

Law & Institutional Transfer

Prof. Dr. Ebrahim Afsah

v.1.4.2

Mondays and Thursdays, 12:00–14:00, **online on Moodle**, participation required!

Please feel free to email me if you have questions: ebrahim.afsah@univie.ac.at

Description

The modern state that came into being in the wake of the Westphalian Peace in Europe subsequently spread, through both choice *and* coercion, to virtually the entire globe. The military and technological superiority of European societies acquired through the scientific and industrial revolutions allowed them to dominate and subjugate the rest of the world, but it is important to realise that the modern corporate state spread primarily because it was more effective and more efficient than traditional forms of political organisation. The modern administrative state offered capabilities and opportunities that other societies couldn't do without, thus leading to sustained and ongoing efforts to transpose its constituent elements into different cultures and adapt them to local needs.

This course introduces you to these processes of transposition and adaptation of Western notions of law and governance to other parts of the world. To use a biological metaphor, concepts, institutions, organisational forms and mandates that had grown in a European cultural soil and in response to particular stimuli and interests were uprooted and replanted into foreign soil. Some of these plants flourished, often by adapting and transforming beyond recognition, while others withered. Here you will learn about this ecology of legal transplants and begin to become a gardener of comparative institutions.

Transplantation is a universal phenomenon and the central domain of comparative law. In this course, we draw many but not all examples from the tortuous modernisation process in the Muslim world. Its experience of sudden inferiority and humiliating domination is emblematic of many Southern societies. The resulting practical, ideational and psychological difficulties of introducing 'best practices' and 'good governance' into a competing traditional normative and social system are thus not uniquely Islamic but emblematic of the 'buzzing, blooming confusion' of modernity.

Due to the special operating procedures at this time, all of this course will be offered electronically in a mixture of online lectures, guided self-study and reading. All the material is available on Moodle and here:

<https://ucloud.univie.ac.at/index.php/s/8BqTWU5JJmP9f44>

Learning Outcomes

At the successful completion of the course, students will have obtained the following learning objectives. Students will:

Knowledge

- Know basic definitions of key terms like state, institution, etc.
- Know broad historical transmission lines
- Know the hierarchy of state functions
- Know the differences between state scope and capacity
- Know the key characteristics of the modern era
- Know selected universally existing institutions
- Know selected institutions that failed to transfer

Skills

- Read classic texts of political and constitutional theory
- Identify major disciplinary debates, both historical and contemporary
- Identify 'lines of parentage' of key concepts and ideological positions
- Identify and evaluate major legal and bureaucratic institutions
- Identify social pressures for legal change
- Carry out independent interdisciplinary research
- Assess the feasibility of competing ideological positions
- Distinguish between dogmatic ideal and practical reality
- Communicate academic findings to an interdisciplinary audience
- Analyse the role of law in complex socio-political phenomena
- Communicate these insights effectively

Competencies

- Conduct independent interdisciplinary research
- Critically examine the validity and reliability of dogmatic claims
- Disaggregate complex phenomena in the developing world
- Distinguish legal from related argumentation
- Critically assess claims about cultural and legal immutability

Course materials can be downloaded here:

<https://ucloud.univie.ac.at/index.php/s/8BqTWU5JJmP9f44>

Preconditions

There are no preconditions for taking this course. All the mandatory literature is in English. Please note: this course is meant to be taught in a Socratic manner. We are determined to recreate as much as possible a normal student experience despite the currently imposed online exclusive format. It is therefore absolutely imperative that students take preparations seriously and actively work to contribute to a good communal learning environment. This is very much a work in progress and suggestions are always welcome, but you really need to pull your weight!

Exam

The grade for this course consists of one **written, two day, open-book book exam** of maximum 2000 words excluding footnotes. You can write your answer in either German, English or French.

Students will have to answer two questions out of six, thus accommodating to some degree personal preferences. The exam is aimed to motivate a renewed engagement with the course material and to cement the retention of the above stated Learning Outcomes, which will guide grading. Special emphasis will be given to the mastery of comparative approaches.

Curriculum

1. Session: Defining the State

- What do the very different examples raised by Orwell have in common?
- What is the role played by battle fields?
- Why does Weber refer to tools rather than objectives to define the state?
- What is the role played by violence in his conception of the state? And in yours?
- What does Weber think about the competition between states?

Mandatory Material:

George Orwell, "In Front of Your Nose, 1946–50," in: *The Collected Essays, Journalism & Letters* (London: D.R. Godine, 2000).

David Dunning *et al.*, "Why People Fail to Recognize Their Own Incompetence," *Current Directions in Psychological Science*, Vol. 12(3), No. 3 (2003) pp. 83-87.

Andreas Anter, *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (London: Palgrave Macmillan, 2014), pp. 9–45. Chapter 1 "Aspects of the Concept of the State"

Voluntary Material:

Idem, *Max Webers Theorie des modernen Staates. Herkunft Struktur und Bedeutung*, 3., überarbeitete Auflage (Berlin: Duncker & Humblot, 2014 [1995]), pp. 19–58. Kapitel 1 „Die Aspekte des Staatsbegriffs.“

Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, ed. by Johannes Winckelmann, Studienausgabe (Tübingen: Mohr, 1980), pp. 1034–62, besonders pp. 1042–48.

Elliot Aronson, "The Theory of Cognitive Dissonance: The Evolution and Vicissitudes of an Idea," in: *The Message of Social Psychology: Perspectives on Mind in Society*, ed. by C. McGarty and S. Alexander Haslam (Oxford: Blackwell, 1997) pp. 20-35.

Justin Kruger and David Dunning, "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments," *Journal of Personality and Social Psychology*, Vol. 77(6), No. 6 (1999) pp. 1121-34.

Foad Ajami, *The Arab Predicament. Arab Political Thought and Practice since 1967*, 17th ed. (Cambridge: Cambridge University Press/Canto, 2007), pp. 1–28. Introduction.

2. Session: Competition & Survival

- What is the intellectual core of Realism?
- Which role, if any, does it accord institutions? Do you agree?
- What happened 1853 in Japan? How did Japanese state and society respond?
- Can we speak of public international law as an institution? Can it be transposed?
- What are the standards by which Saxonhouse measures Japan? Is it relevant?

Mandatory Material:

Kenneth Neal Waltz, “Structural Realism after the Cold War,” *International Security*, Vol. 25 (1), No. 1 (2000) pp. 5-41.

Susumi Yamauchi, “Civilization and International Law in Japan during the Meiji Era (1868-1912),” *Hitotsubashi Journal of Law and Politics*, Vol. 24 (1996) pp. 1-25.

Gary R. Saxonhouse, “Technological and Information Transfer: How Do Some Nations Learn What other Nations Know? Japan’s Experience,” *The Pacific Review*, Vol. 12(2), No. 2 (1999) pp. 225-47.

Voluntary Material:

Kenneth Neal Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 1959).

Idem, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979).

Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (New York: Crown, 2012), pp. 368–427. Chapter 13 “Why Nations Fail Today,” and Chapter 14 “Breaking the Mold.”

3. Session: Defence

- What war does al-Azm talk about?
- Who started it, who wanted it, who won it, and why?
- Which deeper reasons for defeat are given?
- What is the ‘logic of exoneration’? Do you recognise it in your own life?
- Which repercussions does Melhem see for Arab society?

Mandatory Material:

Sadiq Jalal al-Azm, *Self-Criticism after the Defeat* (London: Saqi Books, 2012 [1969]), pp. 45–87. Chapter 2

Hisham Melhem, “The Arab World Has Never Recovered From the Loss of 1967,” *Foreign Policy*, (5 June 2017).

Voluntary Material:

Ervand Abrahamian, *A History of Modern Iran*, Revised and Updated (Cambridge: Cambridge University Press, 2018), pp. 1–34.

Williamson Murray and Kevin M. Woods, *The Iran-Iraq War. A Military and Strategic History* (Cambridge: Cambridge University Press, 2014), pp. 1–50. Chapter 1 “Introduction,” and Chapter 2 “A Context of ‘Bitterness and Anger.’”

4. Session: State Functions

- Are there particular functions that a state *must* discharge?
- Does it matter how well it does so? What is the yardstick?
- What are ‘slave soldiers’, which role did they play and what brought their end?
- What happened in Egypt and to which idea did it give rise in the ruler?
- Whose idea was conscription? How did this idea operate elsewhere?

Mandatory Material:

Anter, *Max Weber’s Theory of the Modern State: Origins, Structure and Significance*, pp. 9–45. Chapter 1 “Aspects of the Concept of the State” (Repeated from Session 1)

Roger Owen, *State, Power and Politics in the Making of the Modern Middle East*, 3rd ed. (London: Routledge, 2004), pp. 1–4. Part 1 “States and State-Building: Introduction.”

Francis Fukuyama, *The Origins of Political Order. From Prehuman Times to the French Revolution* (London: Profile Books, 2012), pp. 214–28. Chapter 15 “The Functioning and Decline of the Ottoman State”

Khaled Fahmy, *All the Pasha’s Men: Mehmed Ali, His Army, and the Making of Modern Egypt* (Cairo and New York: The American University in Cairo Press, 2003), pp. 76–111. Chapter 2 “The Birth of an Army: Conscription and Resistance.”

Voluntary Material:

Fahmy, *All the Pasha’s Men: Mehmed Ali, His Army, and the Making of Modern Egypt*, pp. 112–98. Chapter 3 “From Peasants to Soldiers: Discipline and Training,” and Chapter 4 “Beyond the Façade of Order: The Performance of the Army.”

Malcolm Yapp, *The Making of the Modern Near East, 1792-1923*, Vol. 1 (London: Longman, 1987), pp. 97–178. Chapter 3 “Reform in the Near East 1792–1880”

Ira M. Lapidus, *A History of Islamic Societies*, 3rd ed. (Cambridge: Cambridge University Press, 2014), pp. 511–43. Chapter 45 “Introduction: Imperialism, Modernity, and the Transformation of Islamic Societies,” and Chapter 46 “The Dissolution of the Ottoman Empire and the Modernization of Turkey.”

Owen, *State, Power and Politics in the Making of the Modern Middle East*, pp. 5–22. Chapter 1 “The End of Empires: The Emergence of the Modern Middle Eastern States.”

Anter, *Webers Theorie des modernen Staates*, pp. 19–58. Kapitel 1 „Die Aspekte des Staatsbegriffs.“ (Repeated from Session 1)

5. Session: Measuring Stateness

- What does Fukuyama see as an ‘attractive package’? Who wants it and who can have it?
- Which two dimensions does he distinguish?
- Is there an obvious hierarchy of state functions?
- Is there an obvious hierarchy between institutional effectiveness and strength?
- What does this mean for state reform?

Mandatory Material:

Francis Fukuyama, *State-Building: Governance and World Order in the Twenty-First Century* (Ithaca: Cornell University Press, 2004), pp. 1–42. Chapter 1 “The Missing Dimension of Stateness.”

Voluntary Material:

Ajami, *The Arab Predicament*, pp. 89–168. Chapter 2 “Egypt as State, as Arab Mirror.”

Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996-2008* (Washington D.C.: The World Bank, 2009).

Elinor Ostrom, *Understanding Institutional Diversity* (Princeton, N.J.: Princeton University Press, 2009).

6. Session: State & Administration

- Why is public administration a ‘black hole’ and not a ‘black box’?
- Why is the assumption of cost-benefit rationality problematic?
- What is the connection between institutions and organisations?
- Why are aims, control and delegation interesting?
- What is the role of transaction volume?

Mandatory Material:

Fukuyama, *State-Building: Governance and World Order in the Twenty-First Century*, pp. 43–91. Chapter 2 “Weak States and the Black Hole of Public Administration.”

Joseph Kaminski, “Bureaucracy and Modernity: A Comparative Qualitative Analysis of Public Administration in the West and OIC States,” *Politics, Bureaucracy, and Justice*, Vol. 3(2), No. 2 (2013) pp. 1-10.

Voluntary Material:

Weber, *Wirtschaft und Gesellschaft*, pp. 1034–62, besonders pp. 1042–48.

Anter, *Max Weber’s Theory of the Modern State: Origins, Structure and Significance*, pp. 149–95. Chapter 5 “Archaeology of the Modern State”

Idem, *Webers Theorie des modernen Staates*, pp. 166–214. Kapitel V „Archäologie des modernen Staates.“

Francis Fukuyama, “Why There Is No Science of Public Administration,” *Journal of International Affairs*, Vol. 58(1), No. 1 (2004) pp. 189-201.

7. Session: Order & Legitimacy

- Where was Max Weber not born?
- What is the difference between power and authority?
- What is the role of state legitimacy and which institutions are necessary?
- What does Ajami mean with the ‘springtime of nations’?
- What did Mohamed Bouazizi do? Why?

Mandatory Material:

- Anter, *Max Weber's Theory of the Modern State: Origins, Structure and Significance*, pp. 46–79. Chapter 2 “State and Rulership”
- Ajami, *The Arab Predicament*, pp. ix–28. Preface, Note to the Non-Specialist Reader and Introduction.
- Hernando de Soto, “The Real Mohamed Bouazizi. One Year on, a Team of Researchers Uncovers the Man Behind the Martyr and the Economic Roots of the Arab Spring,” *Foreign Policy*, (16 December 2011).

Voluntary Material:

- Anter, *Webers Theorie des modernen Staates*, pp. 59–94. Kapitel II „Staat und Herrschaft.“
- Idem*, *Max Weber und die Staatsrechtslehre* (Tübingen: Mohr Siebeck, 2016), pp. 157–78. Kapitel IX „Das Gewaltmonopol des Staates.“
- al-Azm, *Self-Criticism after the Defeat*, pp. 7–44. Forewords by Ajami, Darraj and al-Azm, Chapter 1.
- Hisham Melhem, “The Barbarians Within Our Gates. Arab Civilization Has Collapsed. It Won’t Recover in My Lifetime,” *Politico*, (18 September 2014).
- Kanan Makiya, *Republic of Fear: The Politics of Modern Iraq*, Updated ed. (Berkeley, Calif.: University of California Press, 1998 [1989]).

8. Session: Reform & Resistance

- What is the condition of the Iranian State at the close of the 19th century?
- Which traditional institutions are described in Qajar society?
- What is ‘defensive modernisation’? Did it work well in Iran?
- How does Fukuyama define political development? How did this play out in Prussia?
- What is the main debate between science and religion?

Mandatory Material:

- Ervand Abrahamian, *A History of Modern Iran* (Cambridge: Cambridge University Press, 2008), pp. 35–64. Chapter 2 “Reform, Revolution, and the Great War.”
- Francis Fukuyama, *Political Order and Political Decay. From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014), pp. 23–80, 313–321. Part I: The State, Chapters 1–4, 21.
- Sadiq Jalal al-Azm, “Islam and the Science–Religion Debates in Modern Times,” *European Review*, Vol. 15(3), No. 3 (2007) pp. 283–95.

Voluntary Material:

- Idem*, “Die Moschee hat nicht immer recht,” *Die Zeit*, (Hamburg, 13 Januar 1995), p. 44.
- Tilman Nagel, *Staat und Glaubensgemeinschaft im Islam: Geschichte der politischen Ordnungsvorstellung der Muslime. Band 2: Vom Spätmittelalter bis zur Neuzeit* (Wiesbaden: Artemis Verlag, 1981), pp. 266–329. Band II, Kapitel II, Unterkapitel 4 „Das Wiedererwachen kämpferischer Elemente in der Schia und die islamische Revolution.“
- Säid Amir Arjomand, “The Ulama’s Traditionalist Opposition to Parliamentarianism: 1907–1909,” *Middle Eastern Studies*, Vol. 17(2), No. 2 (1981) pp. 174–90.

9. Session: Authenticity

- Which linguistic schism is described by Enayat?
- How does Enayat explain the dearth of independent political thought in Islam?
- What about modernity is pernicious from an Islamic point of view?
- What does it take to be civilised according to Watenpaugh's Syrian newspaperman?
- What is "most beautiful thing to take from the Westerners"? Do you agree?

Mandatory Material:

Hamid Enayat, *Modern Islamic Political Thought: The Response of the Shi'i and the Sunni Muslims to the Twentieth Century* (London: I.B. Tauris, 2005), pp. 1–17. "Introduction: The Relevance of the Past."

Keith David Watenpaugh, *Being Modern in the Middle East: Revolution, Nationalism, Colonialism, and the Arab Middle Class* (New Haven: Princeton University Press, 2006).

Voluntary Material:

Roxanne L. Euben, "Premodern, Antimodern or Postmodern? Islamic and Western Critiques of Modernity," *Review of Politics*, Vol. 59(3), No. 3 (1997) pp. 429–59.

Tilman Nagel, *Staat und Glaubensgemeinschaft im Islam: Geschichte der politischen Ordnungsvorstellung der Muslime. Band 1: Von den Anfängen bis ins 13. Jahrhundert* (Wiesbaden: Artemis Verlag, 1981), pp. 11–18, 279–441. Band I, Vorwort, „Zur Eigenart des politischen Denkens im Islam“ and Kapitel III „Die Überwindung des charismatischen Herrschertums in der Sunna.“

Idem, *Staat und Glaubensgemeinschaft im Islam: Geschichte der politischen Ordnungsvorstellung der Muslime. Band 2: Vom Spätmittelalter bis zur Neuzeit*, pp. 330–56. Band II, „Systematische Zusammenfassung der Ergebnisse“ und „Chronologie der wichtigsten Daten und Ereignisse.“

Sadiq Jalal al-Azm, *Critique of Religious Thought (English Translation of Naqd al-Fikr ad-Dini)*, trans. by George Stergios and Mansour Ajami (Berlin: Gerlach Press, 2015).

10. Session: Alternatives?

- Is there a geographically, religiously, linguistically, ethnically distinct science?
- Are law, economic and political science objective and universal?
- What is the difference in the respective programmes of Shukri Mustafa and Bin Baz?
- Why cannot the Caliphate be recreated and what should replace it?
- Would Waltz consider the different models enumerated by Enayat to be sustainable?

Mandatory Material:

Idem, "Islam and the Science–Religion Debates in Modern Times."

Enayat, *Modern Islamic Political Thought: The Response of the Shi'i and the Sunni Muslims to the Twentieth Century*, pp. 69–110. Chapter 3 "The Concept of an Islamic State."

Voluntary Material:

Idem, “Orientalism and Orientalism in Reverse,” in: *Collected Essays on Islam and Politics. Vol. 3: Is Islam Secularizable? Challenging Political and Religious Taboos* (Berlin: Gerlach Press, 2014) pp. 27-56.

Scheherazade S. Rehman and Hossein Askari, “How Islamic are Islamic Countries?” *Global Economy Journal*, Vol. 10(2), No. 2 (2010) pp. 1-40.

Sarah Albrecht, “How Islamic Is the West? Recent Approaches to Determining the “Islamicity” and “šarī ‘a Compliance” of Modern States,” *Zeitschrift für Recht & Islam*, Vol. 8 (2017) pp. 197-224.

11. Session: Legislation

- Did Lapidus see a historical distinction between state and mosque?
- Could the Caliph create law?
- Whose duty was it to uphold the rule of law?
- Did a unitary state exist? What was the dogmatic solution to this discrepancy?
- How practical are Mawardi’s suggestions?

Mandatory Material:

Ira M. Lapidus, “The Separation of State and Religion in the Development of Early Islamic Society,” in: *The Caliphate - Formation, Fragmentation and Modern Interpretations, Volume 1*, ed. by Carool Kersten (Berlin: Gerlach Press, 2015) pp. 55-75.

Carool Kersten, “Introduction: Modern and Contemporary Interpretations,” in: *The Caliphate - Formation, Fragmentation and Modern Interpretations, Volume 3*, ed. by Carool Kersten (Berlin: Gerlach Press, 2015) pp. 1-5.

‘Ali b. Muhammad al-Mawardi, *The Ordinances of Government*, trans. by Wafaa Hassan Wahba (London: Garnet, 1996), pp. xiii–22, 38–59. Translator’s Introduction, Chapter I “On the Appointment of the Sovereign,” and Chapter IV “On Appointing War Commanders.”

Voluntary Material:

Hamid Mavani, *Religious Authority and Political Thought in Twelver Shi’ism* (London: Routledge, 2013).

Carool Kersten (ed.), *The Caliphate - Formation, Fragmentation and Modern Interpretations*, Vol. 3 Volumes (Berlin: Gerlach Press, 2015). These three volumes are overkill for most of you, but you might want to peruse this collection on *the* core institution of the Islamic world.

12. Session: Outlook & Review

- What does Mallat consider to be the core of the Islamic state?
- Which conception of the state does he consider to be emblematic for the Middle East?
- Why is the nation state rejected ideologically (but not in practice)?
- What are the polar extremes described by Mallat?
- Can you think of reasons both are unsustainable?

Mandatory Material:

Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (Cambridge: Cambridge University Press, 1993), pp. 1–27, 188–189. “General Introduction: The Law in the Islamic Renaissance and the Role of Muhammad Baqer as-Sadr,” and “Conclusion: The Cost of Renewal.”

Voluntary Material:

Roy Mottahedeh, *The Mantle of the Prophet* (New York: Simon & Schuster, 2014).

Muhammad Baqir as-Sadr, *Lessons in Islamic Jurisprudence*, trans. by Roy Parviz Mottahedeh (Oxford: Oneworld).

Muhammad Bager as-Sadr, *Iqtisaduna – Our Economics* (Tehran: World Organization for Islamic Services, 1994).