# Law and Society

# Course Manual

**Law and Society (2017-18)**
Code: SSC 2027

Course Coordinator :

Dr. Sascha Hardt LL.M (sascha.hardt@maastrichtuniversity.nl)

# Contents

# General Information

## 1 OVERVIEW

Legal scholars generally focus their attention on black-letter law as it appears in books. They look at formal manifestations of the law, such as constitutions, statutes, legal rulings and court structures. This is certainly an important aspect of studying law, but we would miss quite a lot if we limited our attention to the formal structures of law, and ignored the larger society in which law functions. While law in action bears some resemblance to law in books, law as a social phenomenon is often far more complex and wider ranging than is apparent from the formal manifestations of law alone.

This course looks at the law in action, and in context: it studies *law as a social phenomenon*. Only if we understand how the major elements of a legal system function together in a specific social context, can we really understand how law affects society and how society in turn shapes law. Indeed, by looking through the lens of a theoretical framework, we can explain many legal phenomena. To this end we will examine several theoretical approaches to law and society. With the aid of these tools we will examine several legal processes, such as conflict resolution, lawmaking, social control and social change, and seek to understand how they function empirically, i.e. in reality. For each of these processes we will try to get a basic overview of the terrain and then turn to specific case studies to illustrate the workings of the processes.

## 2 OBJECTIVES

The objectives of the course are:

1. To discover how the law works in action
2. To examine and identify the factors that explain why the law in practice works the way it does.
3. To learn how to construct and evaluate explanations of legal phenomena, using a variety of theoretical frameworks.
4. To actively engage in socio-legal thinking

## 3 PREREQUISITES

At least one of the following:
SSC 1001 – Macro-Sociology: an introduction;
SSC 1007 - Introduction to Law.

Students who have not taken these courses may participate in the course after consultation with the course coordinators. They will be asked to study Tony Honoré's *About Law* (available in the reading room) before the beginning of the course. For most legal notions that may occur during the course, the book is a good quick-reference resource, too.

## 4 STRUCTURE OF THE COURSE

The first part of the course will introduce the sociological study of law. We will give an overview of the field, discuss several prominent theoretical approaches and examine various methods of researching socio-legal questions. The second part of the course will examine several legal processes in detail, using the tools that were developed in the first half of the course. In particular, we will look at the making of law, dispute resolution, law as a means of social control, and law as a means of social change. We will also discuss questions of international law and human rights from a socio-legal perspective.

## 5 LITERATURE

***For each piece of literature, this course manual either provides a URL or indicates another source. When retrieving literature from the internet, please note that you will EITHER need to be logged in at a university computer terminal OR on a VPN connection to the university network.***

- John R. Sutton, *Law/Society: Origins, Interactions, and Change (Sociology for a New Century Series)*, Sage Publications, London, 2001.

- A selection of fine articles, either available on-line, or as an E-reader, or through the Student Portal.

- Additional materials, distributed for copying or available at the reading room.

- Additional reading for inspiration (Available in the Reading Room):

  - Simon Halliday & Patrick Smith, *Conducting Law & Society Research,* Cambridge University Press, Cambridge, 2009.

  - Eve Darian-Smith, *Laws and Societies in Global Contexts,* Cambridge University Press, Cambridge, 2013.

  - Steven Vago, *Law and Society*, 7th / 8th edition, Prentice Hall, New Jersey, 2006.

## 6 ASSESSMENT

There will be one **written mid-term exam, which counts for 40% of the final grade**. This closed book exam will consist of open-ended essay questions. The exam will be held in week 4 of the course (not counting the carnival week) and will test students' ability to analyze and explain legal phenomena.

Students will also write a **research paper of about 3000-3500 words on a socio-legal topic of their own choosing. This paper will count for 50% of the final grade**. The paper should not examine a legal problem, but focus on a problem of *law and society*. The lecture in week four will offer you some tips for finding an appropriate problem. Students should submit a short (1- 2 page) description of the problem they will tackle, detailing what approach they will take, and why this topic is of interest and importance. This preliminary outline is due in week 5. The final paper is due on the last day of week 7.

For their contributions to group discussions, students will receive a **participation grade, which counts for 10% of the final result**. Especially in the second half of the course (after the mid-term exam), participation is of the essence.

## 7 Grading policy

The exam will be organized after the theoretical part of the course, and will hence test the insight students have in the tenets, explanatory power and appropriate application of theory. In the exam, students will have to show and will be graded on (1) the knowledge of the theoretical framework, (2) the ability to creatively use the theory as a tool to understand the relationship between law and society and (3) the ability to contrast the different theoretical frameworks.
The paper will be graded on (1) the choice of appropriate methodological tools to approach the problem (2) the quality of the analysis (3) choice and quality of source material used (4) identification and use of concepts, mechanisms and actors that are important to the problem. As is usual in the assessment of a paper, the general formal requirements concerning style, language and citations will also influence the grade (5). The participation grade will reflect the quality, not the quantity of in-class participation (that said, a certain *amount* of participation is of course required to make a qualitative assessment!). Quality refers to the degree to which a student displays her/his ability to view and analyse legal phenomena from a sociological angle in discussions, taking into account the ability to think and argue logically, but also creatively.

## 8 Attendance, Extra Assignments and Resit Policy

Students must attend a minimum of 10 of the 12 meetings. Students who have attended 9 meetings may apply for an extra assignment in accordance with standard UCM procedure. Students who attend 8 meetings or less will fail the course.

Students whose final grade is below the passing mark of 5.5 may enter the resit, which – depending on the number of students – will consist of either a written exam or an oral exam. As opposed to the mid-term exam, the resit exam covers the materials of the entire course, including lectures. The grade of the resit exam constitute the final grade; the paper grade does not count in the resit.

## 9 Teaching staff

The course coordinator and sole tutor of this course, who may be contacted for any reason and at any time, is:

Dr. Sascha Hardt, LL.M
Faculty of Law, Room D2.210
Bouillonstraat 1-3
Maastricht, the Netherlands
T.: +31 43 388 3221
E.: sascha.hardt@maastrichtuniversity.nl

## 10 PAPER INSTRUCTIONS FOR LAW & SOCIETY

The paper will count for 50% of the final grade. Students will submit a short (1-2 page) description of the problem they will tackle, what approach they will take, and why this topic is of interest and importance. This preliminary paper is **due in week 5**.

The final paper is due the **Sunday of week 7** (date and hour to be announced during the course). The precise deadline (date and hour) will be announced during the course.

To ensure transparency and equal treatment of all students, the deadline for the paper is a strict one: late submissions will **not** be accepted. Please allow sufficient time to edit your paper before submitting it.

The paper must be handed in via the Student Portal, a paper copy is not required.

### *10.1 Content requirements*

In this paper you are expected to analyze a Law and Society phenomenon, in the same way that many of the articles in the course do. Obviously, there will be limited room to do your own research, and the course coordinators are fully aware of this. However, you will be expected to think as if you were going to do a fully-fledged study. In particular, you will be expected to do the following:

1) Select a Law and Society phenomenon of your own that you believe to be interesting and socially important. This phenomenon may focus on certain laws and how they have developed, on the effects of law for society or merely on the place the law occupies in society. Describe the phenomenon using legal or empirical sources, and explain why it is of interest and social importance.

2) Develop a hypothesis as to what might explain this phenomenon. In developing this hypothesis, use and discuss an appropriate theoretical approach from the ones found in the literature of the course and explain why you think this is a good hypothesis.

3) Describe how you would test this hypothesis. In particular discuss the questions that need answering and what research methods you would use to answer them and why. Also pay attention to what findings would confirm or refute your hypothesis.

4) Look for existing data and information on your question. You may use the results of existing studies, but must apply them to your own phenomenon.

5) Draw a preliminary conclusion from that data if possible. If not, discuss what additional data you would need to test your hypothesis.

### *10.2 Formal requirements*

1) The paper should be between 3000 and 3500 words long.

2) It must provide references to all sources used. **Please do *not* use in-text references but footnotes in OSCOLA or APA style.**

3) The paper must contain a table of contents and a bibliography.

4) The paper should feature headings to make its structure explicit.

## 11 COURSE SCHEDULE

| | Meeting 1 | Meeting 2 | Lecture |
|---|---|---|---|
| **Week 1** | Mon 5 February<br>**Law in Theory, Law in Practice** | Thu 8 February<br>**Theoretical Perspectives: Durkheim** | Thu 8 February<br>**(exceptionally at 9:00)**<br>**The Conflict and Consensus Models of Legal Development** |
| **Carnival Break** | | | |
| **Week 2** | Mon 19 February<br>**Theoretical Perspectives 2: Marx** | Wed 21 / Fri 23 February<br>**(check schedule!)**<br>**Theoretical Perspectives 3: Weber** | Thu 22 February<br>**Law as a social phenomenon & Law and Economics** |
| **Week 3** | Mon 26 February<br>**Theor. Persp. 4: Law & Economics** | Thu 1 March<br>**E X A M** | |
| **Week 4** | Mon 5 March<br>**Lawmaking** | Thu 8 March<br>**Dispute Resolution** | Thu 9 March<br>**Paper writing: interactive lecture/Q&A** |
| **Week 5** | Mon 12 March<br>**Law, violence and civilization** | Wed 14 / Fri 16 March<br>**Law and Social Control** | Thu 15 March<br>**Law and Morality** |
| **Week 6** | Mon 20 March<br>**International Law, Transn. Justice & Human Rights** | Thu 22 March<br>**Law and science: neurolaw?** | Thu 23 March<br>**Challenges to 'traditional' models of law & society** |
| **Week 7** | Monday, 26 March<br>**Law and a new image of the human being: neurolaw?** | **Exam week – paper deadline Sunday 1 April, 18:00**<br>**Caution: hard deadline**<br>**No hard copy required.** | |

# Meetings

## WEEK 1, MEETING 1 INTRODUCTION: WHAT IS LAW?

"[Law is] a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged."
– *Benjamin Cardozo*

"An order will be called a law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves especially ready for that purpose."
– *Max Weber*

"[Law is] the normative life of a state and its citizens, such as legislation, litigation and adjudication"
– *Donald Black*

"[Law is] The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society. […]"
– *Black's Law Dictionary*, 3rd Pocket Edition, 2006

If we are to study the law as a social phenomenon, we first need to define law. This is not easy. While we can all point to examples of laws, it is much harder to give a sufficient definition of what law actually is. We often think of laws as rules that are made by national parliaments, signed by heads of state and published in statute books. But this might be too narrow a conception of law. To see this, consider that there are many social institutions (UCM regulations, ministerial decisions, EU directives, ancient customs, mafia-enforced contracts, family traditions) which are not covered under the narrow understanding of law, but seem like law anyway.

**As preparation for the first meeting, please come up with *your own* definition (don't look one up!) of what law is. Are you able to come up with one that**

- **contains workable criteria**
- **allows us to distinguish law from non-law**
- **remains concise and understandable**

## WEEK 1, MEETING 1 (CONTINUED) LAW IN THEORY VS. LAW IN PRACTICE

**Optional Reading**

- Simon Halliday & Patrick Smith, *Conducting Law & Society Research,* Cambridge University Press, Cambridge, 2009, Ch. 19. (Reading Room)

**Task:**

When they start their study of law most students think of the law in terms of cases and statutes, of courts and constitutions, and of juries and judges. In short they tend to think of law in a formal and institutional sense. Furthermore, they tend to think of law as a majestic vision of equality, impartiality and fairness. This is the theoretical vision of law that lives in the common perception of the law.

But law is also something very practical. It is something most of us come into contact with on a regular basis. Its ultimate purpose is to regulate our social interactions, and for this reason we should also study how individuals coming into contact with the law as litigants, victims of crime or as distant observers experience the law. To do so, we can study stories of everyday life, which reveal how people use and think about law. Often these stories show us a very different side of law, one that is sometimes less uplifting than the theoretical vision of law. In practice the law can be unequal in its protections, partial and unfair. But, no matter how much the law in practice disappoints people, they often continue to believe in the theoretical ideal of law.

Legal sociologist Susan Silbey recorded the following story of a woman who had an experience with the police and traffic court in the United States:

*"My son was sideswiped on the way home and the lady that hit him kept going. He took her license plate number and went to the police to tell them … When he got to the police department he talked to the policeman who told him that he was going to have to investigate that number to find out who the person was and so on. So he did, and my son went to see this person on his own before he made any formal complaints about it, and the lady said no, she did not hit his car. She was a motherly type person and she said … that he hit a tree in her yard and that she was not involved in the accident.*

*Well, there was quite a lot of damage done to my son's truck so we pursued it further and went to court. We spent the whole night in court. … The police officer got up and denied knowing anything about my son, could not see where this lady would have ever had this problem, and it turned out that he's a policeman right on the corner of where this lady lives. … I came away feeling kind of disappointed in the system that this man could change his story … You know, you kind of put police officers and courts on a higher level and you would never expect them to go to this level."*

- How do individuals perceive "the law" and what does this perception depend on? What factors play a role in creating a difference between "the law" in a material sense and "the law" as a social institution? How do you relate to "the law" yourself, and why?
- Try to identify the range of concepts that can all be denoted as "the law".

**Task: Trolley problems**

You may have heard of the following little thought experiment:

1. *You stand on a bridge overlooking a railway track. You see an unmanned railway trolley approaching at high velocity and know (there is no doubt) that it will hit and kill five workers standing on the track below the bridge. However, you notice a lever which you could pull to divert the trolley to a side track on which there is only one worker, who would invariably be killed if you pull the lever, sparing the five on the original track.*

2. *The same bridge, the same trolley approaching, the same five people on the track, but no lever and no side track to divert the trolley to. However, coincidentally there is a very fat person standing next to you on the bridge. It occurs to you (you are certain) that pushing this person off the bridge would stop the trolley, save the fiver persons on the track, but invariably kill the fat person.*

3. *You are a highly skilled doctor at a hospital. On your ward, there are five patients about to die very soon from organ failure, which can only be averted by immediate transplantation. It occurs to you that the perfectly healthy patient on whom you are currently performing a routine checkup has exactly the right parameters (age, blood type, etc.) to qualify him as an organ donor to save all five patients in the ward. You could secretly sedate the healthy person and operate immediately, certainly saving the five.*

Question 1: In each scenario, would you become active in the way proposed, and why (not)?

Question 2: If your answer to question 1 changes between the scenarios, what is the difference that motivates the change, exactly?

Question 3: Imagine you knew nothing about existing legal rules or the legal system as a whole. How *should* the law respond to the proposed actions? Should one be punishable, for instance, for pulling the lever in scenario 1? Or for *not* doing so? On which considerations do you base your legal rule?

## WEEK 1, MEETING 2 THEORETICAL PERSPECTIVES 1: DURKHEIM

**Literature**

- Sutton, CH 1 & 2

- Telpner, Brian. "Constructing Safe Communities: Megan's Law and the Purposes of Punishment." Georgetown Law Journal 85 (June 1997): 2039-2068.

  http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/glj85&id=2063

**Task:**

'Their names still haunt us. Megan Kanka, a seven-year-old New Jersey girl who was raped and murdered in 1994 by a convicted pedophile living across the street. Ashley Estell, a seven-year-old Texan who was killed by a habitual sex-offender in 1993. Zachery Snider, a ten-year-old Indiana boy who was molested and murdered by his neighbor, a released child sex offender. … All are horrifying tragedies that serve as reminders of our inability to insulate children from the dangers of the modern world, and shake our faith in legal institutions designed to prevent such crimes.'
- Telpner, p. 2039

In the wake of the tragedies Telpner describes, there was a huge public outcry for new laws. In response, many US states passed laws requiring the public disclosure of the names and addresses of convicted pedophiles. Citizens can now actively band together to prevent such persons from living in and endangering their communities.

But this is a strange law. Pedophiles can easily avoid it by moving to states that don't have such laws. Laws like this make it impossible for these individuals, who have paid their debt to society and are often thought to be the victims of a psychological disorder, to reintegrate into the community. Nor are these laws likely to prevent future crimes. Nevertheless, they enjoy enormous popular support among the communities for whose benefit they have been adopted.

## WEEK 2, MEETING 1 THEORETICAL PERSPECTIVES 2: MARX

**Literature**

- Sutton, CH 3
- Trevino, Javier, "The Sociology of Law," St Martin's Press, 1996, pp. 93-105. (Student Portal)
- Chambliss, William J. "A Sociological Analysis of the Law of Vagrancy." Social Problems 12 (1964): 67-77.

  http://heinonline.org/HOL/Page?handle=hein.journals/socprob12&div=11&collection=journals&set_as_cursor=0&men_tab=srchresults#69

**Task:**

An English statute, passed in 1349, declared:

'… every man and woman, of what condition he be, free or bound, able in body, and within the age of threescore years, not living in merchandise nor exercising any craft, nor having his own upon whereon to live, nor proper land whereon to occupy himself, and not serving any other, if he in convenient service (his estate considered) be required to serve, shall be bounded to serve him which shall require … And If any refuse, he shall on conviction by two true men, … be committed to jail till he find surety to serve. And if any workman or servant, of what estate or condition he be, retained in any man's service, do depart from said service without reasonable cause or license, before the term agreed on he shall have pain of imprisonment.'

Almost 200 years later, in 1530, the following law was passed, changing the definition of the crime under consideration:

'If any person, being whole and mighty in body, and able to labor, be taken in begging, or be vagrant and can give no reckoning how he lawfully gets his living; … and all other idle persons going about, some of them using diverse and subtle crafty and unlawful games and plays, and some feigning themselves to have knowledge of … crafty sciences … shall be punished as provided.'

In 1571, the following statute appeared which took that of 1530 to its ultimate conclusion, increasing the punishment and changing the nature of the offense once more:

'All rogues, vagabonds, and sturdy beggars shall … be committed to the common jail … he shall be grievously whipped, and burnt thro' the gristle of the right ear with a hot iron of the compass of an inch about: … And for the second offense, he shall be adjudged a felon, unless some person will take him for two years in to his service. And for the third offense, he shall be adjudged guilty of felony without benefit of clergy.'

## WEEK 2, MEETING 2 THEORETICAL PERSPECTIVES 3: WEBER

**Literature**

- Sutton, CH 4

- Silbey, Susan. "The Consequences of Responsive Regulation." In Enforcing Regulation. Edited by J. Thomas and K. Hawkins. Boston, The Hague and London: Kluwer Nijhof, 1984, pp. 147-170. (Student Portal)

**Task:**

In 1966 the Massachusetts state government passed the Consumer Protection Act. This act, passed with unanimous political support, established the Consumer Protection Department. The CPD, which reports to the state attorney general, but is run by an administrative official not employed by the attorney general's office, was specifically mandated by the CPA to protect the consuming public from deceptive and misrepresentative trade practices. It was to investigate consumer complaints concerning deceptive trade practices, initiate action in courts in cases involving deceptive trade practices, promulgate rules and regulations and enforce the provisions of the CPA and supplementary rules and regulations. The CPA gives CPD staff attorneys and investigators the power to (1) file suits to obtain injunctive relief, (2) to file law suits for compensation of damages sustained by consumers due to deceptive trade practices, (3) to file motions requesting the impositions of fines up to $ 10,000 for the violation of injunctions, (4) order businesses to produce records and persons to uncover deceptive trade practices or resolve consumer complaints and impose fines of up to $5,000 for failure to comply with the investigative process, and a number of far reaching legal remedies to stop unfair trade practices in Massachusetts including revoking businesses' license to do business in the State. In other words, the CPA gives the CPD many powerful instruments with which to protect the interests of consumers and make deceptive traders mend their ways.

Despite the enormous power of the CPD, in fact the department only very rarely used most of its powers. Instead of engaging in litigation, agency staff adopted a policy of case-by-case resolution of individual consumers' complaints. When a complaint was received, the CPD would contact the business concerned and seek to mediate between the two parties. Usually the CPD was able to broker a solution that was acceptable to

both parties. This policy aided consumers who complained to the CPD but not those who did not bother to complain, and ensured that businesses, much to their satisfaction, did not have to change their deceptive trading practices. In short, the CPD did not protect consumer interests in a vigorous way and had little if any impact in changing unfair or deceptive business practices.

## WEEK 3, MEETING 1 (ONLY ONE MEETING IN THIS WEEK)

## THEORETICAL PERSPECTIVES 4: LAW AND ECONOMICS

**Literature**

- Calabresi, Guido & Melamed, Douglas, "Property Rules, Liability Rules and Inalienability – One View of the Cathedral," Harvard Law Review, Volume 85.6 (1972).

  http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hlr85&id=1107

**Optional Reading (much recommended)**

- Jolls, Christine, Sunstein, Cass & Thaler, Richard "A Behavioral Approach to Law and Economics", Stanford Law Review, Vol. 50. 5 (1998)

  http://heinonline.org/HOL/Page?handle=hein.journals/stflr50&div=46&collection=journals&set_as_cursor=0&men_tab=srchresults

**Task:**

Law and economics is a movement within the study of law that uses concepts from economics to understand, explain and predict legal phenomena. In doing so, this movement casts a new light on several legal problems. One concept that is central to much work in this field is the concept of economic efficiency; from this perspective laws are deemed to ensure efficient organization and regulation of human interaction. Or, to put it briefly, law ensures that the best overall outcome results. This justifies particular legal arrangements and might even explain certain legal phenomena.

One of the central functions of law is to protect people's property. There are 3 ways in which this might be and is done. Some property is protected by an inalienability rule, which means that individuals cannot give up this property at all. For example, you own your organs but selling them to the highest bidder is illegal. Other property is protected by a property rule, which means that individuals can sell this property at whatever price is agreed between a willing seller and a willing buyer. For example, if you own your

house you may decide to sell it for €15 or for €15,000,000. It's up to you and those who wish to buy your property to decide the value. However, if society as a whole wishes to buy your property, to build a park or a railway line, it will, through eminent domain, disown your property and pay you a fixed sum determined by a judge. In this case, your house is protected by a liability rule; your property may be alienated for an externally determined price.

Consider the problem of pollution. First of all we must decide who has the right to pollute or be free from pollution, the factory or the people who live nearby. Then we must decide how to protect this rule, by an inalienability rule, by a property rule or by a liability rule. Hence there are in principle 6 ways of regulating a factory's right to pollute.

1) We might decide that the factory may not pollute at all (an inalienability rule protecting the people).

2) We could also decide that the factory can pollute as much as it wants, but that it cannot sell this right (an inalienability rule protecting the factory).

3) We might say that a factory cannot pollute unless it agrees with all its neighbors an amount of money that compensates them (a property rule protecting the neighbors).

4) Or we might give the factory the right to pollute only if it pays some fixed sum to the government that is then used to clean up the air (a liability rule protecting the neighbors).

5) Alternatively, we might say that the factory has the right to pollute and can only be stopped if its neighbors agree with the factory some amount of money to pay the factory for not polluting (a property rule protecting the factory).

6) Or, we might decide that the factory has the right to pollute, but that the government can pay the factory some sum determined by a judge for not polluting (a liability rule protecting the factory).

Not all of these policies produce the same effects and are equally efficient. Surely this is something a lawmaker should consider.

## WEEK 4, MEETING 1 LAWMAKING

**Literature**

- Sebastian Scheerer, The New Dutch and German Drug Laws: Social and Political Conditions for Criminalization, Law & Society Review, 12: 585 (1978).

  http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/lwsocrw12&id=587

**Task:**

Lawyers tend to take legislation as a given, an exogenous datum, which administrators and courts then must process. But social scientists seek to understand the forces that create rules, perpetuate them, and foster change.

When societies are faced with a threat to their norms they may respond in different ways. They may seek to eliminate the threat by repressing it. Alternatively, they may choose to incorporate the deviant behavior by decriminalizing it. For example, in the 1960's both Germany and the Netherlands were confronted with an explosion in the use of so-called soft-drugs. However, the two countries responded to that explosion in very different ways. The German government sought to repress this behavior by passing strict laws criminalizing the sale and use of these drugs. The Dutch government sought to decriminalize the use of soft-drugs. There are many other cases where governments confronted with large-scale violations of certain norms either seek to repress that behavior or decriminalize it. Think only of abortion, homosexuality or gambling.

## WEEK 4, MEETING 2 DISPUTE RESOLUTION

**Literature**

- David Engel, The Oven Bird's Song: Insiders, outsiders, and personal injury in an American community, 1995

  http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/lwsocrw18&id=553

- Hoetker, Glenn P. and Ginsburg, Tom, The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation (September 8, 2004). U Illinois Law & Economics Research Paper No. LE04-009.

  http://heinonline.org/HOL/Page?handle=hein.journals/legstud35&div=5&collection=journals&set_as_cursor=0&men_tab=srchresults

**Optional Reading**

- Simon Halliday & Patrick Smith, *Conducting Law & Society Research,* Cambridge University Press, Cambridge, 2009, CH 8. (Reading Room)

**Task:**

Living together with other people in a society creates all kinds of disputes. The courts are frequently called upon to resolve these disputes, including contractual disputes and tort cases. Nevertheless, not all cases make it to court. Often these disputes are settled informally or a settlement is reached before the case comes to trial. What's more the likelihood of cases making it to a full court trial varies both from type of dispute to type of dispute and also from place to place. In an American rural town called Sander County, for example, contract disputes are far more likely to be taken to trial than personal injury cases. And it is well known that people in Japan are far less likely to settle disputes through the court system than people in the United States.

## WEEK 5, MEETING 1 LAW, VIOLENCE AND CIVILIZATION

**Literature:**

- Steven Pinker, *The Better Angels of our Nature – A History of Violence and Humanity*, London / New York: Penguin, 2011, p. 71-154 (distributed for copying)

**Optional but fascinating reading:**

- Norbert Elias, *The Civilizing Process*, Oxford: Blackwell, 2000 (reprint).

Or in the original German:

- Norbert Elias, *Über den Prozess der Zivilisation* (Bd. 1 & 2), Suhrkamp, 2010

On any given day, at look at the evening news will confirm the feeling that we live in particularly violent times – or so it seems. Although it is hard to believe, mankind actually seems to be much *less* violent today than throughout large parts of history. This decline in violence can be observed not only in warfare, but also in in crime and, most interesting to us – the punishment of crime and the administration of 'the law'. Of course, this is not a straight, linear development without setbacks, but nonetheless one that can be traced across geographical and cultural divides. Steven Pinker puts forward the theory that the decline in human violence is connected to progress in civilization and, as a consequence thereof, an increase in 'humaneness'.

Do you accept Pinker's theory and its premises? If so, what implications does this have for our thinking about law and civilization?

## WEEK 5, MEETING 2 LAW AND SOCIAL CONTROL

**Literature**

- Richard D. Schwartz, Social factors in the development of legal control: a case study of two Israeli settlements. 63 *Yale Law Journal* (1953-54), pp. 471-492.

  http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ylr63&id=497

**Task:**

The law is a formidable force of social control; in our societies law and legal institutions are used to encourage members of society to behave in accordance with the norms of society. For example, if I steal someone's car, something which is against our social norms, the law will ensure that I am arrested, and that some sanction is applied to me. In this way, the law discourages people from stealing cars. Interestingly enough, some societies do not have formal legal social control. They lack written codes of conduct, courts and official enforcement mechanisms. Rather, they make sure that individuals behave according to the social norms through informal means, such as peer pressure and public stigmatization. These societies can otherwise be quite similar to societies that do rely on law as the means of social control.

## WEEK 6, MEETING 1 INTERNATIONAL LAW

**Literature**

- Eric A. Posner, "Do States Have a Moral Obligation to Obey International Law?", 55 Stan. L. Rev. 1901 2002-2003.

  http://heinonline.org/HOL/Page?handle=hein.journals/stflr55&div=75&collection=journals&set_as_cursor=0&men_tab=srchresults&terms=(Do States Have a Moral Obligation to Obey International Law)&type=matchall

- Eric A. Posner, "International Law and the Disaggregated State", 32 Fla. St. U. L. Rev. 797 2004-2005.

  http://heinonline.org/HOL/Page?handle=hein.journals/flsulr32&div=34&collection=journals&set_as_cursor=0&men_tab=srchresults

**Optional Reading:**

**Recommended for everyone unfamiliar with the basics of international law:**

- Malcolm D. Evans (ed.), *International Law*, 3rd edition, Oxford: OUP, 2010, chapters 1, 2, and 3. (Library)

**Task:**

Though perhaps tacitly, we have so far discussed law and society within the classical framework of the nation state. Most of the providers of our theoretical framework (Marx, Durkheim, Weber) did their thinking in times when 'society' was largely thought of as national society, and 'law', except for minor exceptions such as the *ius ad bellum*, referred to national law. But realities have changed and socio-legal thinking has to be adjusted and broadened to fit an increasingly globalized world in which a given national society is just one of many and exists within a global society. Scholars of international law also speak of a 'society of states', in which states are treated as both the subjects and the makers of law. But whether our knowledge and theories of law and society apply in the international arena is a matter for debate. The outcome of this debate, however, is crucial for central questions of international law, since it will determine how we look at states. For instance, is it reasonable to treat them as subjects of international law in the same way as their citizens are subjects of national law? How does a state's

role in the ‘society of states’ compare to that of an individual in national society? Are states capable of having responsibilities and obligations, of being the subject of social norms?

## WEEK 6, MEETING 2 TRANSNATIONAL JUSTICE AND HUMAN RIGHTS

**Literature:**

- Eve Darian-Smith, *Laws and Societies in Global Contexts*, Cambridge: CUP, 2013, chapter 5. (only 1 copy in UCM reading room – please read/copy well in advance!)

**Optional – but highly recommended – reading:**

- Eric A. Posner, "Human Welfare, Not Human Rights", 108 Colum. L. Rev. 1758 2008.

  http://heinonline.org/HOL/Page?handle=hein.journals/clr108&div=49&collection=journals&set_as_cursor=0&men_tab=srchresults

- Seth Korman, "The Welfarist approach to Human Rights Treaties – A Critique", 58 UCLA L. Rev. Disc. 95.

  http://www.uclalawreview.org/pdf/discourse/58-5.pdf

**Task:**

"Within the field of law and society, no arena of inquiry has grown as fast as that analyzing the abuse of human rights and the application and implementation of human rights discourses and remedies. In the past, sociolegal scholars typically focused on civil and political rights of individuals within the context of nation-states. More recently, sociolegal scholars have moved beyond analysis of peoples' domestic rights vis-à-vis the state to look to the application and implementation of human rights discourses in international and global contexts. […] The transnational justice literature suggests an urgent need to shift gears and rethink the future of international human rights and humanitarian law as they are applied in contexts not framed or informed by state institutions of state-enforced legalities."[1]

[1] Eve Darian-Smith, *Laws and Societies in Global Contexts*, Cambridge: CUP, 2013, p. 243.

**WEEK 7, MEETING 1** **LAW AND NEW IMAGES OF THE HUMAN BEING**

**Literature**

- Elizabeth Bennett, "Neuroscience and Criminal Law: Have We Been Getting It Wrong for Centuries and Where Do We Go from Here", 85 *Fordham L. Rev.* 437 (2016). (Student Portal)

  http://heinonline.org/HOL/Page?handle=hein.journals/flr85&collection=journals&id=453&startid=&endid=468

- Stephen Morse, "Avoiding Irrational Neuro Law Exuberance: A Plea for Neuromodesty", 3 *Law Innovation & Tech.* 209 (2011). (Student Portal)

  http://heinonline.org/HOL/Page?handle=hein.journals/linovte3&collection=journals&id=213&startid=&endid=232

- Jaap Hage, "The Compatibilist Fallacy", 32 *REVUS* (2019). (Student Portal)

  http://jaaphage.nl/pdf/The_Compatibilist_Fallacy.pdf

**Task:**

In 2018, it seems to many as though many of the traditional assumptions on which law seems to rest are a thing of the past. Most prominently, the idea than human beings act on the basis of a free will seems to be wrong, or at the very least reality is much less simple than in classic 20th century criminal law, where punishability attaches to blameworthiness, and blameworthiness depends conscious volition. What if we do not consciously decide what we want but merely become conscious of our will, a short but often decisive time after decisions have been taken on a cellular or molecular level, on the genetic, environmental, and social influences beyond anyone's conscious control?

What's more, the law's understanding of who is capable of acting is increasingly out of sync with reality (as it was before, in antiquity, when the capacity to legally act was often withheld from whole classes of people – foreigners, slaves, women, adult children): in legal theory, a juridical act is an act that bears legal consequences for the reason that it was intended to do so. If we accept this, does a self-learning algorithm operating in the neural networks of stock trading computers perform juridical acts? If so, who can we punish for its wrongdoing? If not, who can its acts be attributed to? What about moral

decisions, similar to those of the trolley problems (meeting 1), taken in split-seconds by the artificial intelligence in self-driving cars?

It seems that the law operates under the assumption that law is something that can only meaningfully apply to human beings, as well as certain assumptions about the nature of a human being. At the beginning of the 3rd millennium, all these assumptions are increasingly challenged.