

Syllabus of the course **Philosophy of Law**

Утверждена
Академическим советом ООП
Протокол № 1от «31» августа 2018 г.

Pre-requisites

This course is based on knowledge and competences which were provided by the following disciplines:

- Political Science
- Philosophy
- General Sociology

Course Type: Elective

Abstract

The general overview of the basic issues of the contemporary philosophy of language.

Learning Objectives

The students are supposed to become professed in the knowledge of the major existent theories of the philosophy of law, to develop the skills of philosophical analysis of the major issues of law.

Course Plan

Philosophy, Ethics and Law
Natural Law Theory
Classical Legal Positivism
Modern legal positivism
Ronald Dworkin. Moral Integrity of Law
Legal Realism
Historical and anthropological jurisprudence
Critical legal theory
Feminist Jurisprudence
Crime and Punishment
Philosophy of International Law
Theories of justice

1. Philosophy, Ethics and Law

The nature of jurisprudence. Descriptive, critical and normative legal theory. The rational techniques of philosophy and the sphere of law. The clarification of concepts and reexamination of values. Analytical jurisprudence and Normative jurisprudence. Rational criticism and its application to the sphere of law. Conceptions of Philosophy and various branches of Philosophy. Ethics and ethical theories. Ethical skepticism and relativism. Deontological Theories. Consequentialism. Virtue ethics. Contemporary theories in ethics. Moral problems. Ethics and Morality. The concept of law. The sphere of law. Moral and legal regulation of actions. Social institutions and normative regulation of social life. Descriptive law and prescriptive law. The problem of moral fidelity and allegiance. Implications of jurisprudence for political, economic and social theory.

2. Natural Law Theory

The origins of natural law theory in philosophy of Plato and Aristotle. Absolute values. Intuitive apprehension of values. The role of reason. Justice and its inherent connection with law. Human nature as the source of law and justice. Cicero. Roman Law. The relations of law and morality, morality and nature. The systematic statement of natural law theory in philosophy of Thomas Aquinas. Eternal law, natural law, divine law and positive law. Inherent inspiration to good. Life, knowledge, procreation, society, and reasonable conduct as basic good. The priority of good to the right. Mala in se. The principle of proportionality. Double effect. Lex iniusta non est lex. Corruption of law. Thomas Hobbes. John Lock. Jean-Jacques Rousseau. Hugo Grotius. Declaration des droits de l'homme et du citoyen. The traces of the Natural Law Theory in the Just War Theory. The limitations of natural law theory. The decline of the Natural Law in the 18th century. The critique of Bentham and Alf Ross.

The contemporary revival of natural law. Nurnberg war trial. Crime against Humanity. The post-war recognition of human rights and their expression in declarations such as the Charter of the United Nations, the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Declaration of Delhi on the Rule of Law of 1959. The theory of John Finnis and the tradition of analytic jurisprudence. "Natural Law and Natural Rights" as a major restatement of classical natural law theory. The neo-Thomism. The special logic of defining goodness. Primary and secondary principles of natural law. Seven 'basic forms of human flourishing' and nine 'basic requirements of practical reasonableness'. The requirement of the community. Conception of natural rights. The account of law. Hard and soft natural law. The recent critique of Finnis. Lon Fuller and his idea of The Internal Morality of Law.

3. Classical Legal Positivism. Jeremy Bentham and John Austin.

The idea of positivism. The major stages of positivism. The combination of empiricism and rationalism. The idea that a legal system is a 'closed logical system. The separation of law as it laid down from what is should be morally. The method of suspending moral judgement. The classical school of English legal positivism. Jeremy Bentham. Demystification of common law. Bentham as Luther of jurisprudence. Major legislative reforms of the English law of evidence of 1843, 1851, and 1898 inspired by Bentham. Natural law and private opinion in disguise. The "dog" law. The principle of publicity. Codification of law. Two parts of law: the directive part which announces the conduct to be done and the incitative part. John Austin's critique of natural law theory. "Laws properly so called". Laws 'improperly so called'. The distinction of analytical and normative jurisprudence. The role of utilitarianism. The command theory of law. Austin's 'gunman' theory of authority. The concept of sanctions. The concept of sovereignty. Four features of a command (wish, sanction, expression of a wish, generality and identifiable political superior, or sovereign). Sanctions.

4. Modern legal positivism

Contemporary legal positivism. Its three theses: The separability thesis. The pedigree thesis, The discretion thesis. Hans Kelzen and his "pure" theory of law. Kantian background. The separation of sein and sollen. Law as a system of norms. The idea of "Grundnorm". Its highest level of generality. Lasting effectiveness of the basic norm and its assumed validity. The formal nature of the basic norm. Value-free account of law. Essential individualism of legal positivism. The ideological link with earl capitalism. Neutral idea of validity. Monopolization of force as the only function of law. Value relativism. Sanctions. Law s coercion. Objectively valid norm vs. subjective validity. Hierarchy of norms. The critique of Raz and Harris. H.L.A.Hart. "The Concept of Law". Humean background. The usage of linguistic techniques. The critique of Austin. "Gunman Writ Large". The acknowledgement of the 'core of indisputable truth in the doctrines of natural law' Minimum content of natural law. Law as a system of rules. Primary rules and secondary rules. The rules of recognition, change and adjudication. "Minimum content theory" of natural law in later legal positivism. The discretion of the judge is to fill in the gaps between the legal rules.

5. Ronald Dworkin. Moral Integrity of Law

The criticism of Hart's model of rules. *Riggs v. Palmer case. Henningsen v. Bloomfield Motors Inc. case.* An assault on legal positivism. The critique of the model of rules. Non-rule standards in law. The difference of legal principles and rules. The integration of law and morality. The unity of value. The possibility to go beyond rules and apply to principles and policies in legal cases. Appeal to moral principles as the central part of judicial decision making. Rights as trumps on the goals of policy. Judge as an author in the chain of common law. The concept of the ideal judge. (Hercules). Law as interpretive concept. The system of social justice. The ideal of equality.

6. Legal realism

American and Scandinavian branches of legal realism. The rejection of ponderous metaphysics and absolute values. Law is what the judge do. Realism as technology. American realism. Oliver Wendell Holmes, Karl N Llewellyn, and Jerome Frank. "The life of the law has not been logic". The possibility of 'free play' and the discretion of a judge. Law as prediction of what courts will decide. Llewellyn's realist manifesto. Holmes and the device of the 'bad man'. Llewellyn: law as a 'technology' rather than a philosophy. Grand style and the formal style of judicial opinions. Jerome Frank and his radical realism. Alf Ross. The nonexistence of justice. Hägerström. Legal norms as fantasies of the mind. Olivecrona's Law as a matter of Fact. Psychological approach to legal theory.

7. Historical and anthropological jurisprudence

Historical jurisprudence. Law as the result of historical development. The specificity of the Western law. Civil Law and Common Law. Culture, custom, and tradition at the very heart of the exposition of the concept of law. Friedrich Karl von Savigny. Law is located in the spirit of the people: the Volksgeist. The protest against codification of law. Lawmaking is only one of the sources of law. The critique. Henry Maine. Evolutionary account of law. Six phases of the development of law. Common ownership was the earliest form of title. The critique of the natural law. Anthropological jurisprudence. 'Law' in tribal societies. Bronislaw Malinowski. Reciprocity as the pattern of law. Hoebel. "The Law of Primitive Man: A Study in Comparative Legal Dynamics Law of Primitive Man". Gluckman. The study of the Barotse of Northern Rhodesia. Bohannan. The analysis of the Tiv of Nigeria. Legal pluralism.

8. Critical and Postmodern legal theory.

The attack on the idea of neutral principles of law and morality. The influence of the philosophy of Nietzsche. The inversion of values. The function of public values as validation and maintenance of oppression. Marxist critique of the substantive doctrines of the law. interdisciplinary approach of critical legal studies. The Politics of Law. The denial of law as a system. Four of Critical Legal Studies principles (indeterminacy, antiformalism, contradiction, and marginality). Deconstruction of the legal thought. Antiformalism and skepticism. Postmodernist legal theory. Habermas, Foucault and Derrida. Jean-François Lyotard on "The Postmodern Condition". Redundancy of metanarratives. Four types of subjectivity. Onslaught on the Enlightenment and rationalism including analytical tradition. The death of the subject. Jacques Lacan. The idea of 'deconstruction'. Skeptical attitude to the idea of rights.

9. Feminist Jurisprudence

Major strands of feminism: Liberal feminism, Radical feminism, Postmodern feminism, Difference feminism. The concern with equality and the concern with difference as major character traits. Public-private division. The presumed gender blindness of legal theory. The political nature of feminism. 'The personal is political' Suppression and exploitation of women as the major sources of the movement. The practical nature of feminist philosophy and comprehension of justice. The facts of subjugation of women all over the world. The tacit bias against women in dominant legal culture. Exploitative power and law of patriarchal society. The case of rape and utmost resistance requirement. Law as reflecting the male point of view. The ethics of care against the ethics of justice. The possibility of woman's morality and a special virtue of care. Gilligan's critique of moral psychology of Colberg. Rights as formal, hierarchical, and patriarchal. Critical evaluation of feminism. Its utopianism and radicalism.

10. Crime and Punishment

Punishment as inevitable violation of fundamental rights of a person. The justification for the criminal law. Criminalization and compensation, the case of Robert Nozick. Deterrence model of punishment. Punishment of the innocent. Scapegoating. Utilitarian approach to punishment. Retributivist approach to punishment. Kantian perspective. The ideal of punishment as the avoidance of parasitism and free riding. Mental states, excuses and strict liability. The theory of culpability and responsibility. The idea of agency, choice and intention. Sophocles drama "Oedipus Rex". Contemporary systems of criminal responsibility. Intention, purpose, knowledge, recklessness and negligence. Malice aforethought. Mental states of the wrongdoer and responsibility. Mens rea (guilty mind). Commission of the offense.

11. Philosophy of International Law

The law of peoples and the possibility of international justice. International law as a primitive legal system (Kelzen). National Self-defense. War. The conditions of Jus ad Bellum. Just wars? The conditions of Jus in Bello. The moral status of combatants. Non combatants in war. The status of terrorism. Terrorism, torture and just war. Jus Post Bellum.

12. Theories of justice

Language, Logic and Meaning of Justice. Utilitarian Theory of Justice. The Theory of Justice of John Rawls. The Justice of Political Liberalism. Libertarian Theory of Justice by Robert Nozick. Justice by Agreement by David Gauthier. Marxism as a Theory of Justice. Feminism and Justice. Communitarian Critique of Justice. The Russian Historical Discourse of Justice.

Grading system

Class attendance is required. Unexcused absences will lower the participation grade. Students are expected to regularly do the homework reading and study according to the lists of sources (books, documents, electronic resources) provided by the lecturer. On seminars students are expected to take active part in the discussion and demonstrate good acquaintance with the content of lectures, documents and respective literature. If the student misses more than 20% of class meetings, additional assignment will be provided. The deadlines should be met. In case of the missed deadline the instructor will extract one point off the grade for each day missed. The Essay will be evaluated on the basis of the text written and oral presentation of the main thesis of it. Research paper should contain the analyses of literature on the subject as well as personal attitude to the subject matter. The oral exam by the end of the course will be provided in the form of a conversation of the student with the course instructor on one of the topics of the course.

The current work will be graded based on the effort and quality of the presentations at class. The quality of the essays will be graded too, based on both the quality of the text and the ability to present orally. The quality of the research paper will be evaluated. The final exam will be based on the student presentation of one of the 15 topics of the content of the course.

Requirements and Grading

Type of grading	Type of work	1 year		Parameters
			3	
Current	Essay Paper		23.02	10 thousand or less characters by the end second week of studies is due
			16.03.	Research paper on one of the topics. 15 thousand or more characters by the end of the terms
	Homework			Weekly homework is due
Midterm				Oral presentation of the main thesis of the essay in class
Final	Exam			Oral exam by the end of the term.

O stands for “grade”. The final grade O_{final} will be formed based on the results of the final oral exam (O_{exam}) and accumulated grade (O_{acc}). The accumulated grade (O_{acc}) in its turn is formed of three parts, namely (research paper (O_{paper}), essay (O_{essay})and current class work work (O_{current}). Current class work will be evaluated based on participation – 20%, activity in the debates – 30%, homework – 30%.

The formula for the accumulated grade is the following

$$O_{\text{acc}} = 0,25 O_{\text{current}} + 0,25 O_{\text{essay}} + 0,5 O_{\text{paper}}$$

The formula for the final grade is the following

$$O_{\text{final}} = 0,5 O_{\text{acc}} + 0,5 O_{\text{exam}}$$

Methods of Instruction

The course requires a lot of readings for every weekly class meetings. Two papers are due. The first is a small essay, which shall be written in the first quarter. The second is a research paper, an endeavor in the earnest, which will demand a serious work with the literature. Please, pick up you topic and start working on the final paper as early as possible.

The tentative topics of the essays

The topic is all the same. Please pick up the theory of Philosophy of Law which sounds more plausible to you and give the explanation to your choice.

The tentative topics of the research papers

The interrelation of law and morality.
The contemporary revival of the natural law theory.
The classical legal positivism. Bentham and Austin.
Modern Legal positivism. Hart and Kelzen.
Dworkin and the idea of moral integrity of law. The critical appraisal.
What legal realism is realistic about?
Postmodern critique of law.
Critical legal studies. An overview.
Theories of legal punishment.
The morality of international law.
The possibility of international justice.

Both, the topic of the essay and of the research paper should be coordinated with the course instructor.

Textbooks and Readers

Our primary textbook will be: Wacks, Raymond. *Understanding Jurisprudence. An Introduction to Legal Theory*. Third edition. Oxford: Oxford University Press, 2012.

Special Equipment and Software Support

Overhead projector will be needed for each lecture.

Required readings:

Wacks, R. *Understanding jurisprudence: an introduction to legal theory* / R. Wacks. – Oxford; New York: Oxford University Press, 2012. (34 W11 in HSE library)

Bentham, J. *An introduction to the principles of morals and legislation: the collected works* / J. Bentham; Ed. by J. H. Burns, H. L. A. Hart; Introduction by F. Rosen. – Oxford: Clarendon Press, 2005. (17 B43 in HSE library)

Hart, H. L. A. *Essays on Bentham: studies in jurisprudence and political theory* / H. L. A. Hart. – Oxford: Clarendon Press, 2001. (34 H31 in HSE Library)

Hart, H. L. A. *Essays in jurisprudence and philosophy* / H. L. A. Hart. – Oxford: Clarendon Press, 2001. (34 H31 in HSE library)

Kelsen, H. *General Theory of Law and State* / H. Kelsen; Translated by A. Wedberg. – Union: The Lawbook Exchange, Ltd., 2000. (34 K31 in HSE library)

Optional readings:

Dworkin, R. *A matter of principle* / R. Dworkin. – Oxford: Clarendon Press, 2001. (1 D97 in HSE library)

Europe's Other: European Law Between Modernity and Postmodernity / Ed. by P. Fitzpatrick, J. H. Bergeron. – Aldershot: Ashgate, 1998. (4 E91 in HSE library)

Hoebel, E. *The Law of Primitive Man: A Study in Comparative Legal Dynamics*. Cambridge, Mass: Harvard University Press, 1967. URL: <https://ebookcentral.proquest.com/lib/hse/library-ebooks/reader.action?docID=3300214> – ЭБС ProQuest Ebook Central - Academic Complete.