South Asian University
Faculty of Legal Studies
LLM
Monsoon Semester _1_ in 2017
Course Information

Part I

Course Title: Jurisprudence & Legal Theory
Nature Compulsory Paper
Course Code: LW001
Course instructor: Dr Sai Ramani Garimella ramani@sau.ac.in
Course Duration: One Semester
Credit Units: 4 (MSE/TPW/ESE)
Medium of Instruction: English
Prerequisites: Nil
Precursors: Nil
Equivalent Courses: N/A
Part II

Course Objectives

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. 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 through judicial opinion, 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. 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.

The course attempts to

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

Individual Modules Description

Week 1 – Theoretical foundations of Law

The institution of law is analysed in terms of two concepts indispensable to an understanding of its formal structure and substantive objectives – order and justice. Further the discussion focusses on the rhetorical essay of Joseph Raz on the normativity of law.

Readings –
Week 2

Sources of law - sources of international law

Jurisdictional Immunities of the State (Germany v Italy) ICJ Judgment of 3 February 2012

Jones v. Saudi Arabia (European Court of Human Rights (Applications 34356/06 and 40528/06)

The techniques of judicial process – Precedent - *stare decisis* – ratio – discovery and creation in the judicial processes – Non-formal sources of law – customary law – *ex aequo et bono* - justice and reason – equity

Readings


Week 3 - Natural law

Journey through time beginning with the Greek and Roman Legal Theories – Medieval Christian theories – Thomism – Classical era - Grotius on international law – Revival of natural law – Edmond Cahn, Lon Fuller, John Finnis – practical reasonableness and new international order, the role of the Sovereign State and collateral moral rights

Readings


**Week 4 - Positivism**

Utilitarian underpinnings in Bentham’s theory – the imperative analytical theory of Austin – the Neo analytical positivism in the theories of HLA Hart and Joseph Raz – Hart’s opinion on the indeterminateness of international law

**Readings**


**Week 5 - Pure theory of Law**

Hans Kelsen – *grundnorm* – monism and the integration of domestic law and international law – two constructs of the pure law theory – *jus cogens* - influence of these constructs in the development of international law especially the human rights law and international trade law.

**Readings**

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/](http://scholarship.law.berkeley.edu/californialawreview/vol40/iss1/2/)


**Week 6 - Sociological Approaches and Economic Analysis to Law**

The sociological character of law – the social origins of law and legal institutions - the living law as being positive law founded upon the social norms. Jurisprudence of Interests and free law movement

**Law as a reflex of the economic substrate –economic determination of law**

a) the Commodity-Exchange theory of Law – Marxist influences in the development of theories of international law.

b) Law and economics – the analysis of the economic efficiency of law – methods of policy analysis and political economy
Readings

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4994&context=fss_papers


http://www2.econ.iastate.edu/classes/tsc220/hallam/Hallam/Coase.pdf

Prabhakar Singh, “Macbeth’s Three Witnesses – Capitalism, Common Good and International Law” (2012) 14 Oregon Review of International Law 47
http://ssrn.com/abstract=1927107

Week 7 - Legal Realism


Readings


Richard A. Posner (1986&87) – Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution, 37 Case Western Reserve University Law Journal 129.


Week 8 – Critical Approaches to the study of Law

Critical legal theory approaches - The Indeterminacy critique - on the Classical Liberal Theory of Rights and the Instrumentalist thesis on policy discretion
Feminist Approaches to law – the liberal equality model, the difference model, the dominance model and the anti-essentialist model – Martha Fineman, Catherine MacKinnon

Readings


Kamala Visweswaran, “Gendered States: Rethinking Culture as a site of South Asian Human Rights Work” (2005) 26(2) 483

Reed v Reed (1971) 404 US 71

Michael M. v Superior Court (1981) 450 US 464

Week 9

Legal Rights and Duties – Jural Co-relatives – Hohfeld’s classification – critique on Hohfeld by Holmes-Pollock – Asian understanding of the fundamental and primordial nature of rights – the select judicial statements from Bangladesh and the Pakistan.

Readings


Anwar Hossain Chowdhary v Bangladesh 41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1

Al-Jehad Trust v Federation of Pakistan PLD 1996 SC. 367

Week 10 - Rule of Law

Rule of law – benefits and drawbacks of rule of law – the adjustment of conflicting interests - Ronald Dworkin and Constructivism – Rule of law and international law - an international rule of law?

Readings –


Week 11

Concepts of ownership and possession

Gerald Gaus, “Property and Ownership” Department of Philosophy, University of Arizona. Author’s copy http://www.gaus.biz/PropertyOwnership.pdf


Week 12

Concept of Legal Personality

Readings


Select List of Further Readings


RWM Dias, Jurisprudence (London: Butterworths, 1985)


John Finnis, Natural Law and Natural Rights (London: Oxford University Press, 1980)

MDA Freeman, Lloyd’s Jurisprudence (London: Sweet &Maxwell, 2001)


