

ISSUES IN LEGAL AND POLITICAL  
PHILOSOPHY

OPTIONAL COURSE  
MONSOON 2010

# ISSUES IN LEGAL AND POLITICAL PHILOSOPHY

The objective of the course is to examine select fundamental issues in political and legal philosophy in western political and legal thought. In Unit 1 we look at a few issues which form the basis of important moral, political, constitutional and legal developments in human societies.

The issues selected for the unit however, are not exhaustive of all core issues which have a bearing on such developments. Unit II aims at closely examining the process of legal reasoning. Since the course focuses on philosophical perspectives, the endeavor is to look at the important components of legal reasoning and their role in the process of adjudication. Though we try and highlight the bearing of these properties on the activities of legal actors, a large part of the unit, like the previous ones, is purely intellectual. The constant endeavour of the course is to familiarize the participants with the major trends in western political thought.

## COURSE OUTLINE

Foundational Issues in Political and Legal Philosophy: (7 weeks)

1. Justice (3 weeks) (6 classes)
2. Rights and Duties (2 weeks) (4 classes)
3. Punishment (2 weeks) (4 classes)

Understanding the Legal System: (3 weeks)

1. Legal reasoning (3 weeks)

# **UNIT I: FOUNDATIONAL ISSUES IN POLITICAL AND LEGAL PHILOSOPHY (7 weeks)**

## **Justice (3 weeks)**

### ***Week 1***

#### ***Class 1. Introduction to the Course and to Various Conceptions of Justice***

##### **Readings**

Julian Lamont, "Distributive Justice", *Stanford Encyclopedia of Philosophy*:

<http://plato.stanford.edu/archives/fall2008/entries/justice-distributive/>

Michael Slote, "Justice as a Virtue", *Stanford Encyclopedia of Philosophy*:

<http://plato.stanford.edu/archives/fall2008/entries/justice-virtue/>

##### **Supplementary Readings**

Robert C. Solomon and Mark C. Murphy, *What Is Justice?* 2<sup>nd</sup> ed. (New York: Oxford University Press, 1999)

Jonathan Westphal, ed., *Justice* (Indianapolis: Hackett, 1996)

Milton Fisk, *Justice* (Atlantic Highlands: Humanities Press, 1993)

Will Kymlicka, ed., *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Newbury Park: Sage, 1992)

Klaus R. Scherer, ed., *Justice: Interdisciplinary Perspectives* (New York: Cambridge University Press, 1992)

James P. Sterba, ed., *Justice: Alternative Political Perspectives*, 3<sup>rd</sup> ed. (Belmont: Wadsworth Publishing Company, 1998)

Thomas E. Hill, Jr. *Respect, Pluralism and Justice: Kantian Perspectives* (New York: Oxford University Press, 2000)

Allen D. Rosen, *Kant's Theory of Justice* (Ithaca: Cornell University Press, 1993)

Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000)

#### ***Class 2. Utilitarian Theories of Justice***

##### **Readings**

Will Kymlicka, *Contemporary Political Philosophy* [Chapters 1-2 ("Introduction" and "Utilitarianism")]

Supplementary Readings

John Stuart Mill, *Utilitarianism*, [Chapter 5]

David Hume, "Of the Origin of Government" (1741)

Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* [Chapters 1 & 4]

**Week 2**

***Class 3. Liberal Egalitarianism***

Readings

Will Kymlicka, *Contemporary Political Philosophy* [Chapter 3 ("Liberal Equality")]

Supplementary Readings

John Rawls, *Theory of Justice*, [Particularly: Preface, Chapters 1-5; 7 (only section 1)]

John Rawls, *Political Liberalism*

John Rawls, *Justice as Fairness: A Restatement*

***Class 4. Libertarian Theories of Justice***

Readings

Will Kymlicka, *Contemporary Political Philosophy* [Chapter 4 ("Libertarianism")]

Supplementary Readings

Robert Nozick, *Anarchy, State, and Utopia*, [Particularly: Preface, Chapters 1-5; 7 (only section 1)]

Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987)

G. A. Cohen, *Self-Ownership, Freedom, and Equality* (New York: Cambridge University Press, 1995)

**Week 3**

***Class 5. Justice in Indian Philosophy and Comparisons with the West***

Readings

SK Purohit, *Indian Legal Philosophy and Contemporary Jurisprudence*, chapters 9 and 10

B. Parekh, *Gandhi's Political Philosophy-A Critical Examination*, (McMillan 1984)

Further Reading:

Frederic B. Underwood, "Aspects of Justice in Ancient India" (1978) 5 *Journal of Chinese Philosophy* 271

## **Rights (2 weeks)**

### *Week 4*

#### **Class 1: A CONCEPTUAL ANALYSIS OF RIGHTS**

Readings

WN Hohfeld, *Fundamental Legal Conceptions: as applied in judicial reasoning* (ed WW Cook New Haven, Yale University Press) available in (1913) 23 *Yale Law Journal*

Kocoureck, *Jural Relations* (2<sup>nd</sup> edn) Indianapolis, Bobbs Merrill

Further Reading

Ross, "Social Power and the Hohfeldian Relation", (10) 1 *Nottingham Law Journal*, 47-63.

Tony Honore, "Rights of Exclusion and Immunities Against divesting", 34 *Tulane Law review*, 453-468

Penner, Schiff and Nobles, *Introduction to Jurisprudence and Legal Theory* (Oxford University Press 2002) Chapter 13 (Referred to hereafter as 'LSE')

#### **Class 2: WHAT DO RIGHTS PROTECT OR ACHIEVE.**

Benefit theory and Choice theory

Readings

HLA Hart, 'Legal Rights' in *Essays on Bentham*.

Raz, 'Rights and Individual well being', *Ethics in the Public Domain* (Clarendon Press Oxford 1994)

Further Reading:

Matthew Kramer, 'Rights Without Trimming', in Kramer, Simmonds and Steiner (eds.) *A debate over rights: Philosophical Enquires*, Oxford: Clarendon Press\*

Neil MacCormick, 'Rights in Legislation' in PMS Hacker and Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, Oxford Clarendon Press: 1997.\*

## Week 5

### Class 3 ARE RIGHTS NON-NEGOTIABLE

#### Readings

R.M. Dworkin, 'Do we have a Right to Pornography?' in his *A Matter of Principle* (1984)\*

Alon Harel, 'Theories of Rights' in *The Blackwell Guide to the Philosophy of Law and Legal Theory*

#### Further reading

Dworkin, *Taking Rights Seriously*, Chapter 4 especially the parts on rights and goals. (1978)\*

J.L. Mackie, 'Can there be a Rights-based Moral Theory?' (1978) 3 *Midwest Studies in Philosophy* 350

### Class 4 ARE RIGHTS NECESSARY?

#### Readings

R. Panikkar 'Is the notion of Human rights a Western Concept' (1982) 120 *Diogenes* 75

Mahendra P. Singh, 'Human rights in the Indian Tradition: An Alternative Model', 2 *NUJS L. Rev.* (2009)

Yash Ghai, "Rights, Duties and Responsibilities" in J. Caughelin, P. Lim & B. Mayer-Konig, eds., *Asian Values: Encounter with Diversity* (London: Curzon Press, 1998) 20  
at <http://www.hrsolidarity.net/mainfile.php/1997vol07no04/301/>

#### Further reading

Alon Harel, 'What Demands are Rights? An Investigation into the Relation Between Rights and Reasons', 17 *OJLS* 101-14.

KN Iyer, *Moral and Political Writings of Gandhi* (1986)

## **Punishment (2 weeks)**

## Week 6

### Class 1: Deterrence versus Retributivism

#### Readings

LSE, Chapter 12: pp. 539-566

David Dolinko, "Some Thoughts about Retributivism" (1991) 101 *Ethics* 537

Further reading:

Antony Duff, 'Legal Punishment', in Stanford Encyclopedia of Philosophy,  
<http://www.plato.stanford.edu/entries/legal-punishment/>

Hugo Adam Bedau, 'Punishment' in Stanford Encyclopedia of Philosophy,  
<http://www.plato.stanford.edu/entries/punishment/> (For an overview of theories of punishment)

JG Murphy, "Marxism and Retribution" (1973) 2 *Philosophy and Public Affairs* 217-243

Michael Davis, "How to Make the Punishment Fit the Crime" (1983) 93 *Ethics* 726-52

***Class 2: A Mixed Approach to the Deterrence versus Retributivism Debate***

Readings

HLA Hart, *Punishment and responsibility*, (2<sup>nd</sup> Ed. Oxford University Press 2008) chapter 1:  
'Prolegomenon to the Principles of Punishment'

Further reading

John Cottingham, "Varieties of Retributivism" (1979) 29 *Philosophical Quarterly* 238-46

Hugo Adam Bedau, "Retributivism and the Theory of Punishment" (1978) 75 *Journal of Philosophy* 601-20

***Week 7***

***Class 3: Alternative Approaches to the Theory of Punishment***

Readings

Claire Finkelstein, 'A Contractarian Approach to Punishment', in *The Blackwell Guide to the Philosophy of Law and Legal Theory*

LSE, pp.571-593

**UNIT III: LEGAL REASONING (3 weeks)**

***Week 8***

***Class 1: Distinguishing features of legal reasoning: The role of rules***

Readings

H.L.A. Hart, *The Concept of Law* (Oxford University Press 1961), Chapter 7

Joseph Raz, *Practical Reasons and Norms* (Oxford University Press, 1999) pp. 35-48 and 50-62

Further Reading:

Freidrich Schauer, *Playing by the Rules: A Philosophical Examination of Rule Based Decision Making* (Clarendon Press Oxford 1991)

LSE: 656-663

LSE 663-667

***Class 2: Second Order Justification and Adjudication***

Neil McCormick, *Legal reasoning and Legal Theory*, (Oxford University Press 1978) Chapter 5

Joseph Raz, *Authority of law* (Indian Edition, Clarendon Press Oxford, 2008 ) Chapter 10,

Futher Reading

LSE 682-687

***Week 9***

***Class 3: Is legal reasoning a special type of reasoning?***

Readings

Joseph Raz, 'On the Autonomy of Legal Reasoning' in his *Ethics in the Public Domain* (Clarendon Press Oxford 1994)

Dworkin, *Taking Rights Seriously*, chapter 4,

Further reading:

J.M. Finnis, 'Natural Law and Legal Reasoning' in George (ed), *Natural Law Theory* (1992)

J. Raz, 'Legal Rights' in *Ethics in the Public Domain*,(1993)

LSE pages, 687-717