



South Asian University
Faculty of Legal Studies
Detailed Course Structure
Semester _1_ in 2019

Part I

Course Title:

Jurisprudence & Legal Theory

Course Code:

LW001

Course instructor : Dr Sai Ramani Garimella

Course Duration : One Semester

Credit Units : 4 (MSE/TPW/ESE)

Medium of Instruction: English

Prerequisites : Nil

Precursors : Nil

Equivalent Courses : N/A

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Part II

Course Aims

The curricula presence of Jurisprudence & Legal theory is founded on the avowed purpose of engaging with the student on the general aspects of the law as an instrument of social policy. In the words of Julius Stone, “it is the lawyer’s examination of precepts, ideals and techniques of the law in the light derived from the present knowledge in disciplines other than law.” Jurisprudence and legal theory are the summation of the knowledge on the nature of legal rules, the underlying meaning of legal concepts and on the essential features of legal systems, and therefore referred to as the philosophy of law. Law as the system of social ordering, gains its reasons and content from the theoretical constructs, and the theoretical constructs themselves are strengthened by the societal development. This symbiotic relationship thus necessitates the study of jurisprudence as an introduction to the first principles of law and beyond. The accumulated wisdom of thinkers and the concepts that have gained a formal structure through their wisdom forms the curricular content for this course.

The course structure has been prepared to ensure that the topics and the readings that form the mainstay of the intellectual exchange in the classroom leave a curiosity for exploring the theoretical constructs of the variety of legal institutions. It aims at encouraging the student to explore the symbiotic relationship of theoretical constructs and practical issues. Apart from gaining strength with module-specific readings, there are readings drawn from the practice of law, especially the case judgment readings, and this helps the student to found their reasoning on logical premises. It is expected that this course shall give a significant impetus to the student’s research interests, apart from being a significant fillip in comprehension and articulation of the knowledge of law. Understanding the increasing presence of South Asia in the international legal discourse, the course draws upon specific legal and judicial statements from South Asian countries, to understand the inspirations and intersections with the Western legal thought in certain specific concepts.

This course has a collection of readings to go along with the topics that explain the various approaches to social ordering that have been attempted in human history. Also included are topics related to the concepts of rights and duties, the sources of law and the techniques of the judicial process.

OBJECTIVE OF THE COURSE

The course on the “Jurisprudence & Legal Theory” is one of the compulsory courses for LL.M. It has been designed and developed with a view to meet the following objectives –

1. Understand the foundations of theoretical knowledge in international law.
2. Appreciate the importance of theoretical constructs in social policy ordering, the role of law as an instrument of such policy activity.
3. Articulate a critique on the rule of law and its nuances in influencing public policy activity.
4. Appreciate the linkages that evolve in this course between theoretical knowledge and policy activity through the readings and case judgments interspersed in this course structure.

INDIVIDUAL MODULES DESCRIPTION

Week 1- Introduction to the coursework

- Importance of Jurisprudence
- Understanding law
- Relationship between jurisprudence and philosophy
- Concept of Justice and Order

Basic Readings:

William Twining, *General Jurisprudence, Understanding law from a global perspective*, (CUP 2009) Chapters 1 (1-31) & (116-121).

Annette Forster, *Peace, Justice and International Order*, (Palgrave Macmillan 2014) (1-7, 62-95)

Suri Ratnapala, *Jurisprudence* (CUP 2013) Justice (318-357)

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) (88-120)

Gunther Hellmann, Power and law as Ordering Devices in the system of International Relations, in Stefan Kadelbach & others, *System, Order, and International Law* (OUP 2017) (443-463)

Ian Mcleod, *Legal Theory* (Palgrave Macmillan 2003) Theory of Justice (161-176)

Anders Wedberg (Trans), Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) Law and Justice (1-14)

Anders Wedberg (Trans), Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) Legal Order (115-122)

Anthony D. Amato, 'On the Connection between Law and Justice', (2011) Northwestern University Faculty Working Papers -2.

<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2/>

Advanced Readings:

Jeffrey Brand, *Philosophy of Law Introducing Jurisprudence* (Bloomsbury Academic 2013) Chapter 1 (1-29)

Janna Thompson, *Justice and World Order A Philosophical Inquiry* (Routledge 1992) Introduction (1-26)

Hans Kelsen, *Introduction to the Problems of Legal Theory* (OUP 2002) Law and Nature (7-14)

Allan Beever, *Forgotten Justice The forms of Justice in the History of Legal and Political Theory* (OUP 2013)

Conway W. Henderson, *Understanding International Law* (Wiley-Blackwell 2010)

Richard A. Posner, *Problems of Jurisprudence* (Harvard University Press 1993) (1-23)

Week 2- Law and Modernity

- International Rule of Law
- Sources of law (Int'l law)
- Structural and substantive objectives

Basic Readings:

Simon Chesterman, "An International Rule of Law?" [2008] 56(2) Am. J. Comp. L. 16.

T Bingham, 'The Rule of Law in the International Order' Grotius Lecture of the British Institute of International and Comparative Law, 18 November 2008.

Mattias Kumm, "The Rule of Law, Legitimate Authority and Constitutionalism" in Christoph Bezemek Michael Potacs and Alexander Somek, *Legal Positivism, Institutionalism and Globalisation* (Hart Publishing 2018) 113.

Stephane Beaulac, "The Rule of Law in International Law Today" in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* (Hart Publishing 2009) 197.

Neil Maccormick, The Rule of Law and the Arguable Character of Law, in Neil Maccormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (OUP 2005)

Chimni BS, "Legitimizing the International Rule of Law" in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012)

H.L.A. Hart, *The Concept Of Law* (1994) 213-37.

James Crawford, *Brownlie's Principle of Public International Law* (OUP 2012) Sources of International law (20-47)

Samantha Besson and Jean D' Aspermont, *The Oxford Handbook of the Sources of International Law* (OUP 2017)

Sundhya Pahuja, *Decolonising International Law* (CUP 2011) (172-253)

Advanced Readings:

Jean D' Aspermont, *Formalism and the Sources of International Law* (OUP 2011)

Martti Koskenniemi (ed.), *Sources of International Law* (Ashgate Publishing 2016) Sources (3-122)

Jean D' Aspermont, Towards a New Theory of Sources in International Law, in Anne Orford and Florian Hoffman, *The Oxford Handbook of The Theory of International Law* (OUP 2016) (545-563)

Week 3- Natural Law

Laws of Nature and Natural law

- 20th Century Neo-Scholastic/Christian Period

Basic Readings:

Jules Coleman and others, *The Oxford Handbook on Jurisprudence and Philosophy of Law* (OUP 2004) Chapter 1&2 (Natural Law)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Natural Law (15-28)

Ian Mcleod, *Legal Theory* (Palgrave Macmillan 2003) Nature Law (41-69)

George Pavlakos, Normative Knowledge and the Nature of Law, in Sean Coyle and George Pavlakos, *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory* (Hart Publishing 2005) (89-126)

Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011)

Advanced Readings:

Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006) (1-25)

Andrea Padovani and Peter G. Stein, *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (Springer 2007)

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) Natural Law Theory (211-227)

George Duke and Robert P. George, *The Cambridge Companion to Natural Law Jurisprudence* (CUP 2017)

Bardo Fassbender and Anne Peters, *The Oxford Handbook of The History of International Law* (OUP 2012)

Week 4- Concept of Rights and Duties

- Right and Duties
- Legal Personality

Basic Readings:

Jules Coleman and others, *The Oxford Handbook on Jurisprudence and Philosophy of Law* (OUP 2004) Chapter 12 (Rights)

Suri Ratnapala, *Jurisprudence* (CUP 2013) Rights (295-317)

Fleur Johns (ed.) *International Legal Personality* (Ashgate 2010)

- Jan Klabbers, 'The Concept of Legal Personality', 11 (2005) *Ius Gentium* (35-66)
- Hans Aufricht, 'Personality in International Law', *American Political Science Review*, 37 (1943) 217-43.
- C.F. Amerasinghe, 'International Legal Personality Revisited', *Austrian Journal of Public and International Law*, 47 (1995) 123-45.

Roland Portmann, *Legal Personality in International Law* (CUP 2010) Introduction (1-28)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Theory of Rights (191-220)

Tate, Joshua C. "Ownership and Possession in the Early Common Law." *The American Journal of Legal History* 48 (3) (2006) (280-313)

Riggsby AM, "Ownership and Possession," *Roman Law and the Legal World of the Romans* (Cambridge University Press 2010) (135-142)

Anders Wedberg (Trans), Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) Legal Duty and Right (58-64 & 75-89)

Advanced Readings:

W. Hastie (Trans), Immanuel Kant, *The Philosophy of Law, The Science of Right* (Edinburgh 1887)

Week 5- Formalism and Normativism

- Positivism and its contemporary challenges (specific to Int'l law)
- Pure theory of Law (Kelsen's proposition on norms)
- Norm collision and fragmentation

Basic Readings:

Hans Kelsen, *Introduction to the Problems of Legal Theory* (OUP 2002) Legal norm (21-36 & 55-76)

Jules Coleman and others, *The Oxford Handbook on Jurisprudence and Philosophy of Law* (OUP 2004) Chapter 21 (Philosophy of International law)

William Twining, *General Jurisprudence, Understanding law from a global perspective*, (CUP 2009) Chapter 5 (122-172).

Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" [2002] 15 (3) 553-579

Martti Koskenniemi; "Fragmentation of International Law - The Function and Scope of the *lex specialis* Rule and the Question of 'self-Contained Regimes': An Outline" [2009] 1 TDM 1, Available at: www.transnational-dispute-management.com/article.asp?key=1308

Ralf Michaels & Joost Pauwelyn, "Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law", in Tomer Brode & Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Hart Publication 2010) 19-44.

Jacob Katz Cogan, "The Idea of Fragmentation", [2011] 105 Proceedings of the Annual Meeting (American Society of International Law) 123-125.

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) (21-48)

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) Legal Positivism (228-248)

Robin West, *Normative Jurisprudence* (CUP 2011) Introduction (1-11)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Positivism (29-49)

Ian Mcleod, *Legal Theory* (Palgrave Macmillan 2003) Positivism (70-85) & Norms (86-103)

Humberto Avila, *Theory of Legal Principles* (Springers 2007) Normative Conflict (19-28)

Edwin W. Patterson, 'Hans Kelsen and his Pure Theory of Law', (1952) 40 California Law Review 5

<http://scholarship.law.berkeley.edu/californialawreview/vol40/iss1/2/>

Advanced Readings:

James Bernard Murphy, *The Philosophy of Positive Law Foundations of Jurisprudence* (Yale University Press 2005)

Alexander Orakhelashvili, The Origins of Consensual Positivism – Pufendorf, Wolff and Vattel, in Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) (93-110)

Lauri Malksoo, International Law between Universality and Regional Fragmentation: The Historical case of Russia, in Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) (456-477)

Week 6

Revision and Feedback.

Week 7- Need for theoretical understanding of International law

- Why theory is important?
- How it helps to better understand the subject.
- A brief overview of the list of theories to be focused in the following weeks

Basic Readings:

Andrea Bianchi, *International Law Theories* (OUP 2016) Chapter 1 (1-20)

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) (1-20)

Ian Mcleod, *Legal Theory* (Palgrave Macmillan 2003) Nature of Legal Theory (1-17)

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) Law and Normativity (417-445)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Can there be a Theory of Law? (324-342)

Week 8- Post-Modern theories

- New Heaven School
- Legal Realism

Basic Readings:

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) American Legal Realism (249-266)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Legal Realism (50-66)

Ian Mcleod, *Legal Theory* (Palgrave Macmillan 2003) American Realism (137-149)

Oliver Jutersonke, Realist Approaches to International Law, in Anne Orford and Florian Hoffman, *The Oxford Handbook of The Theory of International Law* (OUP 2016) (327-343)

Andrea Bianchi, *International Law Theories* (OUP 2016) New Haven School (91-109)

Harold H. Koh, Is There a "New" New Haven School of International Law?, 32 Yale J. Int'l L. (2007).

Reisman, W. Michael; Wiessner, Siegfried; and Willard, Andrew R., "The New Haven School: A Brief Introduction" (2007). Faculty Scholarship Series. Paper 959.

http://digitalcommons.law.yale.edu/fss_papers/959

Advanced Readings:

B.S. Chimni, *International Law and World Order A Critique of Contemporary Approaches* (CUP 2017) (38-178)

Week 9- Critical approaches to international law

- Why new approaches?
- Critical Legal Studies (CLS)
- New Approaches to International law (NAIL)

Basic Readings:

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) Critical Legal Studies (267-278)

Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) Critical Legal Theory (80-89)

Andrea Bianchi, *International Law Theories* (OUP 2016) CLS (135-162)

David Kennedy, 'A New Stream of International Law Scholarship,' 7 *Wis. Int'l L.J.* 1 (1988) 1-49

Advanced Readings:

Roberto M. Unger, *The Critical Legal Studies Movement* (Harvard University Press 1983)

B.S. Chimni, *International Law and World Order A Critique of Contemporary Approaches* (CUP 2017) (246-357)

Week 10- TWAIL & FtAIL

Third World Approaches to International Law (TWAIL) and its relevance in practice

Feminist Approaches to International Law (FtAIL)

Basic Readings:

Dianne Otto, *Feminist Approaches to International Law*, in Anne Orford and Florian Hoffman, *The Oxford Handbook of The Theory of International Law* (OUP 2016) (488-504)

Andrea Bianchi, *International Law Theories* (OUP 2016) Third World Approaches (205-226) & Feminism (183-204)

Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law,' *Am. J. Int'l. L.* 85 (4) 1991 613-645

Christine Chinkin, *Feminism, Approach to International Law*, *Max Planck Encyclopedia of Public International Law*, 2010.

B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach,' 8 *Melb. J. Int'l L.* 499, 515 (2007) 499-515.

James T. Gathii, 'TMAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' [2011] 3 Trade L. & Dev. 26

Advanced Readings:

B.S. Chimni, *International Law and World Order A Critique of Contemporary Approaches* (CUP 2017) (358-439)

Week 11- Economic Approaches to International Law

- Marxist Approaches to International law
- Kouzes and Posner

Basic Readings:

Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley – Blackwell 2010) Marxist Theory of Law (350-360)

Ian Ward, *An Introduction to Critical Legal Theory* (Cavendish Publishing 1998) Law and Political Economy (105-136)

B.S. Chimni, An outline of a Marxist Course on Public International Law, in Susan Marks, *International Law on the Left Re-Examining Marxist Legacies* (CUP 2008) (53-91)

Robert Knox, Marxist Approaches to International Law, in Anne Orford and Florian Hoffman, *The Oxford Handbook of The Theory of International Law* (OUP 2016) (306-326)

Andrea Bianchi, *International Law Theories* (OUP 2016) Marxism (72-90)

Eric Posner, "International Law: A Welfarist Approach" (John M. Olin Program in Law and Economics Working Paper No. 256, 2005).

Advanced Readings:

Jeffrey L. Dunoff & Joel P. Trachtman, 'Economic Analysis of International Law,' 24 Yale J. Int'l L. (1999) 1-59.

Posner & Sykes, *Economic foundations of international law* (Harvard University Press 2013)

Week 12

Revision and Feedback.