



RHODES UNIVERSITY

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JURISPRUDENCE – 2010

1. INTRODUCTION

1.1 Overview

Jurisprudence aims to encourage critical thinking about law and the purpose of law. It is not a study about the rules of law, but rather a study in thinking about the law. The fundamental purpose of the course is to critically examine what the purpose of law *is* and what the purpose of law *ought to be*.

Thus questions such as the relationship between law and morality, law and justice (is law synonymous with justice?), law and economics and the vexing issue of truth, justice and reconciliation in South Africa today will be some of the recurring themes of the course and will permeate the course.

The course is thus designed to encourage critical thought and debate about law as a social and political entity and to provide a philosophical basis to enable students to better understand and critique the rationale underlying the existence, structure and content of the law that you have studied in other law courses. The course should also serve to give you the opportunity think deeply about the values underpinning legal systems of the world.

The course will also attempt, where possible, to see how the legal philosophies studies have been applied and have impacted on our courts. Thus the course aims to be not merely a theoretical exercise but one with sufficient practical effect.

1.2 Credit Value

9 Credits

1.3 Assumptions of Prior Learning

In order successfully to complete this course, students need to be able to:

- Be capable of writing and communicating in coherent English.
- Know how and where to access resources such as textbooks, law reports and statutes in the Law Library.
- Be capable of independent learning.
- Read, analyse and extract principles from textbooks and other source material.
- Have a working knowledge of legal referencing conventions, and to be able to apply these to their written work.

2. OUTCOMES

2.1 Critical Outcomes

Students will be able to:

- (a) identify and solve problems.
- (b) organise and manage themselves and their work load.
- (c) collect, analyse and evaluate information from various sources, as well as information conveyed in the classroom environment.
- (d) communicate effectively in class debate and written assignments.

2.2 Intended Specific Outcomes

The Jurisprudence course is designed so that students successfully completing this course should be able to achieve the following outcomes. The student should be able to:

- (a) Understand, explain and evaluate the major schools of legal philosophy.
- (b) Understand, explain and evaluate some of the major jurisprudential debates that have preoccupied legal philosophers.
- (c) Understand how certain philosophical approaches to law have shaped the way our South African society and its legal system has arranged itself in the past.
- (d) Think critically about law as a social and political entity, particularly in the context of contemporary debates about law in modern South African society.
- (e) Understand more clearly the reasons behind the existence, structure and content of the black-letter laws that are studied in other legal courses.

3. **TEACHING METHODS**

The course will be presented by means of *viva voce* lectures. There is no comprehensive handout for the course, and students will be expected to take their own notes during class. In lectures, only a broad explanatory overview of leading jurisprudential theories will be given. Students will be expected to read extensively to consolidate and develop their understanding of the topics that are covered in the course. Students will also be expected to debate the merits of the various jurisprudential issues in class. Students are expected to assume responsibility for their learning by reading ahead before each lecture, and consolidating afterwards. Lectures are compulsory. A student may not miss more than three lectures without excuse. There are no tutorials in this course. However, students will be required to watch the film *Judgment at Nuremberg* as part of the course requirements.

4. **COURSE CONTENT**

4.1 **WEEK 1: Introduction and natural law**

What is jurisprudence?

See Riddall, JG *Jurisprudence* and Harris, JW *Legal Philosophies*

The idea of natural law; Greek and Roman ideas of natural law; medieval natural law thinking in Judaism, Christianity and Islam, with specific reference to the idea of Revelation and reason.

Read Goolam, NMI 'Divine and human reason in Stoic philosophy, Ibn Rushd and St. Thomas; the common threads' in 2007 *Stellenbosch Law Review* (Vol.18 No.2), 364-376.

4.2 **WEEK 2: Positivism**

Nature and origins

John Austin and the command theory

Kelsen and the pure theory of law

HLA Hart – law as a system of rules

4.3 WEEK 3: The rebirth of natural law

Law and morality – the Hart-Fuller debate

Read Hart HLA ‘Positivism and the separation of law and morals’ in 1958 *Harvard Law Review* (Vol. 71 No. 4), 593-629.

John Finnis

John Rawls – the concept of justice

See Rawls, J *A Theory of Justice*

Van Niekerk, B. ‘The warning voice from Heidelberg – the life and thought of Gustav Radbruch’ in 1973 *South African Law Journal* (Vol. 90), 234.

4.4 WEEK 4: Transitional justice

Read:

Asmal, K. ‘Truth, reconciliation and justice; the South African experience in perspective’ in 2000 *Modern Law Review* (Vol. 63 No. 1), 1-24.

Wilson, S. ‘The myth of restorative justice: truth, reconciliation and the ethics of amnesty’ in 2001 *South African Journal of Human Rights* (Vol. 17), 531-562.

Azapo and others v Truth and Reconciliation Commission and others 1996 3 ALL SA 15 (CC) and 1996 (8) BCLR 1015 (CC).

Justice in the lives of three great human beings

4.5 WEEK 5: Ronald Dworkin

The thought of Ronald Dworkin

See *The Law’s Empire* (1986) and *A Matter of Principle* (1985)

4.6 WEEK 6: African jurisprudence and legal thinking

Understanding the concept of *ubuntu*

Read *S v Makwanyane* 1995 (6) BCLR 665 (CC)

4.7 WEEK 7: Hohfeld

The idea of rights and duties

POST-MODERNISM

4.8 WEEK 8: Legal realism

Read Hart HLA 'American jurisprudence through English eyes; the nightmare and the noble dream' in 1977 *Georgia Law Review* (Vol. 11 No. 5), 969-989.

4.9 WEEK 9: Critical Legal Studies

See Further Reading list in *Roederer and Moellendorf* p 271.

4.10 WEEK 10: Critical Race and Gender (Feminist jurisprudence) Theory

See Further Reading list p 289 and Selected Reading p 326 in *Roederer and Moellendorf*

See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC)

4.11 WEEK 11: Islamic jurisprudence and legal thinking

Kamali, MH *Principles of Islamic Jurisprudence* 1991

The concepts of *istihsan* (equity) and *ijtihad* (personal reasoning)

Goolam, NMI 'Ijtihad and its significance for Islamic legal interpretation' in 2006 *Michigan State Law Review* 1443-1467.

4.12 WEEK 12: Conclusion

Impact of the legal philosophies studied on South African case law.

5. RESOURCES

The prescribed text for the course is:

Roederer, R and Moellendorf, D *Jurisprudence* (Juta, 2004)

Other recommended texts are:

Harris, JW *Legal Philosophies* (Butterworths, 1997)

Johnson, D, Pete, S and Du Plessis, M *Jurisprudence A South African Perspective* (Butterworths, 2001)

Riddall, JG *Jurisprudence* (Butterworths, 1999)

Students are also encouraged to browse through the library shelves and to familiarise themselves with its other holdings. This will no doubt stand you in good stead when research for assignments is undertaken.

6. STUDENT ASSESSMENT

Specific Outcomes (On completion of this course, the student should be able to:)	Assessment Criteria (What evidence must the student provide to show that they are competent? The student must be able to:)	Assessment Tasks (The evidence will be gathered in the following way. The student may be expected to:)
Understand, explain and evaluate the major schools of legal philosophy.	<ul style="list-style-type: none"> - Describe and explain the principles of classical natural law theory, as viewed through the eyes of certain leading philosophers. - Describe and explain the principles of legal positivism, as viewed through the eyes of certain leading philosophers. - Describe and explain the re-birth of natural law theory, as viewed through the eyes of leading philosophers. - Describe and explain the philosophies behind the school of American Realism and the school of Critical Legal Studies. - Evaluate critically the advantages and disadvantages of any of these particular approaches to law. - Critically discuss African jurisprudence and legal thinking - Critically discuss Islamic jurisprudence and legal thinking 	<ul style="list-style-type: none"> - Write essays in which the principles and features of the various schools of jurisprudence are discussed and critically evaluated. - Write essays in which one school of jurisprudence is compared and contrasted with another.
Understand, explain and evaluate some of the major jurisprudential debates that have preoccupied legal philosophers.	<p>Discuss critically the Hart/Fuller debate as to whether law and morality are intrinsically interlinked.</p> <ul style="list-style-type: none"> - Discuss critically the Hart/Devlin debate about whether it is the task of the criminal law to enforce morality. <p>Discuss critically the debate about how the process of legal adjudication occurs.</p> <ul style="list-style-type: none"> - Discuss constructive and deconstructive attitudes to law. 	Write essays in which these debates are discussed and critically analysed.

<p>Understand how certain philosophical approaches to law have shaped the way our South African society and its legal system has arranged itself in the past.</p>	<ul style="list-style-type: none"> - Discuss critically the impact of the various philosophical approaches on the South African legal system, particularly in respect of the record and role of the South African judiciary under apartheid. 	<p>Write an essay in which the debate on the record and role of the South African judiciary is discussed, from various philosophical perspectives.</p>
<p>Think critically about law as a social and political entity, particularly in the context of contemporary debates about law in modern South African society.</p>	<ul style="list-style-type: none"> - Identify the relevant principles of legal philosophy that may underpin issues of legal and social debate in South Africa. - Critically and logically discuss the relevant principles. - Apply these principles to discussions about issues of contemporary legal interest in South African society. - Propose potential solutions to these debates, which are grounded in firm jurisprudential foundations. 	<p>Write essays in which contemporary issues of legal interest in South Africa are critically analysed from a philosophical perspective, and solutions are proposed to the problem that are logically argued, and grounded in relevant philosophical theory.</p>
<p>Understand more clearly the reasons behind the existence, structure, value and content of the black-letter laws that are studied in other legal courses.</p>	<ul style="list-style-type: none"> - Identify and explain the philosophy behind the existence of various particular laws and legal structures. - Discuss the way in which one's philosophical starting point may determine how one understands the meaning and content of various laws and legal structures. 	<p>Write essays in which a particular legal rule, principle, doctrine or institution is explained in its philosophical context.</p>

Assessment Strategy

The final mark for the course is comprised of the following components:

Examination: out of 60 marks.

Class work: out of 40 marks.

Total: 100 marks.

Assignments

There are two major assignments in this course, which are submitted towards the end of the third and fourth terms respectively. In these assignments, students will be expected to discuss a particular jurisprudential issue, and relate the theory to a contemporary issue of interest to South African society. The assignments should be approximately 3000 words in length, and will have to be thoroughly researched, and correctly referenced and presented. Each assignment counts 50% of the class-mark component of the course. The assignments are compulsory.

Examination

One two-hour paper will be written in November. The examination will be out of 60 marks. There will be several 30-mark questions on the paper, of which the student will have to choose two to answer. The questions will generally require students to be able to explain the nature and content of the theories about law that were examined in the course. The examination is compulsory. An external examiner assesses the quality of both the examination paper and the students' answers.

7. EVALUATION

This course is evaluated as part of the global evaluation of LLB courses conducted at the end of each semester.

8. CONTACT DETAILS

My office number is S2 and is situated on the second floor of the Law Faculty building. Students are welcome to come and see me anytime, should they need any information or advice.

My e-mail address is: n.goolam@ru.ac.za