JURISPRUDENCE AND LEGAL THEORY

General Information and Syllabus
2014-2015

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Lecture & tutorial schedule 2014-2015

Semester 1

Part A: Clarificatory Jurisprudence

Lectures:

Week 1 Anarchy or Obligation? (CK)
Week 2 Charting the Options (CK)
Week 3 Law as a Social Fact (CK)
Week 4 Law and Morality 1 (CK)
Week 5 Law and Morality 2 (CK)
Week 6 Reading Week
Week 7 Law and Rights (CK)
Week 8 Descriptive Sociology and Living Law (DN)
Week 9 Drawing a Conclusion: Revision of Part A (CK)
Week 10 Transnational Law (DN)

Tutorials:

no tutorial
Anarchy or Obligation
Charting the Options
Law as a Social Fact
Law and Morality 1
no tutorial
Law and Morality 2
Law and Rights
Descriptive Sociology
Essay feedback tutorial

Part B: Evaluative Jurisprudence

Week 11 Liberty and Perfectionism (RP)
Week 12 Liberty and Justice (RP)

Semester 2

Week 1 Equality: Egalitarianism and Luck (RP)
Week 2 Solidarity and the Limitations of Liberalism (RP)
Week 3 Liberalism and Its Discontent (LZ)
Week 4 Global Justice and Human Rights (LZ)
Week 5 Revision of Part B: Overview (LZ)

Part C: Mini-options
The subject

In this course we will study some key questions about law, legal reasoning, legal values and legal legitimacy. These are questions which arise in all legal systems, although not all of them attract a general answer applicable to all legal systems.

Part A

We will begin by assessing various answers which have been given to the big and deceptively simple question: What is Law? This question in turn breaks down into a number of subsidiary questions: What is a legal rule? What is a legal principle? How does legal reasoning work? What is a legal system? And so on. This could be called ‘clarificatory jurisprudence’; its job is to clarify legal experience and thought, rather than to judge its quality.

Part B

Although the boundary is not sharp, clarificatory jurisprudence can be contrasted with ‘evaluative jurisprudence’, the job of which is to judge the quality of legal experience and thought by e.g. moral or economic standards. In evaluative jurisprudence we encounter problems such as: Should the law enforce moral standards? If so which? Do we owe the law any moral allegiance? If so, how much? What makes a legal system just? These are the second set of key issues with which we will be concerned.

Part C

There is also a final part of the course which is not covered by this reading guide. This is because Part C is made up of a range of mini-options from which you choose one later on in the academic year. These will either be more detailed investigations of themes already touched on, or new themes. Part C begins at reading week of the second semester and the process of choosing takes place in January, when full details of all the Part C options are provided.

The teaching

Parts A and B of the course will be taught, first, by two weekly lectures taking place on Wednesdays and Thursdays, and, secondly, by weekly one-hour tutorials, beginning in Week 2. The tutorials do not aim to cover all issues raised in the lectures, rather the stress will be on techniques for thinking about the subject. The tutorials should aim to focus on developing your ability to reason consistently and plausibly, rather than attempt to cover the substance of the course comprehensively. The key to the subject is argument. Arguing is not merely describing the thinking of others (although most arguments will make reference to such thinking), it is not voting for a given solution in the absence of reasons for the conclusion in question. It is not rhetoric, preaching or clever aphorisms. All of these are different from argument and to be avoided. A schedule of the lectures appears above. Each tutorial topic may be developed in a different way by a different tutor, although the outlines at the top of each reading list provide the common core. You may be given a list of questions for discussion by your tutor. Differences of approach will be taken into account in setting and marking the examination. The teachers for Parts A and B of the course are Dr Christoph Kletzer, Professor Timothy Macklem, Professor David Nelken, Professor Raymond Pland, and Dr Lorenzo Zucca. Professor T. Campbell, our regular visitor from the Australian National University, will also contribute to the teaching in the second semester. Part C options will be taught in a two-hour
seminar format instead of lectures-plus-tutorials. Your timetable will be revised in the middle of
the second semester to take account of this change of teaching method.

The reading

There is no course textbook for Jurisprudence. Unfortunately none covers the course in sufficient
detail. There are one or two books you could purchase that will help you—more will be said about
that below—but none that you must buy.

A. You can find the material you need in the library and some of it also online. So far as possible,
you should do the essential reading for each topic in advance of the lecture, and you should read
what your tutor suggests in advance of your tutorial. Often the essential reading will be enough for
the tutorial too, but see what your tutor says on that point. The lists also indicate more advanced
reading, and your tutor may sometimes ask you to ensure you have read a particular item from this
extra list in time for your tutorial. The advanced reading is not necessarily more difficult than the
essential reading, but it does enable students to pursue topics to a higher level of sophistication. Its
main purpose is for essay-writing and for exam preparation, once you have narrowed down the
topics you intend to prepare for the examination. Ambitious students who aspire to a first-class
standard should ensure that they have done some of the advanced reading. Most of the essential
reading is held in multiple copies on short loan if not available online; but sometimes items in short
supply will be supplemented by photocopies held in the off-prints collection at the issue desk in the
Law Library.

B. As already said, there is no book you must buy. There now follows a description of some of the
most important books examined on the course and notes on getting access to them, followed by
notes on gaining access to journal articles.

Books

Don’t worry: you are not asked to read all these books in their entirety. You are asked to read most
of one of them (HLA Hart’s Concept of Law under item 1), but only extracts from the rest and some
of them only for further reading rather than required reading. If you want to do preliminary or
background reading, items 2, 3 cover Part A of the Course. Item 4 covers Part B.

   It is a good idea to buy a copy of this, even if not essential, since you are asked to study more
   than three quarters of it. You can find it in the major bookshops like Hammicks,
   Waterstones, Wildys or online via Amazon.
   the arguments, although still too brief to substitute for any primary texts.
   of the latest debates included, especially in clarificatory jurisprudence.
   companion to the debates about liberalism in evaluative jurisprudence.
5. Will Kymlicka, Contemporary Political Philosophy (Second edition, Oxford 2002) –
   introduction to political philosophy, excellent resource for Part B of the course.

Articles

1. The Stanford Online Encyclopaedia of Philosophy. There are a number of readings on your reading
list below from this. Gaining access to the Stanford Encyclopaedia is as easy as getting online. You do not need to be on campus or even to remember your Athens password. Whenever this is cited in your weekly reading list below the web address is given and you go direct to the article when online.

2. Law Journals  On your reading list are references to a number of law journals, eg King’s College Law Journal, Oxford Journal of Legal Studies, Michigan Law Review, University of Chicago Law Review, American Journal of Jurisprudence, Harvard Law Review, Law and Philosophy. Most, if not all, of these are available online. If on campus go to http://www.kcl.ac.uk/ Click on ‘Information Services and Systems’. Under ‘For King’s People’ click on ‘undergraduate’. You’ll be prompted for your usual username and password to get into OneSpace. Once there click on ‘Study’. Go to ‘Connect to’. Click on ‘EJournals’. Type in the name of the journal you are looking for eg American Journal of Jurisprudence.

3. In addition, using your ATHENS password will enable you to access a broad range of electronic journals from outside of the campus. Once you’ve got to http://www.athens.ac.uk/ you will find Hein Online especially useful for Law Journals.

4. Philosophy Journals: On your reading list are references to a number of philosophy journals, eg Ethics, Philosophy and Public Affairs, Law and Philosophy. If on campus go to http://www.kcl.ac.uk/ Click on ‘Information Services and Systems’. Under ‘For King’s People’ click on ‘undergraduate’. You’ll be prompted for your usual username and password to get into OneSpace. Once there click on ‘Study’. Go to ‘Connect to’. Click on ‘EJournals’. Type in the name of the journal you are looking for eg Philosophy and Public Affairs. Once you’ve got to http://www.athens.ac.uk/ you will find JSTOR especially useful for Philosophy Journals.

Formative Written Work

We require a minimum of two pieces of written work (one on Part A and one on Part B) from each student in the course of the year. Your tutor will give you a list of suitable questions from time to time.

The Examination

Jurisprudence is examined partly by a traditional, timed, closed-book examination and partly by an assessed essay. Parts A and B of the course—the parts covered by this reading guide—are the parts examined in the traditional closed-book exam. This will last two hours and you will be required to answer two questions, one from part A and one from part B. The exam will roughly follow the model of previous years as far as parts A and B are concerned. However Part C of the course will be examined exclusively by an assessed essay, to be written during March and April on a topic set by your Part C teacher. The rules for these essays and the timetable for writing them will be common to all the Part C options. More details will be given when the final list of Part C options is published in January. In recent years some work of a very high standard has been produced by your predecessors. Two important caveats are in order. First, the question of plagiarism. Happily, experience suggests that it does not even occur to the overwhelming majority of our students to plagiarize work. Unfortunately, however, one or two students in previous years have been investigated and found guilty of plagiarism. The consequences are severe; and you must also remember that most employers and professional bodies when asking for references ask explicitly if a student has been investigated for plagiarism. Secondly, there will be no part C questions at all on the exam paper. If you fail to hand in your essay by the specified date around March and April, you will simply get a mark of zero for Part C. No essay, no mark.
SEMESTER 1

Part A: Clarificatory Jurisprudence

Week 1: Introduction: Anarchy or Obligation?

READINGS

- Raz, The Authority of Law (Oxford 1979), Ch 12.

Possible QUESTIONS for Tutorials

- Wikileaks does not believe in the moral authority of the state. To what extent, can it harm the state by leaking its documents?
- What is the difference between political and philosophical anarchism? Does one imply the other?
- Can an anarchist ever be a law-abiding citizen?
- Do you follow the law? To what extent do you follow the law? In either case: why?

Week 2: Charting the Options

READINGS

- HLA Hart, The Concept of Law, chapters 1 to 4, focus on chapter 1.
- Nigel Simmonds, Central Issues in Jurisprudence, Introduction.

Possible QUESTIONS for Tutorials

- Draw a table outlining the main differences between legal theories. Where do you locate yourself?
- Is it possible to do law without theory?
- What is the difference between reductive and non-reductive legal positivism?
- What role does reason play in positivism, reductivism, and natural law theory, respectively?
- What role does authority play in positivism, reductivism, and natural law theory, respectively?

Week 3: Law as a Social Fact

READINGS

- Hart, The Concept of Law, chapters 5-6.
Possible QUESTIONS for Tutorials

- Imagine that you move to Happystan, where everything that makes people happy is considered to be the law, to work there as a lawyer. How do you know what counts as the law?
- What, according to Hart, is the concept of law?

Week 4: Law & Morality 1

READINGS

- Fuller, *The Morality of Law* (2nd ed. 1969) ch. 2; and 133-51, 157-59, 189-224, especially 207ff; it is not essential that you read Fuller in the original; you can instead read the chapter on him in Simmonds, *Central Issues in Jurisprudence*.
- Green, introduction, pp. xxxiii-xliv.

Possible QUESTIONS for Tutorials

- Is Bashar Assad’s law still law?
- Bashar has lost the war, he accepts to go and live in exile in London. He wishes to keep all his properties back home. Does he have a valid legal claim.
- Can there be degrees of legality?

Week 5: Law & Morality 2

READINGS

- HLA Hart, *Postscript*.
- Green, Introduction, pp. xxxiii-xliv.

Possible QUESTIONS for Tutorials

- Mr Schwein is a cannibal. He met online someone who is happy to be killed and eaten. Is killing always illegal? What if a person gives her free consent?

Week 6: Law and Rights

READINGS

- N. Simmonds, *Central Issues in Jurisprudence*, Chapter 8

Possible QUESTIONS for Tutorials

- Is there a right to food? (If so, is there a right to good food?)
- Are Rights atoms or molecules?
- What is the structure of rights?
• Do rights have a point or a function?
• If one has a legal right to do X, does that entail doing X is the right thing to do?

**Week 7: Reading Week**

**Week 8: Descriptive Sociology and Living Law**

**READINGS**

• Roger Cotterrell *The Politics of Jurisprudence*, pp87-106
• Dennis Galligan *Law in Modern Society*, OUP 2007 pp 6-19, 28-38 50–63

Possible QUESTIONS for Tutorials

• What did Hart mean by saying that his Concept of law was also an exercise in descriptive sociology?
• What is – and what should be -the relationship between legal and social theorising about law?
• What does Ehrlich mean by ‘living law’? Is it a legal or sociological concept?

**Week 9: Drawing a Conclusion: Revision of Part A**

*no reading*

**Week 10: Transnational Law**

**READINGS**

• Ralf Michaels 'Law and Globalisation: law beyond the state' in Reza Benakar and Max Travers eds. *Law and Social Theory* 2013 pp 287 -303.
• William Twining 'Have concepts, will travel: analytical jurisprudence in a global context International' *Journal of Law in Context*, 1,1 , 2005 pp. 5–40.

Possible QUESTIONS for Tutorials

• In what ways are globalisation and law related?
• What is transnational law? Is it law?
• Why do some legal concepts travel more easily than others?
Part B: Evaluative Jurisprudence

Week 11: Liberty and Perfectionism

READINGS

- Mill, On Liberty (London 1859) various cheap editions in the shops and in different parts of the library. Read the whole thing, or as much as you can. It’s short, readable and brilliant. If pressed, you should focus on chs 1 and 2, and if you can, ch. 4. Alternatively, you can download it: http://www.earlymoderntexts.com/mill.html

Week 12: Liberty and Justice

READINGS

- During the week of your tutorial if you find the Rawls readings above hard to get hold of, you can postpone your reading of Rawls in the original and read instead: Wenar, ‘John Rawls’, Stanford Online Encyclopedia http://www.seop.leeds.ac.uk/entries/rawls/

SEMESTER 2

Week 1: Equality. Egalitarianism and Luck

READINGS


Week 2: Solidarity and the Limitations of Liberalism

READINGS

- Kymliycka, Contemporary Political Philosophy, Chapter 6
- Geuss, History and Illusion in Politics, Chapter 2
Week 3: Liberalism and Its Discontents

READINGS

• Jon Elster, An Introduction to Karl Marx, chapters 3, 5, 8 and 9.

Week 4: Global Justice & Human Rights

READINGS

• Tom Nagel, The Problem of Global Justice, see KEATS
• Sabel/Cohen, Extra Rempublicam Nulla Justitia? See KEATS

Week 5: Part B Revision and Overview of Parts A & B

No new readings, but refer generally to readings from Part A of the course.
Advanced Readings for Part A

1. Anarchy or Obligation

- Raz, *The Authority of Law* (Oxford 1979), ch 1, a critique of one aspect of Wolff’s view; and Raz ‘Government by Consent’ in *Ethics in the Public Domain* (Oxford 1994) a critique of the rest of it.
- Raz, *The Authority of Law* (Oxford 1979) Ch 13 is valuable but not essential. It explains one way in which people may nevertheless acquire a more or less general prima facie obligation to obey by entering into a semi-voluntary relationship with law. Thus a compromise position between (1) and (2) emerges.
- For prominent defences of view (1) read either Finnis, *Natural Law and Natural Rights*, chapter 11, or ‘Law as Coordination’ 2 *Ratio Juris* 301 (1989), reprinted in Finnis, *Natural Law* (Vol. 1)
- Dworkin, *Law’s Empire*, 190-216
- Les Green, ‘Legal Obligation and Authority’ *Stanford Online Encyclopaedia of Philosophy* [http://plato.stanford.edu/entries/legal-obligation/] An excellent overview. GENERAL READINGS ON LEGAL POSITIVISM (PERHAPS MORE FOR REFERENCE LATER IN THE COURSE) • Green, ‘Legal Positivism’, *Stanford Online Encyclopaedia of Philosophy* [http://plato.stanford.edu/entries/legal-positivism/] This is an overview of contemporary legal positivism, the topic of this week as well as that of a number of subsequent weeks.
- For another excellent overview of positivist theories and what they are and are not about in the view of the best known contemporary legal positivist, see Raz, *The Authority of Law* (1979) ch. 3.
- For a taste of the complexities jurisprudence has to offer, see Raz, *Practical Reason & Norms* (2nd ed.1990), 154-62. This presumes more understanding than you yet possess, but will be valuable to you when revising the question of law and coercion.

2. Charting the Options

ON COERCION:

3. Law as a Social Fact

- Raz, Practical Reason & Norms (2nd ed. 1990), 129-48. A sophisticated analysis of the issues, that you won’t fully grasp until the end of Part A, but that offers resolutions to a number of puzzles.

4. Law and Morality 1

- Raz, Practical Reason & Norms (2nd ed.), 50-58, an explanation and criticism of Hart’s ‘practice theory’ of norms, or social normativity.
- Finnis, Natural Law and Natural Rights (Oxford 1980), ch. 1, showing how easily the ‘internal aspect’ may be turned against positivism; see also its treatment of Weber, in response to those who would reject the internal point of view, and offer in its place a contemporary version of Austin’s entirely external approach.

5. Law and Morality 2

- Hart, ‘Positivism and the Separation of Law and Morals’, (1958) 71 Harvard Law Review 598. It is also reprinted in his Essays in Jurisprudence and Philosophy (Oxford 1983) 49-87. This is Hart’s portion of the ‘Hart-Fuller’ debate. Be careful not to be distracted by the debate as to whether positivism offered comfort to the Nazis, and the underlying idea that positivism is good because its outcome is good. Note too that many legal positivists, such as Joseph Raz and John Gardner, do not accept the proposition that positivism involves the separation of law and morals.
- Waluchow, ‘Herculean Positivism’, 5 Oxford Journal of Legal Studies (1985), 187. Waluchow, a legal positivist, illustrates one way in which legal positivism has responded to Dworkin’s famous critique. This is known variously as ‘soft positivism’, ‘incorporationism’ or ‘inclusive legal positivism’. In week 7 (Authority) we foreground the second way in which legal positivists (the ‘hard positivists’ or ‘exclusive legal positivists’) have responded to the same critique. As we will see there is almost as much disagreement between inclusive and exclusive legal positivists as there is between Dworkin and legal positivism. On the evidence of current writing on the subject, Dworkin has not conquered legal positivism, but he has certainly divided it. Before that we examine Dworkin’s own ideas about the nature of law.
6. Law and Rights

- Simmonds, Steiner, Kramer, Taking Rights Seriously.

8. Descriptive Sociology and Living Law

Books which look at legal theory questions also from a sociological perspective:


A easy introduction to the field of sociology of law:


More about Ehrlich:


9. Law beyond the State

Efforts to rethink law under globalisation:


Original approaches to the effects of globalisation:


Studying globalisation with a socio-legal lens:

- David Nelken, Transnational legal processes and the (re) construction of the ‘social’: The