

COLLEGE OF LAW

SCHOOL OF LAW: DEPARTMENT OF JURISPRUDENCE

INTRODUCTION TO LEGAL PHILOSOPHY (LJU406-K)

TUTORIAL LETTER 101/2005

First and Second semester

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1**A WORD OF WELCOME**

We welcome you to the course Introduction to Legal Philosophy (LJU406-K). We trust that you will enjoy the course and find it rewarding.

2**COMMUNICATION WITH YOUR LECTURERS**

All queries that are not of a purely administrative nature but are about the contents of this module should be directed to us. Please have your study material at hand when you contact us.

The lecturer (LJU406-K)
Department of Jurisprudence
PO Box 392
UNISA 0003

Prof IJ Kroeze	(012) 429-8412	(Course leader)
Prof M Slabbert	(012) 429-8305	
Prof DC Taylor	(012) 429-8342	
Prof NMI Goolam	(012) 429-8598	
Mr DD Ndimma	(012) 429-8460	
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Please phone between 07:45 and 13:00, because lecturers are not obliged to be on campus after 13:00 and therefore may not be available later.

Prof IJ Kroeze	Cas van Vuuren 6-75
Prof DC Taylor	Cas van Vuuren 6-72
Prof M Slabbert	Cas van Vuuren 6-51
Prof NMI Goolam	Cas van Vuuren 6-57
Mr DD Ndimma	Cas van Vuuren 6-67

Feel welcome to visit us to discuss any queries or problems. However, please make an appointment. Our offices are on the 6th floor of the Cas van Vuuren Building, Main Campus, Muckleneuk Ridge, Pretoria.

STUDENTS WHO HAVE ACCESS TO THE APPROPRIATE COMPUTER TECHNOLOGY MAY CONTACT THE LECTURERS BY MEANS OF E-MAIL AT THE FOLLOWING E-MAIL ADDRESSES:

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Prof DC Taylor	taylodc@unisa.ac.za
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Prof NMI Goolam	goolanmi@unisa.ac.za
Mr DD Ndimma	ndimadd@unisa.ac.za

3 COMMUNICATION WITH THE UNIVERSITY ADMINISTRATION

Students must address all queries on administrative matters to:

The Registrar (Academic)
PO Box 392
UNISA 0003

Assignment Section: (012) 429-4155
Student Affairs: (012) 429-4116
Despatch: (012) 429-4104
Examination Section: (012) 429-4122

Telephone enquiries about other administrative matters should be addressed to the particular sections. Consult the brochure *Unisa: services and procedures* in this regard. If you have access to the Internet, you can contact us on the University's SOL facility ("Students on Line") on the Internet at: <https://sol.unisa.ac.za>.

PLEASE NOTE:

- ⇒ You may enclose more than one letter in the same envelope. However, do not write to more than one department in one letter - this will cause delay. Write a separate letter to each department and mark each letter clearly: "For attention (the relevant department)".
- ⇒ When writing to the University, always give your student number, the name of the course and the course code at the beginning of the letter.
- ⇒ Remember to have your student number ready whenever you contact the University.
- ⇒ Please include your address and telephone number in a letter if you want a reply.

4 STUDY MATERIAL

4.1 STUDY MATERIAL

The study material for LJU406-K consists of a tutorial letter 501. **There is neither a textbook nor a study guide for this course.** The study material in the tutorial letter 501 contains all the material needed to complete this course successfully. The tutorial letter 501 will indicate how you should approach the course and how you should use the tutorial letters. Please note that the tutorial letters are also available electronically at <http://sol.unisa.ac.za>.

4.2 INVENTORY

On registration you will receive, in addition to the available study material, an **INVENTORY FOR THE CURRENT ACADEMIC YEAR** which lists only the items available from the Department of Despatch in Pretoria or the regional offices at the time of registration. Students who register at a regional office will receive the rest of their study material by registered post from Pretoria.

Check the study material you receive against the inventory. You should have received all the items specified in the inventory, unless there is a statement like “out of stock”. If any item is missing, follow the instructions on the back of the inventory without delay.

PLEASE NOTE: Your lecturers cannot help you with missing study material. Please contact the Department of Despatch at (012) 429-4104.

5

PURPOSE AND STRUCTURE OF THE COURSE

5.1 PURPOSE OF THIS COURSE

Philosophy, and legal philosophy in particular, is seen by many students as a “difficult” subject. This is so because it is very different from most other legal subjects. Legal philosophy is not concerned with “black-letter law”, and therefore it seems foreign to many students. But just because it’s strange does not mean it’s impossible to master! If you approach the subject with an open mind, you will be able to learn much that will make you a better lawyer.

However, we realise that it is impossible to turn students into philosophers in the course of one semester’s work. What we hope to achieve is to give you a basic understanding of a few established legal philosophies. For this purpose you will need to know where these philosophies come from and what impact they have had. Obviously, the emphasis will be on those theories that influence and has influenced current legal practice, although they cannot be seen in isolation.

5.2 STRUCTURE OF THIS COURSE

This course tries to give you a general understanding of the major problems and debates in legal philosophy as they are relevant to South African law and legal philosophy. It is impossible to cover all the debates but, in general, the purpose of this course can be summarised in three main objectives. On completion of this course you should be able to do the following:

- 1 Define and explain the most important concepts and ideas in legal philosophy as it is use din the various philosophies you have studied.
- 2 Make connections between the various philosophies you have studied.
- 3 Recognise how these philosophies influence contemporary South African case law.

To achieve these objectives, the course is structured in the following way:

INTRODUCTION

The introduction briefly explains what we mean by the objectives set out above and gives an overview of what we plan to do. We also indicate how you should approach this subject and highlight some features of the study material.

THE PREMODERN APPROACHES

In this study unit you will be introduced to classical Greek and Medieval Western legal philosophy as well as traditional African legal thinking.

THE MODERN APPROACHES

This study unit deals with the modern scientific and rational approaches to law that have dominated Western legal thinking since the 18th century. It is, in many cases, still the basis of the dominant Western legal philosophies and therefore very important.

THE POSTMODERN APPROACHES

The last study unit deals with the recent criticism of this dominant modern approach to law and legal philosophy. This criticism has come mostly from within the Western tradition and focuses on the individualism and rationalism that is so characteristic of Western philosophy and Western approaches to law. (Do not worry about all the new terminology for now! We will explain everything to you.)

6

ASSIGNMENT

The university authorities have decided that at least one assignment per semester in each module must be submitted **for a mark contributing to the final mark for the module**. One of the reasons for this step is that a student is required to provide proof that he or she “actively studied” before writing the (final) examination.

The assignment will count 10% towards a student’s final mark for the module.

How will this work? We will explain by way of an example: Your final mark for the module will be a combination of your mark for the assignment and your exam mark. Say you receive a mark of 70% for your assignment: 10% of 70 is 7. You will therefore carry forward 7 marks towards your final mark. If you are awarded a mark of, say, 48% in the examination, this will count 90% of the final mark: 90% of 48 is $43,2 = 43$. Your final mark will therefore be calculated as follows: 7 (assignment) + 43 (exam mark) = 50 (final mark). The examination paper still counts 100 marks, but because the exam mark contributes only 90% towards the final mark, a student who failed to submit the assignment (or who obtained 0% for the assignment) will have to obtain at least 55% in the examination to pass the module ($(90\% \text{ of } 55 \text{ is } 49,5 = 50)$).

Please take careful note of the following:

- (1) **Automatic admission to the examination** Although the assignment contributes to your final mark, submission of the assignment is not a prerequisite for admission to the examination in this module. As a registered student for this module, you have automatic admission to the examination, whether you have submitted the assignment or not. The choice whether to submit the assignment or not is yours, but be reminded that should you choose not to submit the assignment, you will forfeit your assignment mark and will have to obtain at least 55% in the exam to pass the module.
- (2) **The examination** The examination consists of one two-hour paper which counts 100 marks. (As set out in the above example, the exam mark counts 90% of the final mark for the module and the assignment 10%.)
- (3) **Closing dates for the assignment** The closing dates for the assignment are as follows:
 First semester: **20 March 2005**
 Second semester: **31 August 2005**
- (4) **No extension** The closing date for the assignment will be adhered to very strictly due to the fact that automatic admission to the examination applies for this module and because the commentary on the assignment will be dispatched to you on the closing date already. **Consequently no extension whatsoever will be granted for submission of the assignment and you are requested not to apply for extension under any circumstances.**

ASSIGNMENT 1 - <u>FIRST SEMESTER ONLY</u>
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Closing date: 20 March 2005

Unique number: 395065

(Unique numbers must be filled in on the enclosed mark-reading sheet. If this is not done, the assignment cannot be marked.)

You will only be able to do this assignment once you have studied all the relevant study material. Answer the following questions by filling in the relevant square on the mark-reading sheet with a HB pencil.

Question 1

Pre-modern legal thinking does **not** assume that

- (1) there is a natural order that applies to social life.
- (2) the community is more important than the individual.
- (3) the individual is more important than the community.
- (4) there are a separate set of laws that exist metaphysically by which human laws can be measured.

Question 2

When resolving a legal matter African legal philosophy does **not**

- (1) encourage all members of the community to participate in legal matters.
- (2) use precedents.
- (3) make use of a judge.
- (4) take into account the attempts of the parties to resolve the issue.

Question 3

Early modern legal thinking is **not** characterised by the acceptance of

- (1) scientific method
- (2) rationalism
- (3) empiricism
- (4) metaphysics

Question 4

Post-modern legal philosophies does **not** include

- (1) Critical Legal Studies.
- (2) Existentialism.
- (3) Conceptualism.
- (4) Communitarianism.

Question 5

Communitarians do **not** criticise John Rawls for

- (1) failing to separate questions of ethics and law.
- (2) determining general principles of justice in a rational, autonomous and individualistic way.
- (3) arguing that the state should interfere in the private sphere in a minimal way.
- (4) removing the question of rights to a pre-political stage.

Question 6

John Dugard did **not** argue

- (1) for a realist-cum-natural-law approach to legal interpretation.
- (2) for the promotion of human rights values in the common law.
- (3) for the replacement of 'pure' Roman-Dutch Law.
- (4) that mechanical adjudication concealed racist prejudices.

Question 7

The original position is

- (1) Hobbes's description of the social contract
- (2) Rawls's idea of the state of nature
- (3) Nozick's version of the veil of ignorance
- (4) Locke's original term for pre-political rights

Question 8

The rejection of natural law is

- (1) a principle of pre-modern philosophy
- (2) part of Aquinas's natural law
- (3) the opposite of legal positivism
- (4) characteristic of modern philosophy

Question 9

"Wele, you must go home and continue the good work you have always been doing ... and you must come and report here anything that is hindering you in this regard." This is a judgement of

- (1) the old Native Appeal Court
- (2) the defunct Black Commissioner's Court
- (3) the African indigenous court
- (4) the People's Court

Question 10

Mokgoro J relied on "umuntu ngumuntu ngabantu" in

- (1) *S v Makwanyane*
- (2) the twins' case
- (3) *S v Jordan*
- (4) *Prince v President of Cape Law Society*

Question 11

The dictum in *Prince v President of Cape Law Society* : " to understand the 'other' one must try ...to place oneself in the position of the 'other'" can be associated with

- (1) communitarianism
- (2) legal positivism
- (3) relational feminists
- (4) American Realism

Question 12

The rejection of metaphysics as “nonsense” is typical of

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 13

Emphasis on care, imagination and empathy in law can be found in

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 14

In Aristotle’s theory, justice can be understood as referring to

- (1) the divine natural law
- (2) a parallel universe of pure forms
- (3) the natural purpose of law
- (4) rational justifications

Question 15

"Hart does not distinguish between law and morality." This statement is

- (1) true
- (2) false

Question 16

The idea that the state is a result of a social contract is found in the theory of

- (1) HLA Hart
- (2) Bentham
- (3) Austin
- (4) Locke

Question 17

"Legal rules can be established empirically and this form the basis of the science of law." This statement represents the view of the

- (1) Realists
- (2) Formalists
- (3) Critical Legal Studies
- (4) Utilitarians

Question 18

Who said: "Law is not a brooding omnipresence in the sky"?

- (1) Christopher Columbus Langdell
- (2) Roscoe Pound
- (3) John Dewey
- (4) Oliver Wendell Holmes

Question 19

"The Realists stated that formal rules are unambiguous." This statement is

- (1) true
- (2) false

Question 20

Postmodern feminism is based on

- (1) liberalism
- (2) anti-essentialism
- (3) relational feminism
- (4) socialism

Question 21

"Postmodern feminists emphasise the ethic of care rather than the ethic of justice." This statement is

- (1) true
- (2) false

Question 22

The meta-ethical debate in communitarianism deals with the

- (1) nature of moral values and statements
- (2) nature of community
- (3) nature of human beings

Question 23

Atomism refers to

- (1) the community as the source of values
- (2) the pre-social individual
- (3) communitarianism
- (4) the situatedness of humans in a community

Question 24

"Communitarians accept the idea of state neutrality." This statement is

- (1) true
- (2) false

Question 25

The argument that law is politics claims

- (1) that judges make decisions based on law and various interests in society.
- (2) that judges make decisions based only on law.
- (3) that individuals can and must act without harming others.
- (4) that freedom of contract is a myth.

ASSIGNMENT 2 - SECOND SEMESTER ONLY

Closing date: 31 August 2005

Unique number: 234879

(Unique numbers must be filled in on the enclosed mark-reading sheet. If this is not done, the assignment cannot be marked.)

You will only be able to do this assignment once you have studied all the relevant study material. Answer the following questions by filling in the relevant square on the mark-reading sheet.

Question 1

The emphasis on the good of the community as opposed to the interests of the individual is typical of

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 2

The idea of a natural or God-given order is found in

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 3

The rejection of metaphysics as “nonsense” is typical of

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 4

Emphasis on care, imagination and empathy in law can be found in

- (1) early modern thinking
- (2) postmodern philosophies
- (3) late modern theories
- (4) pre-modern thinking

Question 5

For modern philosophers the law must be studied with emphasis on

- (1) religion
- (2) science
- (3) god/God
- (4) the good of the community

Question 6

The defining characteristic of early modern thought is

- (1) metaphysical speculation
- (2) a reliance on religion
- (3) community values
- (4) radical individualism

Question 7

The command theory of law was criticized by

- (1) HLA Hart
- (2) Locke
- (3) Austin
- (4) Hobbes

Question 8

Realism is characterised by its insistence on

- (1) formalism
- (2) legal indeterminacy
- (3) utilitarianism
- (4) the command theory of law

Question 9

The idea that judges never have a discretion is found in the theory of

- (1) HLA Hart
- (2) John Rawls
- (3) Ronald Dworkin
- (4) Robert Nozick

Question 10

Dworkin's theory of law as integrity refers to the idea that

- (1) all law is judge-made law
- (2) principles are put above policy
- (3) interpretation constitutes the text
- (4) judges have discretion in hard cases

Question 11

CLS use the following techniques

- (1) constructive interpretation
- (2) deconstruction
- (3) rationalism
- (4) natural law

Question 12

Progressive legal realists argued for the replacement of

- (1) abstract rules with functional rules.
- (2) abstract rules with general rules.
- (3) specific rules with general rules.
- (4) functional rules with specific rules.

Question 13

American Realists claim that

- (1) abstract legal principles together with other legal rules can always give “right answers”
- (2) abstract legal principles together with other legal rules often give “right answers”
- (3) abstract legal principles can always give “right answers”
- (4) abstract legal principles can never give “right answers”

Question 14

Ronald Dworkin holds the view that when the law does not provide a clear answer to a judge, the judge

- (1) has discretion to use sources outside the law.
- (2) should interpret the law using the values of a legal system.
- (3) should consider the social and economic consequences of the decision.
- (4) should weigh up which decision would maximise happiness and minimise unhappiness.

Question 15

In *President of RSA v Hugo Goldstone J*

- (1) treated women differently from men
- (2) treated women equally with men
- (3) preferred black women to white men
- (4) endorsed non-essential feminism

Question 16

The minority judgment in *S v Jordan* was written by

- (1) Ngcobo and Sachs JJ
- (2) Mokgoro and Yacoob JJ
- (3) Sachs and O'Regan JJ
- (4) Yacoob and Ngcobo JJ

Question 17

Processes of collective deliberation or dialogue about, and interpretation of collective values and principles of justice can be associated with

- (1) the common good of pre-modern philosophy
- (2) late modernism
- (3) the meta-ethical debate
- (4) the story-telling of African philosophy

Question 18

The main themes of legal positivism are

- (1) law is politics, false consciousness and legal indeterminacy
- (2) the command theory, conceptualism and pragmatism
- (3) the social thesis, the maximin strategy and epistemological thesis
- (4) the command theory, the social theory and the epistemological theory

Question 19

Thomas Hobbes argued that

- (1) everyone has natural rights
- (2) rights are determined by the ruler
- (3) there is no state of nature
- (4) rights are decided by god

Question 20

The epistemological thesis refers to

- (1) the social basis of legal rules
- (2) the natural rights of citizens
- (3) the idea that laws are commands by a sovereign
- (4) the positivist theory of knowledge

Question 21

Deconstruction is a term that refers to

- (1) the methods of the Critics
- (2) Dworkin's theory of interpretation
- (3) Dugard's criticism of apartheid judges
- (4) the Realist insistence on indeterminacy

Question 22

The political debate in communitarianism deals with the

- (1) nature of moral values and statements
- (2) nature of community
- (3) nature of human beings

Question 23

Anti-atomism refers to

- (1) the community as the source of values
- (2) the pre-social individual
- (3) liberalism
- (4) the situatedness of humans in a community

Question 24

"Communitarians accept the idea of state neutrality." This statement is

- (1) false
- (2) true

Question 25

The argument that law is politics claims

- (1) that judges make decisions based on law and various interests in society.
- (2) that judges make decisions based only on law.
- (3) that individuals can and must act without harming others.
- (4) that freedom of contract is a myth.

PLEASE NOTE

Enquiries about assignments (eg whether or not the University has received your assignment, the allocation of marks, or the date on which an assignment was returned to you) must be addressed to the **Assignment Section** (012) 429-4155.

Assignments should be addressed to:

The Registrar

PO Box 392

Unisa

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NO ASSIGNMENTS MAY BE SUBMITTED BY E-MAIL, FAX, FLOPPY DISK OR STIFFY!

Assignments may, however, be submitted electronically, via the Internet on <http://sol.unisa.ac.za>. All assignments must be submitted in typed, printed or hand-written format.

Please note the submission dates for assignments. **No extensions will be granted.**

7

EXAMINATION

At the end of the semester you will write **one two-hour paper**. The paper counts 100 marks. Information on the preparation for and the writing of examinations will be provided in a later tutorial letter.

8

STUDY SKILLS

A study skills book entitled *Effective Study* is published by the Bureau for Counselling, Career and Academic Development (BCCAD). It is available in English and can be obtained from **Unisa Press (see details below)**. The publication deals with a variety of topics which are applicable to specific periods during the semester or year. It also contains a screening questionnaire, which will indicate to students in which areas they may expect problems and on which areas they should focus.

To gain maximum advantage from the guidelines given in the publication, it is suggested that you work through the book at the beginning of your studies. After this initial overview, you can consult the sections selectively as your needs emerge. The publication can be used repeatedly by both beginner and experienced students, as it was not only written for students with study problems. Successful students can also use the guidelines to improve their academic performance.

Title

Van Schoor, Mill & Potgieter *Effective study* (2001) Pretoria: Unisa Press

How to obtain *Effective Study*?

You can **order the booklet from Unisa Press**. Only prepaid orders will be accepted. The order form appears in the booklet Services and Procedures which you have received as part of your study package.

If you want to buy a copy over the counter you can visit the Sales Section of Unisa Press, Department of Despatch, 2nd floor, Cas van Vuuren Building on the main campus.

Price R30-00

For telephone enquiries: (012) 429-3448

Fax: (012) 429-3221

We hope that you enjoy this course and we wish you success with your studies.

PROF IJ KROEZE
PROF DC TAYLOR
PROF M SLABBERT
PROF NMI GOOLAM
MR DD NDIMA

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