional authority. I mean this in the sense, as is often assumed, that it is a type of authority that tends to lead to increased compliance: a legal norm is more often obeyed than a non-legal norm, all other things being equal, including the contents of the two norms.¹⁸ Joseph Raz pointed the way: “There can be human societies which are not governed by law at all. But if a society is subject to a legal system then that system is the most important institutionalized system to which it is subjected.”¹⁹

If this is true, the label of law may be used to empower or otherwise advance certain interests. If “*this* is law” accords authority, then those who make “*this*” have greater opportunities to create situation in which one believes one ought to obey them.

The trick, of course, is to make the label stick: to make the addressees of the commands one wants obeyed accept the idea that the label of law is adequately affixed to that which it is affixed to. This may be achieved by convincing these addressees of a certain understanding of law (“yes, according to that understanding of law, *this* is indeed law, is an instance of it”).

The power to make law according to a theory – a theory of legality – translates as real power, and effectively orients behaviour in practice, if the theory of legality becomes sufficiently successful.

¹⁶ ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 5 (1970).

¹⁷ I discuss this at greater length in THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 20-31 (2014).

¹⁸ Or at least so one generally thinks, I do not know that this has ever been empirically proven.

¹⁹ JOSEPH RAZ, THE AUTHORITY OF LAW 120 (2d ed, 2009).

Those who make law in theory become those who make law in practice. Schools of thought about the nature of law wield power.

Let me offer a classic example to illustrate the point: Georges Gurvitch, the Russo-French socialist intellectual sometimes credited with inventing legal sociology, sought to empower the working class. Part of his efforts were very much tangible – such as participating in the Russian revolution that brought down the Tsars. Another part of his efforts were subtler, and consisted of advocating a certain understanding of what law itself is, and who can make it.²⁰ He argued, in essence, that the social groups revolving around unions and workers' councils create norms that we should recognise as law in the same way as we recognise the ruling class's state law as law. The legal solution to a problem of labour law can be found in 'workers' law' just as much as it can be found in the law of the state. The real object of his rather byzantine work was simple: positing the equivalence of the two types of law sought to underscore the legitimacy and normative relevance of the unions' regulations. And thus to empower them. Think of legality, here, as a mechanism of social empowerment.

Let me move on to another real-world effect of legality, another reason why it is meaningful to ponder the limits of what is law and what is not. If we mean to survey the law that regulates a certain social field, to understand the legal regulation of a certain social question, and what power that legal regulation codes, then our lens is as wide as our understanding of law. Our understanding of law is our field of vision, our focus, our blinkers. If we understand law only as the law made by states, and if a given social field is regulated increasingly by other norms than law made by states, then we miss out an increasing part of the picture when we, as lawyers, survey the legal regulation of that social field.

The classic illustration is provided here by Lawrence Lessig, who pointed to the simple idea that few lawyers were getting: code is law.²¹ The technological code used to programme the various devices that connect to the Internet is as much law as the rules enacted in parliaments. It wields as

²⁰ GEORGES GURVITCH, *SOCIOLOGY OF LAW* (2001 [1942]); GEORGES GURVITCH, *L'IDEE DU DROIT SOCIAL: NOTION ET SYSTEME DU DROIT SOCIAL; HISTOIRE DOCTRINALE DEPUIS LE XVIIIE SIECLE JUSQU'A LA FIN DU XIXE SIECLE* (1932).

²¹ LAWRENCE LESSIG, *CODE: VERSION 2.0* (2d ed. 2006).

much, and often more, regulatory power. Those who control the code effectively control what one is required and permitted and empowered to do on the Internet, the liberties and the sanctions, the rights and the duties, the cost-benefit matrix of our digital behaviour. Most lawyers did not “get” the Internet, and possibly still do not get it, because they did not “get” the variegatedness of legality – this was certainly so when Lessig’s book first came out in 1999, and probably still is the case today in those places that have a more conservative understanding of legality. If we want to understand what orients behaviour on the Internet, for instance in order to reflect on what laws should be enacted in order to reorient that behaviour, we obtain an incomplete and altogether wrong account of what matters if we work with a too narrow understanding of law. If we study the legal regulation of the Internet while focusing only on rules made by states, the relevance of our analysis is limited. Think of law, here, as an identifier of power, as a mechanism of policy-analysis empowerment, of observational empowerment.

To a third way in which our understanding of law matters, why it matters to get our understanding of law right for something else than the sake of getting it right. Law is what we lawyers are supposed to be competent to deal with. As Lon Fuller put it, “the word ‘law’ means the life work of the lawyer.”²² Affixing the label of law to a given regime brings that regime within the realm of what lawyers are legitimate in dealing with (conducting research on, teaching, advising on, but also more simply identifying and understanding). What we lawyers do on a daily basis is based on what we call law in the first place. The contours of our profession is drawn by our understanding of what law is.²³ Think of legality, here, as a mechanism of socio-professional inclusion and exclusion, as a mechanism of professional empowerment.

In sum, since legality is among other things an instrument of empowerment, a number of interests are affected by it. Put differently, as legality is, among other things, a question of epistemology, our epistemology of law affects certain interests. It follows that our epistemology can, certainly in theory and most likely in practice, be instrumentalized to advance or harm these interests.

²² LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 3 (1940).

²³ Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT. LAW 1075.

And so these interests are likely to reflexively influence, in turn, our epistemology. Now what are these interests and how do they exercise that influence on our epistemology of law?

Within that question, let us go back to the more specific problem that concerns us here: why do we tend to call only state law *law*? Why are we usually content, when we describe the legal regulation of a given field, to describe what parliaments have enacted, what courts have decided, what states and their various organs have done? Our law textbooks are usually limited only to things produced by states. The bulk if not all of what our law schools teach, when they teach law, is regulation produced by states. Something is standing in the way of thinking about law without the state. What is it?

2) Law as state law is a fairly good theory

First of all, it should be recognised that the theory according to which law is necessarily state law is not a bad theory. It is actually a fairly good descriptive theory. So, what makes a descriptive theory a good theory?

Drawing loosely on Karl Popper's notion on verisimilitude or truthlikeness (every descriptive theory is an approximation of truth, and this approximation is successful to varying degrees but virtually never a perfect account of truth),²⁴ and on established discussions of the scientific character of law²⁵ and social sciences,²⁶ here's one way to assess the quality of descriptive theories, based on three criteria:

(1) Boldness or breadth: a broad theory is one that captures a great number of different facets or aspects of the phenomenon it seeks to explain; it explains many different parts of the phenomenon.

²⁴ KARL POPPER, CONJECTURES AND REFUTATIONS (1963); Karl Popper, A note on verisimilitude, 27 THE BRITISH JOURNAL FOR THE PHILOSOPHY OF SCIENCE 147 (1976).

²⁵ Ost, *supra*, 15.

²⁶ Jean Ladrière, *Les sciences humaines et le problème de la scientificité*, in SCIENCES ET PSYCHANALYSE (Patrick de Neuter & Jean Florence eds 1985).

A bolder, broader theory is better, in the sense that its explanatory power is greater, than that of a narrower theory.

(2) Fertility: a fertile theory is one that allows predicting what a given phenomenon will do (or has done – time here is reversible) in the relevant concrete situations. The better, the more accurate the predictions, the greater the theory's fertility. Put differently, a fertile theory helps us accurately understand something about the theory's object; it is capable of producing accurate knowledge; it has analytical purchase. A bold theory that is not fertile allows explaining many things, many aspects of a phenomenon, but it does not explain them well, it does not explain them accurately. A fertile theory that is not bold allows explaining things very well, very accurately, but it explains only few things, few aspects of a given phenomenon.

(3) Simplicity: raw analytic intelligence, some neuroscientists say, depends in part on the amount of information one can actively, consciously have in mind at any single time while conducting reflective reasoning (the so-called working-memory capacity).²⁷ It is the equivalent of a computer's RAM. The simpler a theory, the less "memory" it uses. A simpler theory allows the thinker to have more other "things" (such as other theories) in mind at the same time. This allows for more connections between theories, which arguably increases or widens the explanatory power of a given moment of thinking.

The theory according to which law is necessarily state law scores extremely high on simplicity and arguably scores decently on boldness and fertility. Unsatisfactory as it may be, it is not all that easy to find a theory that fares significantly better. For indeed more law is not necessarily better: a theory of what law is that sees law in more things may see law in too many things. A very bold or broad theory, adopting a particularly inclusive approach to legality, may overreach and fail to predict anything much. As Simon Roberts used to put it, law "may well be found everywhere; but in

²⁷ Andrew R.A. Conway, Michael J. Kane, Randall W. Engle, *Working memory capacity and its relation to general intelligence*, 7 TRENDS IN COGNITIVE SCIENCES 547 (2003); Randall W. Engle, Stephen W. Tuholski, James E. Laughlin, Andrew R.A. Conway, *Working memory, short-term memory, and general fluid intelligence: a latent-variable approach*, 128 JOURNAL OF EXPERIMENTAL PSYCHOLOGY 309 (1999); George A. Miller, *The Magical Number Seven, Plus or Minus Two Some Limits on Our Capacity for Processing Information*, 101 PSYCHOLOGICAL REVIEW 343 (1955).

representing it like that, we risk losing all sense of what it is".²⁸ Legal ubiquity, seeing law in every social norm, does not help us understand anything based on its legal character: affixing the label of law to a norm no longer makes any difference if it is affixed to every norm.²⁹

3) Paradigms do not like change

In any event, regardless how good the theory really is, paradigms do not like change. A paradigm, in the Kuhnian sense, is a central idea, accepted for a time by the discipline's community, which determines the appropriate choice of method and terminology within a discipline.³⁰ It also includes a number of key examples, or "exemplars"³¹ in Kuhn's terminology, of what the paradigm is meant to explain.³² Paradigms have a profound impact on a field: they amount to "competing modes of scientific activity."³³ Adhering to a paradigm is typically essential to become part of the discipline's dominant community.³⁴

But over time, anomalies appear. These are phenomena that are not satisfactorily explained by the dominant paradigm, revealing weaknesses in the paradigm, falsifying it.

²⁸ Simon Roberts, *After Government? On Representing Law Without the State*, 68 MODERN LAW REVIEW 124 (2005).

²⁹ On legal ubiquity, see Rodolfo Sacco, *Mute Law*, 43 AMERICAN JOURNAL OF COMPARATIVE LAW 455 (1995); Giorgio del Vecchio, *Sulla statualita del diritto*, 9 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 1 (1929); LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* (1971); Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAPITAL UNIVERSITY LAW REVIEW 179 (1985); Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOCIAL & LEGAL STUDIES 57 (2004); JEAN-FRANÇOIS PERRIN, *SOCIOLOGIE EMPIRIQUE DU DROIT* (1997).

³⁰ Thomas Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* viii (2d ed., 1970).

³¹ *Id.* at 186-188.

³² *Id.* at 10 ("some accepted examples of actual scientific practice—examples which include law, theory, application, and instrumentation together—provide models from which spring particular coherent traditions of scientific research. These are the traditions which the historian describes under such rubrics as 'Ptolemaic astronomy' (or 'Copernican'), 'Aristotelian dynamics' (or 'Newtonian'), 'corpuscular optics' (or 'wave optics'), and so on.")

³³ *Id.* at 10.

³⁴ *Id.* ("The study of paradigms, including many that are far more specialized than those named illustratively above, is what mainly prepares the student for membership in the particular scientific community with which he will later practice.")

The first reaction of the discipline is to stretch the explanatory power of the paradigm by all sorts of analytical, argumentative, or rhetorical tricks. It resists the falsifications. This may well be what is happening with the paradigm of law as state law.³⁵

All this is well known, and classic Thomas Kuhn. Yet it helps us start thinking about what constrains legal thinking: it is not at all sufficient to show that there are credible instances of law without the state, which are not captured by the dominant paradigm of legal statism, in order to change that paradigm. A paradigm typically survives a number of falsifications (in the Popperian meaning).³⁶ It does not like change.

4) Prudential political rules and descriptive theories

The equation of law and state law was initially the consequence of the political doctrines that surrounded the Westphalian treaties, when they ended the thirty Years War in 1648.³⁷ These political doctrines were the independence of nations and their legal orders and a duty of non-interference in

³⁵ This is essentially Andrea Bianchi's argument about international law: Andrea Bianchi, *Reflexive Butterfly Catching: Insights from a Situated Catcher*, in *INFORMAL INTERNATIONAL LAWMAKING* 200 (Joost Pauwelyn, Ramsel A. Wessel and Jan Wouters eds, 2014).

³⁶ KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 9-10 (2005) ("Finally, there is the testing of the theory by way of empirical applications of the conclusions which can be derived from it. ... if the decision is negative, or in other words, if the conclusions have been falsified, then their falsification also falsifies the theory from which they were logically deduced.")

³⁷ The Westphalian Treaties of October 1648 are considered by most commentators to have brought about the birth of modern international law, marked amongst other elements by a clear separation between the internal affairs of a state and its external relations with other states, and by the concept of territorial sovereignty. It was in fact not the treaties themselves that brought about any change in regard to sovereignty or territoriality, as they happened to be completely silent on these matters, but the general context of their negotiations did indeed foster the shifts that are ascribed to them. See Nico Schrijver, *The Changing Nature of State Sovereignty* 70 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 65, 68-69 (1999); ANTONIO CASSESE, *INTERNATIONAL LAW* 19ff (2001); David Boucher *POLITICAL THEORIES OF INTERNATIONAL RELATIONS* 224-225 (1998); Stephen Neff, *A Short History of International Law*, in *INTERNATIONAL LAW* 42 (Malcolm D. Evans ed. 2003); John Martin Gillroy, *Justice-as-Sovereignty: David Hume and the Origins of International Law*, 78 *BRITISH YEARBOOK OF INTERNATIONAL LAW*, 429 (2007); JOHN M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 175 (1993); MALCOLM N. SHAW, *INTERNATIONAL LAW* 21, 25 (5th ed. 2003).

the affairs of other nations, as captured by the concept of sovereignty and the modern state system, which fully emerged or at least gained traction at that time.³⁸

The purpose of these doctrines was essentially to minimise regulatory overlaps among the various political entities that preceded states³⁹—such overlaps had been one of the causes of the Thirty Years War⁴⁰—by recognising only one regulatory authority (the state) and one type of regulation (state law). States and state legal systems, which the conventional imagery represents as juxtaposed billiard balls,⁴¹ replaced overlapping ‘transnational’ layers of legal regulation.⁴² Reducing law to state law sought to cure the political context that had led to an extremely brutal and destructive war.

Later the equation of law and state law became, at least in part, the consequence of a simpler ethical belief. Léon Duguit and Hans Kelsen,⁴³ for instance, expressed this belief in 1926 when they wrote that “we believe that we have serious reasons to be convinced that the only means to satisfy our aspiration for justice is the resigned confidence that there is no other justice than the justice to be found in the positive law of states.”⁴⁴ Put differently, they thought that to admit of law outside state law would jeopardise our ‘aspiration for justice’ and equity. The only law there is is state law,

³⁸ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 10 (2d ed. 2007) (“the early law of nations had its origin in the European State-system, which existed long before its conventional date or origin in the Peace of Westphalia (1648), ending the Thirty Years’ War. the effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence and autonomy it recognized or established) at the expense of the notion of the *civitas gentium maxima*—the universal community of mankind transcending the authority of States.”)

³⁹ Andreas Osiander, *BEFORE THE STATE: SYSTEMIC POLITICAL CHANGE FROM THE GREEKS TO THE FRENCH REVOLUTION* (2007).

⁴⁰ Stéphane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 160 (2000) (“Th[e] large number of increasingly powerful actors in Europe, in addition to the multilayered system of political authorities, as well as the religious dimension of the different polities, made the violent solution of the situation virtually inevitable.”)

⁴¹ ARNAUD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 19-24 (1962). See also Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT. LAW* 1, 5 (1995).

⁴² Philip Allot, *Self-determination—Absolute Right or Social Poetry?*, in *MODERN LAW OF SELF-DETERMINATION* 184-185 (Christian Tomuschat ed. 1993); Markus Fischer, *Feudal Europe, 800–1300: Communal Discourse and Conflictual Practice*, 46 *INTERNATIONAL ORGANIZATION* 427, 449 (1992); George Clark, *EARLY MODERN EUROPE FROM ABOUT 1450 TO ABOUT 1720* 28 (1957).

⁴³ Undoubtedly the work of both Duguit and Kelsen is significantly more nuanced than I present it here. Then again, I am not taking issue with their scholarship *qua* their scholarship. They are only cited here as an example to help us understand the contention that only state law can be law. Whether this is a simplification of their views that is so brutal as to be deforming is beside the point. They are not the object of study here. For a nuanced discussion, see NORBERTO BOBBIO, *IL POSITIVISMO GIURIDICO* (1961).

⁴⁴ Léon Duguit & Hans Kelsen, *Avant-propos*, 1 *REVUE INTERNATIONALE DE LA THEORIE DU DROIT* 3 (1926-27).

because only systems of rules produced by a state or a collectivity of states can, with sufficient likelihood, deserve the label of law. Only states can produce, with sufficient likelihood, the kind of justice or fairness that mankind has come to associate with law. Hence, Duguit and Kelsen would say, we have to come to the analytic conclusion that only states can create legal norms, even if it is at the price of overstretched theoretical constructs. The axiological rhetoric of legality constrains epistemological conclusions.

Let me make a parallel to illustrate what is happening here: Certain religions turn prudential rules into moral rules: it is generally in your own interest not to do X because the consequences for you are, more often than not, worse than the advantages you gain – that is a prudential rule. Later it becomes “You shall not do X because X is *morally* bad”. When the prudential dimension of the situation changes, the rule remains, because it is now anchored to morality, not prudence.

Similarly with law as state law, the prudential rule that it is (or was?) generally best for our own interest to empower the state over other forms of communal self-expression and power, that prudential rule was turned into a theory of law, into a philosophical doctrine, into a theory that pretends to only seek to maximise analytical purchase and internal logical consistency. A prudential rule was turned into a scientific, descriptive theory, into a descriptive paradigm. And then its origin was largely forgotten.

5) Sheer political resistance

There are theories about the existence of law without the state that in reality seek to terminate, or at least reduce, that existence. These are, sometimes at least, manifestations of sheer political resistance to the creation of law outside the state. The Italian scholar Santi Romano offers a good example.

Santi Romano claimed, based on a set of rather undemanding criteria, that there are a vast number of legal systems beyond the legal system of the state and beyond international law. Even the norms created by the mafia would be law.⁴⁵

Santi Romano was, beyond being a legal philosopher, a rather prominent and active member of the Partito Nazionale Fascista under Mussolini: ultra-nationalists whose ultimate hope was a strong, authoritarian state. Santi Romano sought to strengthen the state.⁴⁶ For that purpose, it is a good argument to suggest that the mafia behaves according to its own rules, rules that from the mafia's perspective live next to and possibly replace the law of the state, with the obvious dreadful consequences that follow. If the legal solution to a problem, commercial or not, is what the mafia says, this is bad news. The reason, here, why certain stateless regimes receive the label of law is that this helps to show that these regimes have acquired an unacceptable degree of autonomy. Their autonomy must be reduced. The state must be strengthened. Law without the state must disappear. Identifying instances of law without the state is like identifying manifestations of an illness.

6) Pleasing constituencies

The perceived legitimacy and actual use of certain legal institutions is volatile. For instance, the legitimacy and use of the International Court of Justice (ICJ) is something that the Court had to fight for and progressively earn, and now has to defend in order to keep.⁴⁷ The use of the Court entirely depends on the consent of states to use it. The Court, when it defines what constitutes international

⁴⁵ SANTI ROMANO, *L'ORDINAMENTO GIURIDICO* (1946).

⁴⁶ Giovanni Tarello, *La dottrina dell'ordinamento e la figura pubblica di Santi Romano*, in *LE DOTTRINE GIURIDICHE DI OGGI E L'INSEGNAMENTO DI SANTI ROMANO* 256 (Paolo Biscaretti di Ruffia ed. 1977); NORBERTO BOBBIO, *TEORIA DELL'ORDINAMENTO GIURIDICO* 41 (1960); Maurizio Fioravanti, *Per l'interpretazione dell'opera giuridica di Santi Romano: Nuove prospettive della ricerca*, 10 *QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO* 169, 181 (1981); Anna di Robilant, *Genealogies of Soft Law*, 54 *AMERICAN JOURNAL OF COMPARATIVE LAW* 499, 551-552 (2006).

⁴⁷ Georges Abi-Saab, *The International Court as a World Court*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE, ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* (Vaughan Lowe & Malgosia Fitzmaurice 1996).

law, has an incentive to define it in a way that makes states want to use the Court again. States have to be courted to use the Court. States have to be pleased.⁴⁸

If legality is indeed a conveyor of authority, if the label of law indeed empowers those who metaphorically hold the sceptre of legality (those who make law), then pleasing states likely means to make sure the sceptre remains in their hands and their hands only: recognising the existence of law without the state decreases the relative power and authority of states. The ICJ's constituency would tend to prefer being the sole maker of international law.

The same situation applies to judges on certain other courts, such as the European Court of Human Rights, as they do not necessarily end their career at the Court. They may continue their career in some other government or government-appointed capacity. Consequently, they have an incentive to make decisions that make them likeable by their governments.

Past allegiances, as opposed to current or prospective ones, may also play a role. Someone who has held a high office for a government may have an incentive to adapt his or her discourse to his or her former group or community. For instance, Michael Wood, former principal legal adviser to the Foreign and Commonwealth Office (where he also had a 35 year career), wrote for the International Law Commission that customary international law can only be made by states,⁴⁹ thereby running roughshod over the (possibly controversial) developments in the area of international lawmaking by non-state actors.⁵⁰ Interestingly, Wood's argument against the recognition of international law made by non-state actors is that it is "the better view".⁵¹ Just that, "the better view". This is voting, or a renewed expression of allegiance, not argument.

⁴⁸ Andrea Bianchi, *Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy*, 4 J. INT. DISP. SETTLEMENT, 457 (2013).

⁴⁹ Michael Wood, SECOND REPORT ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW, INTERNATIONAL LAW COMMISSION, A/CN.4/672. (2014).

⁵⁰ Anthea Roberts & Sivakumaran Sandesh, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT. LAW 107 (2012); JEAN D'ASPREMONT (ED), PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW (2013).

⁵¹ Wood, *supra*, note 49, at 29-30 ("It has sometimes been suggested that the conduct of other 'non-State actors' such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law. ... The better view, however, is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance"." In support of this opinion, Wood says this: "Baron Descamps' original proposal with regard to

7) The role of the practice of law, as an occupation

The socio-professional ideal of the scholar-practitioner – the ideal of an individual who thinks about law and practices law – may well influence our understanding of law. For our understanding of law as *law*, this influence is probably more regrettable than helpful, as it tends to stand in the way of thinking about non-state law. This ideal influences what we teach and what we write. Let me explain.

The formation of knowledge in a field of law is influenced by what we teach. (Or at least one would hope so.) Understandings of law, including of what law itself is, are influenced by what we teach, by how we mould knowledge for the next generations of students. The question then is: what influences what we teach? One answer may well be: the students. Do we not have incentives – a reason-for-action – to adapt our discourse to the students? Do we not have incentives to tell the students what they want to hear?

Many of us are not opposed to being admired by students. It creates a simple, secure and all in all appreciable relationship with them. In addition, one reason why many individual go into academia seems to be a need for recognition that is probably higher than the average individual. (Do we not enjoy hearing things such as “I have discovered a vocation for this field of law thanks to your course...”, etc., that goes far beyond the feeling of a job well done?)

What, then, triggers the admiration of students? The conventional view lies in the realm of innovativeness, relevance, clarity, explanatory power, etc. Without prejudice for such an aesthetically important romanticism, let us see what a more cynical (or realist?) reading of reality tells us: what to make, for instance, of these individuals who constantly refer to the cases they have worked on in class, who invite students to their lavish homes paid for with these same cases, or who, during job

the rules to be applied by the Permanent Court of International Justice referred to custom as “being practice between nations accepted by them as law”.”) One cannot fail to wonder, really, why a proposal for what we should recognize as international law made nearly a century ago is the most appropriate standard for where it makes best sense to draw the contours of (international) law in today’s world.

talks explain that students will most likely be thrilled to have, among their faculty, a professor who has worked on notable cases? How does that influence our teaching? How does that teaching influence the conventional knowledge about a field?

It would seem quite natural that this leads to an overemphasise of the importance of court cases – that is, cases in courts created by states, or other tribunals, such as commercial arbitral tribunals, that apply state-made law. It is certainly rational, for instance from a law & economics perspective, to seek and accept appointments to appear before courts and, instead of apologising for the time not spent doing academic work, present this activity as the profession's highest achievement, making it something that students want to hear about. Temporarily not being an academic becomes, quite ironically, an academic's greatest achievement. And this tells the students that what really matters in law is what states and their organs and their creations do.

To how the socio-professional ideal of the scholar-practitioner influences what we write. In certain fields of law at least, it is a workaday observation that academic colleagues, and even PhD students, say that they cannot write what they really think about a given legal issue because it would reduce their chance of 'getting a case'. The objective of developing or maintaining a practice in law orients the production of knowledge in such fields.

So what sort of thoughts should be thought or, more importantly, written, to increase the likelihood of a flourishing practice? Particularly progressive or contrarian thinking, or thinking that questions the foundations of something, is, for example, unlikely to be all too useful in this regard. Conventional blackletter law thinking, state centred, is probably more advisable. How likely is it to get a case by writing on law without the state?

8) General vested interests

As in mostly any other industry, the current organisation of the legal profession has created vested interests. These play out in at least two situations against the recognition of transnational non-state law.

First, and building on what I have said in the previous section and what I have sketched near the outset of this article on legality drawing the contours of a lawyer's profession, a long tradition in teaching law only as state law has created generations of lawyers whose main if not exclusive legal proficiency is in matters of state law. The value of that proficiency may well decrease if the boundaries of what is law are pushed back.

Let me make a parallel to explain this: in the 1980s, economic law was essentially a matter of national law. But today, after the development of the World Trade Organisation (WTO), investment treaties and other forms of international economic law, someone who offers advice on economic legal questions is more and more often expected to know more than national law. The relevance of national economic law has decreased. Those whose proficiency is only in national economic law are less valuable on the lawyer market than they were 35 years ago. Such a lawyer, if he happened to be briefly equipped with god-like powers, would be well advised to terminate the WTO, investment treaties and all of international economic law. Make it go away. With non-state law, we come close to such god-like powers: we can make it go away, up to a certain point, by saying it does not exist, as law, because it is not law. Those who have been educated only in state-made law have an incentive, tied to the value of their knowledge, not to recognise non-state law as law. They have vested interests in an understanding of law that corresponds to what they have been educated in, which would tend to exclude transnational non-state law.⁵²

Second, in a world where states have a monopoly over the creation of law, one may expect that they create law in a way that serves their interests. Again a parallel from international law helps

⁵² On international lawyers' vested interests in the current system of international law and teaching international law, see ELLEN HEY, *TEACHING INTERNATIONAL LAW* 4-5 (2003).

make the point: Would the entire United Nations system not be rocked if the conventional wisdom became that the most important makers of international law were entities other than states? The traditional international legal system is state-centric. It is of an inter-state nature. And it is focused on the shared interests of these states. States have vested interests in the system they have created.

9) Anti-intellectualism

In a controversial article published in 2014, Christophe Jamin (the head of the Science Po law school in Paris) and Mikhail Xifaras describe what they see as a rampant form of anti-intellectualism in law schools in France: there is, they say, peer pressure among faculty not to engage in academic endeavours considered too ‘intellectual’, which they essentially see as what goes beyond case-law and legislative journalism – reporting on what judicial and legislative bodies do.⁵³

One reason for that, they argue, is that ‘intellectual’ thinking can lead to a reshuffling of academic hierarchies: if, for instance, it emerges that the most relevant description of what regulates mostly anything on the Internet (think of free speech as a concrete example) is a discussion of technological constraints (think back to my discussion of Lessig’s elucidation of law as technological code in the first section of this article), then those who brilliantly pore over court decisions have less of a legitimate claim to be at the top of the profession. Those who brilliantly pore over court decisions still occupy the positions of power in certain areas of the legal academy. For them, anti-intellectualism is a mission of self-preservation.

⁵³ Christophe Jamin & Mikhail Xifaras, *De la vocation des facultés de droit (françaises) de notre temps pour la science et l’enseignement*, 107 REVUE INTERDISCIPLINAIRE D’ETUDES JURIDIQUES 111 (2014).

10) Too much of a good thing

In conclusion, I want to come back briefly to point I already sketched above about the appropriate inclusiveness of our understanding of law. Recognising law without the state as law means, almost necessarily, to recognise more things as law than we usually do today. This is not necessarily a good thing. Arbitration scholars and practitioners, for instance, resort to a high-minded rhetoric that presents arbitration as living in its own transnational stateless legal system, with the implicit argument that states should refrain from interfering in another legal system, namely arbitration's own legal system. The reason for the labelling as law is, there, a call for laissez-faire politics.⁵⁴ There should be limits to the fascination and positive judgment that progressive and critical scholars naturally have towards the idea of non-state law. There can be too much of a good thing.

⁵⁴ I have discussed this in Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences*, 2 J. INT. DISP. SETTLEMENT 59 (2011).