
Editorial

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On My Way Out – Advice to Young Scholars VII: Taking Exams Seriously (Part 1)

I have, as is increasingly evident, reached the final phases of my academic and professional career, and as I look back I want to offer, for what it is worth, some dos and don'ts on different topics for scholars in the early phases of theirs. This is the seventh instalment, and it is dedicated to that central feature of teaching – exams.

I take exams seriously because I take teaching very seriously. My vocation as a scholar comes second to my vocation as an educator and teacher. Though in certain jurisdictions and certain universities some attention is given to the training of young academics as teachers (as if the old geezers are perfect and could not well do with a refresher here and there), and though in certain jurisdictions and certain universities attention is given (often no more than lip service) to the quality of teaching in the progress of an academic career, I am unaware (and would be pleased to be corrected) of any serious and systematic attention to exams.

As a result, one of the most stable, if not the most stable, university institution is the exam. In many cases—I am sure there are exceptions—the kind of exam one had as a student, assuming one remains in the same system, is the kind of exam one will administer to students. If one moves, as many do today, from one system to another, one is simply told 'this is how we do it here' and one falls into line.

There is huge variation in the manner in which exams are conceived and administered at different universities. You might adopt a Darwinian approach – natural selection in different environments has resulted in the best possible form for any given environment. Do not kid yourself! It is the victory of inertia over reflection.

The form and format of exams are typically not the result of serious reflection, collective or individual. You may put an awful lot of effort and creativity, year to year, course to course, into the questions you will include in your exams, that yes. But the framework – the form, the format (the two are not the same), the underlying concept and philosophy of the exam – tends to remain the same and is frequently unarticulated. The questions might change, as the law changes, but it is the same persons, just wearing different clothes. How else, other than inertia, might one explain the

attachment of, say, my Italian colleagues to their 20-minute oral exam, one of the most deficient forms of examination – a charade merged with farce where arbitrariness of result combines with unfairness (I speak from experience).

And yet, I am always struck by the fact that, despite this victory of inertia over reflection, my interlocutors over the years, when attempting to question university practice of exams, become fiercely – fiercely – locale patriotic. A matter of constitutional identity: ‘Change our exams?’ ... imperialism, neo-colonialism, changing civilization as we know it today.

My purpose in this reflection is not to offer a blueprint for the ‘best’ form of exam – though I will not hide my preferences. Instead, I will walk through some of the choices that have to be made in reaching a reasoned result. Thus, not ‘what is the best form and format of an exam’, but ‘how to think about this’ – indeed, taking exams seriously. I will start with some conceptual issues and in further instalments move to the practical.

The ‘Philosophy’ of Exams

The most fundamental point I want to make – more important than the list of choices available – goes to an issue which I think is so obvious that it is often forgotten. You may call it ‘the underlying philosophy of exams’.

Thinking seriously about exam design must, should, force us to think seriously about course design. Yes, I want to teach constitutional law or international law, etc., but what are the educational objectives I want to impart to my students in the course of teaching them these subjects? Which skill sets? What type of understandings of the subject matter, especially given the obvious constraint that in a course of, say, 44 classroom hours I can hardly make them proficient in all doctrinal aspects of the subject? So, what are these educational objectives in a very concrete way? Surely there are more than one.

It is only if I articulate these objectives to myself and design my course accordingly that I can begin to think seriously about the exam design, since, as day follows night (or from a student point of view, as night follows day), the exam should test the extent to which the students have mastered the different facets of the skill set and knowledge that constitute my educational objectives.

I will now illustrate this by reference to my choices as regards educational objectives and how these translate into the format of an exam – with the caveat mentioned above that there can be different choices, but I do insist on a nexus between the educational objectives and skill set and the exam.

Here then are my choices for course design and the consequences for exam design:

1. Doctrinal coverage – knowledge of the positive law. This of course begs, as you all know, two questions. The first question is: What is the correct balance between breadth and depth, between widening and deepening? The more I try to cover, the more superficial will their knowledge be. We all are habituated in making these choices; my own preference is depth at the expense of breadth. The second question is trickier, and I can explain it in two ways: a student can learn and understand the textbook, the manual, perfectly, but that is like giving fish without teaching them how to fish. What

skill set did the author of the textbook have to have when looking at the raw materials of the law (legislation, cases, etc.) in order to synthesize it into positive law. And/or how does it help me and my students if I teach them, as I must, the law as it stands at the time of teaching (say, second semester of first year) if three years later when they graduate, it has, as always happens, changed significantly?

2. Teaching students, then, 'how to fish' – how to read analytically and synthetically the raw materials of the law and translate it into positive doctrinal law. I regard this skill as important – and possibly even more important – than the first objective of doctrinal coverage.
3. Hermeneutics – interpretation is at the heart of legal discourse as a consequence of the inbuilt indeterminacy of large swathes of the law. Since most of my students will be practising lawyers, and not law professors, my approach to hermeneutics is heavily dressed with large doses of legal realism – structures of argumentation, the art of persuasion relevant both in litigation as well as negotiation.
4. All three dimensions mentioned so far come to a head together in the fourth objective – serious experience (if not mastery) in applying the law to complex factual situations. Such situations invite the students to come up with equally complex and creative analyses as well as sorting out from their doctrinal toolkit the relevant and meaningful parts of 'the law'.
5. A systemic, conceptual and normative understanding of the entire subject matter – the equivalent in medical school to anatomy and the public health aspects of medicine. We are, after all, at a university – not a bar exam course. And I will mention here something that is often forgotten in our law faculties – that justice is the underlying telos of the law. So how does one weave justice into the material we are learning?
6. Finally, oral and written articulateness – law, after all, to a much greater degree than, say, mathematics, is a communicative discipline.

This is my list – other lists are obviously possible. The main point is that whatever the list, the exam should test all these aspects of the course; in other words, there should be a consonance between the course design and objectives and the exam design.

Finally, here is another important truism that is oft forgotten: *the exam is also an exam of us as teachers*. If a large number of students perform poorly in relation to one or more of these elements, it is a wake-up call for me that it was my failure as a teacher and that I need to introduce corrections in the design and execution of my course next time I teach it.

So how does one translate these elements into the exam design? How do they reflect on the choice of form – e.g. oral or written, in class or take home, open or closed books and so on?

To be continued.

Vital Statistics

We publish our customary EJIL statistics below. The numbers largely speak for themselves. We make every effort to publish diverse scholarship (methodologically, conceptually, normatively and subject matter wise) and to diversify our authorship (gender, regions, seniority and so on). We are, of course, ‘prisoners’ of our mailbox – the pool of articles submitted to EJIL.

We are often asked about our policy and practice of ‘commissioning’ papers. This was a common practice in the early years of EJIL, but in recent times we do this quite sparingly. We commission the annual Foreword. Our next Foreword will be written by Tony Anghie – A Retrospective and Prospective of TWAIL (we have seen the first draft and won’t disclose more for the moment ...). We commission, too, the Afterword (the brief reactions to the Foreword), but some articles of the Afterword also reach us spontaneously.

A distinct feature of EJIL is the proliferation of Debates (at least one in almost every issue). We commission some of the ‘Replies’, but not infrequently these, too, are unsolicited (and welcome!). Our motto is ‘when scholars vie, wisdom mounts’. We believe that in our Debates the whole is greater than the sum of the parts, to the benefit of our readers and the scholarly mission of EJIL. Overwhelmingly, the Symposia we publish, and the selection of authors therein, are initiatives of our readers, including members of our editorial boards. All symposium papers are subject to the same blind peer review as other papers. For the two large Symposia that EJIL board members recently convened – one on Democracy, the other on Inequality – the contributions were the result of calls for papers.

As to linguistic diversity, the numbers in our statistics refer to the language of the country of the authors’ academic institution. Given that universities in many English-speaking countries have faculty members whose native language is not English, the numbers in the statistics are likely not as positive as the real picture.

Finally, there is one element that the numbers do not reveal: the age demographics. We are proud of our track record in publishing young scholars – a commitment and tradition from our very first issue more than 30 years ago: issue no. 1 opened with an article by a young, relatively unknown scholar.

1 Regional origin (in percentages of total)

	All submissions % of total	Accepted articles % of total	Published articles % of total
Europe	41	45	49
United Kingdom	18	22	20
Oceania	5	0	3
Africa	2	0	0
Asia	18	8	11
South America	3	1	0
North America	13	24	17

2 Linguistic origin (in percentages of total)

	All submissions % of total	Accepted articles % of total	Published articles % of total
English-speaking countries	36	45	40
Non-English-speaking countries	64	55	60

3 Gender (in percentages of total)

	All submissions % of total	Accepted articles % of total	Published articles % of total
Male	63	69	68
Female	37	31	32

JHHW and SMHN

In This Issue

Not long before EJIL's 30th birthday, EJIL's Scientific Advisory and Editorial Boards met to discuss which topics merited the attention of a 30th birthday symposium. Two topics received a lot of support: Democracy & International Law and Inequalities & International Law. Since there is often more truth in the concept 'both' rather than that of 'either/or', we decided to work on a Symposium on Democracy and International Law, as well as one on Inequality and International Law. The Democracy Symposium was published in volume 32:1; this volume, volume 33, opens with the International Law and Inequalities Symposium. Almost all of the articles that you will find in this Symposium were submitted in response to a call for papers¹ – a few came in through our ordinary pipeline and were added because they fitted the topic.

The first article is a contribution by *Petra Weingerl and Matjaž Tratnik*, who ask whether migrant workers admitted from third countries to the EU should be treated similarly to EU national workers for the purposes of free movement of workers. The authors argue why migrant workers with long-term residence and EU national workers should be treated equally.

The section continues with an article by *Luca Pasquet and Lorenzo Gradoni*, who closely examine the Declaration on the Rights of Peasants and Other People Working in Rural Areas and the circumstances of its adoption by the United Nations General Assembly. The authors throw light on the grass roots of the declaration, *La Via Campesina*, an immense transnational coalition of peasants. They then look critically

¹ <https://www.ejiltalk.org/announcing-our-second-ejil-symposium-june-2020-call-for-papers-on-inequality-and-international-law/>.

at the law-making process that led to the adoption of the declaration and reflect on its limits as well as its potential.

In the next article, *David Schneiderman* seeks to restore the historic memory of the 1980s debt crisis of the decolonized world and draws salient connections to the present circumstance of international investment law. He argues that now, as in the past, states' agendas for promoting greater economic equality tend to give way to neoliberal prescriptions for attracting foreign investments.

Johan Horst follows with an investigation into the distributional choices that are inherent in the governance of transnational financial markets. His article delves into how the International Swaps and Derivatives Association exerts its influence over the Over-the-Counter Derivatives market. Horst makes an elaborate argument on how to politicize the inherent distributional consequences of the current legal infrastructure.

In the EJIL:Debate! section, *Donatella Alessandrini* and *Bernard Hoekman* disagree on how to read Global Value Chain Development reports produced by international economic institutions. In her article, Alessandrini argues that such reports regularly claim that undertaking 'deeper trade commitments' is necessary for countries that wish to develop and eventually promote further social and environmental protection. But, so Alessandrini suggests, the link between such deeper commitments and the promotion of greater socio-economic equality within societies is far from certain. In fact, adopting a social reproduction lens, Alessandrini suggests that deeper commitments may end up doing more harm than good by taking away regulatory power from the state, while also 'invisibilizing' certain kinds of labour, such as women's reproductive labour, informal labour and migrant labour.

Whilst agreeing on the need to review global value chains through a social reproduction lens, Hoekman, in his Reply, takes issue with how Alessandrini develops her argument for the reform of international trade law. He suggests that Global Value Chain Development reports produced by international economic institutions are less influential in shaping state behaviour than Alessandrini suggests. He further argues that many developing states have actually steered clear of 'deeper trade agreements', maintaining a broader regulatory sphere than normally assumed. Ultimately, while Hoekman agrees that there is indeed a problem of not assigning proper value to particular forms of labour, he argues that calls for reforming the current trade regulatory framework are premature without more empirical work.

For his part, *Dimitri Van Den Meerssche* zeroes in on how machine learning and data analytics reshape border control in fundamentally unequal ways. The article suggests that the technological tools of data extraction and algorithmic risk assessment not only end up reproducing existing hierarchies, but also do so in a manner that is difficult to register, let alone challenge, with our existing legal vocabulary.

In her article, *Shin-yi Peng* goes on to discuss the role that international economic law has played in the emergence and evolution of digital inequality. Peng argues that international economic law can be employed to oppose, and perhaps even redress, digital inequality.

In the final article, *Amrita Bahri* and *Daria Boklan* pose an important question: if provisions of international trade agreements can accommodate trade

restrictive measures in order to protect non-economic interests, such as famously the preservation of endangered species, can such measures also be adopted to protect women's economic interests? The authors argue that the existing public morality in the General Agreement on Tariffs and Trade should be interpreted in a gender-sensitive way so as to encompass measures taken in the interest of women's economic empowerment. They also suggest that states can, and should, negotiate the inclusion of specific gender exceptions in their future trade agreements.

Our *Roaming Charges*, by *Lorenzo Gradoni*, combines architectural perfection and striking perspective to suggest 'Blue Sky Thinking', reminding us of the importance of new and original ideas in scholarship.

For our Last Page, we return to the overall theme of inequalities with a poem by *Charlotte Anna Perkins Gilman*, one of America's earliest feminists. She wrote 'The Anti-Suffragists' in 1898, portraying in sometimes caustic tones the conservative women who opposed or cared little for women's suffrage, describing them as 'women uniting against womanhood'.

OCT and SMHN

In This Issue – Reviews

Our Review section features one essay and five regular reviews. *Heike Krieger's* essay discusses Don Herzog's *Sovereignty RIP*, a forceful call to 'bury' a so-called 'zombie concept'. Krieger finds the work engaging, but suggests that Herzog, largely drawing on Anglo-American practice, fails to recognize the ambiguities and ambivalences of sovereignty. In her view, sovereignty is best characterized as a *Grundbegriff* (in the sense of Reinhart Koselleck), whose 'past meanings and future expectation are neither fixed in their interpretation nor linear in their historical development'. To illustrate its openness, Krieger presents two 'alternative stories' of sovereignty, one reflecting its emancipatory potential, the other revisiting attempts to 'legalize' and thereby curtail it. At the end, Harry Potter makes a surprise appearance.

The first of our regular reviews continues with the sovereignty theme: *Jason Beckett* finds much to agree with in *Constitution-Making Under UN Auspices*, Vijayashri Sripati's critical account of 'fostering dependency in sovereign lands', which has 'impos[ed] the Western Liberal Constitution ... on under-developed states'. We move on to investment law, another set of rules that is considered by many to 'foster dependency in sovereign lands': *Taylor St. John* follows Nicolás Perrone on a journey into the 1950s when a group of norm entrepreneurs 'imagined' the future law of investment protection with lasting effects – but suggests that today's investment law has evolved rather more than Perrone admits.

The remainder of our review section offers diverse perspectives on international adjudication. *Miriam Bak McKenna* enjoyed reading Burri and Trinidad's *The International Court of Justice and Decolonisation*, a detailed and instructive engagement with the recent *Chagos* advisory opinion. However, she wonders whether perusing the mostly

traditional contributions allows one to really see ‘the legal forest for the doctrinal trees’. Jörg Kammerhofer reviews Sondre Torp Helmersen’s *The Application of Teachings by the International Court of Justice*, a detailed study of the ICJ’s reliance on scholarly work, and uses his review to raise fundamental questions about the limits of empirical research based on citation practices. Finally, empirical research also shapes *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* by Esmé Shirlow, based on the coding of over 1,700 decisions and opinions. Callum Musto notes the complexity of Shirlow’s ‘taxonomy of deferential reasoning’, but finds her attempt to ‘to inductively build an account of deference’s manifestations in practice’ to be ‘largely successful’. Enjoy reading!

CJT