

Foundation for Law, Justice & Society Summer School Programme

All classes run from 10am to 12pm in the morning, and from 1.30pm to 3.30pm in the afternoon. There is a break each day for lunch from 12.00 – 1.30pm.

All classes will be in seminar room 'B' at the Centre for Socio-Legal Studies (CSLS), Manor Road, Oxford. Lunches will be in the CSLS cafeteria.

Reading for each session is listed after the class description. Required reading is marked with an asterisk, optional further readings then follow.

Monday 29 June

Introduction to Law and Society

Tutors: Denis Galligan & Cristina Parau

Denis Galligan:

This class begins the summer school with an introduction to law in society. Two main questions: what is law and how does it relate to society. In the course of the discussion, we shall consider in outline the kinds of issues which law and society researchers are engaged with, including: how does law interact with other parts of the social structure; is law a system of defined rules or something more intangible; how does law relate to other social rules and norms; what distinguishes a legal system from other rule-governed spheres; how is law implemented; and can law change society.

*H. L. A. Hart, *The Concept of Law*, Preface, pp 6 - 13; 20 - 25; 55 - 57; 77 - 96
D. J. Galligan, *Law in Modern Society*, (Oxford UP, 2007) chapters 2, 3, and 6

Cristina Parau:

According to Alexander Hamilton in *The Federalist No. 78*, the judiciary is the weakest branch of government, having neither 'force' nor 'will', but only judgment; yet it is widely supposed to be the institution that ensures that constitutional limits on the legislature and individual liberties are preserved in practice. Be that as it may, the judiciary is certainly involved in the preservation of liberty, and can only do so if independent. The advent of Constitutional Courts and of "judicial review" (not necessarily the same thing as independence) complicates scholarly inquiries into judicial independence. Constitutional Courts were set up in many countries after WWII and have become increasingly powerful. Constitutional Court "judges" (some think they should be called politicians) have routinely become involved in policy-making, leading to the "judicialisation" of politics.

*Hirschl, R. (2004). *Towards juristocracy: the origins and consequences of the new constitutionalism* Cambridge, Mass. ; London Harvard University Press. Chapters 1 and 2.

*Ending from the Song of Roland

*** **Evening event: 7pm - Welcome dinner at St. Catherine's College**

Tuesday 30 June

Why should we obey the law?

Tutor: Daniel Butt

The question of political obligation has exercised political theorists for centuries. It is commonly claimed that individuals have some kind of duty to obey the laws of the states where they live. Locating the source of this duty, however, has proved to be difficult – so much so that some theorists have given up on political obligation altogether, maintaining that we have only prudential reasons of self-interest to conform with the state's demands. It is one thing to say that we would be well advised to obey the law so as to avoid punishment, or to accept that there is moral force to laws which coincide with the requirements of justice, but is there any sense in which we face an obligation to obey the law just because it is the law? This session will examine a wide range of different answers to this question.

*Smith, M. B. E., "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973)

Klosko, George, "Presumptive Benefit, Fairness, and Political Obligation" *Philosophy and Public Affairs* 16 (1987)

Anthropological approaches to law

Tutor: Fernanda Pirie

How are we to understand the legal systems of other countries and people, both past and present? While most nation states have now adopted Western-style legal structure, many indigenous people regulate their affairs according to traditional practices and understandings, often influenced by modern developments, but still substantially different from what we have come to think of as 'law' in the West. How should we approach such phenomena, as scholars: what are the different ways in which people maintain order and resolve disputes; what role is played by rules, norms, mediators and judges; how influential are history and culture and how can we assess what influence they may have; what counts as law? These are the sort of questions raised by anthropologists of law, considering different ethnographic examples from around the world. This session will provide an introduction to such issues, based on a small sample of case-studies.

*Moore, Sally. 1973. 'Law and social change: the semi-autonomous social field as an appropriate subject of study.' *Law and Society Review*, 719-46 (and in Moore, *Law as process: an anthropological approach*).

*Roberts, Simon. 1979. *Order and dispute*. Oxford: Penguin. [Chs 3 & 4]

Wednesday 1 July

Law and Social Change: the American Experience

Tutors: Ric Sheffield & Lisa Miller

Lisa Miller

This session will focus on legal strategies utilized by right-wing groups to achieve social change. Anti-civil rights advocates have used the language of "special rights" to mount attacks on treaty rights of Native Americans, affirmative action policies for women and racial minorities, and legal protections for gay and lesbians. In addition, a growing property rights movement in the U.S. has drawn on constitutional language and common law precedent to limit the power of legislatures to take private property for public use. We will explore these uses of legal rights and rhetoric and compare them to their counterparts on the left for their meaning, significance and efficacy. We will conclude with a discussion of the capacity of the law to achieve social change and the effect of legal mobilization strategies on political counter-mobilization efforts.

*Dudas, Jeffrey R. 2005. "In the Name of Equal Rights: 'Special' Rights and the Politics of Resentment in Post-Civil Rights America." *Law and Society Review* 39, 723-758.

*Sandefur, Timothy. 2006. "The Pain of Eminent Domain." *Cato Institute on-line*

Ric Sheffield

Social change is a product of a multitude of factors including technology, ideology, conflict, political and economic considerations, and law. Law holds a special place in the social order and hierarchy of social influences or social forces that effectuate social change. This session will examine the role of law in causing social change and the ways in which social change impacts the law through the illustration of the status of Black Americans and the development of civil rights law.

- I. Why Law?
 - A. Assumptions about the nature & character of law as a social institution
 - B. Who has access to law and for what purposes
 - 1) structural impediments
 - 2) legal currency and social class or status

- II. The Reach of Law
 - A. Appropriateness of legal interventions
 - B. Cultural tolerance for imposition of law
 - C. Legal capacity

- III. A case study: Race, Law, and Social Change in the U.S.
 - D. Constitutional foundation for racial distinction
 - E. Legislative initiatives
 - F. Court-led change

*Letter from a Birmingham Jail, Martin Luther King, Jr., 1963

*United States Constitution; Article 1, Section 2, Clause 3; and 13th, 14th and 15th Amendments

*Yamamoto, Eric K.; "Symposium: Representing Race: Critical Race Praxis; Race Theory and Political Lawyering Practice in Post-Civil Rights America," 95 Mich. L. Rev. 821

Thursday 2 July

Courts, Constitutions & Socio-economic Rights

Tutor: Daniel Smilov

Is there a fundamental difference between socio-economic rights and first-generation liberal rights?
Should socio-economic rights be constitutionalised?
What should courts do about them: what is the best theory of adjudication which the courts should apply in the case of socio-economic rights?

These questions will be discussed in the context of both established democracies and transition countries and new democracies.

*Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton & Co. (April 2000): Part I: Why a penniless state cannot protect rights (pp. 35-77)

*Daniel Smilov, *The Constitutional Politics of Socio-Economic Rights: Proceduralism 'Writ Large'* – FLJS policy brief series

Cass Sunstein, 'Why does the American Constitution lack social and economic guarantees?', 56 Syracuse L. Rev. 1, 2005.

Legal culture and the Rule of Law

Tutor: Marina Kurkchian

The discussion will focus on exploring law as a social construct, placing it in comparative perspective. Participants will be considering how people in any particular society use law, what specific meanings and roles they attribute to it, and how they relate law to their interpretation of justice. The analyses will explore the factors affecting that process, including historically formed

traditions, current institutional settings, and tendencies towards change. Methodological issues will also be raised for examination and assessment, for example on the relative merits of using qualitative and quantitative methods to gather research data on legal cultures and rule of law in society.

*Susan S. Silbey, *After Legal Consciousness*, Annual Review of Law and Social Science Vol. 1: 323-368, 2005.

Friday 3 July

7.30am – 4.30pm – Visit to London

Train to London

Accompanying staff member: Phil Dines, Publications and Communications Manager

Lecture at Gray's Inn, followed by lunch (TBC)

1pm – Tour of High Court

Saturday 4 July

12.30 – 5.00pm – Visit to Blenheim Palace

Bus pick-up point: St. Catherine's College – 11.45am

Lunch at Courtyard Restaurant, Blenheim Palace, 12.45pm

Tour of palace – 2pm

Sunday 5 July

FREE

Monday 6 July

Crime and Criminology

Tutors: Lisa Miller and Ric Sheffield

Race, inequality and the U.S. Justice system – Lisa Miller

This section introduces students to the criminal justice system through an examination of racial disparities in the administration of justice in the U.S. We will situate crime, justice and law in the broader, and sometimes peculiar, political context of the United States. We will begin with a brief overview of the United States federal system and how it shapes responses to crime and violence. We will then explore policing and police discretion as it has helped shape race relations and racially disparate outcomes in the justice system. From there, we will take a look at state-level incarceration rates and discuss how and why there is so much variation in racial disparities across the states and what factors might explain these differences.

*Bass, Sandra. 2001. Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions. *Social Justice* 28 (1): 156-176.

*Mauer, Mark and Ryan S. King. 2007. "Uneven Justice: State Rates of Incarceration by Race and Ethnicity." The Sentencing Project, Washington D.C. Available at: <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=593>

Remorse & Forgiveness in Criminal Sentencing – Ric Sheffield

Theories of punishment serve as the foundation for sentencing policy and procedures in the U.S. criminal justice system. This session will examine the role of expressions of remorse in various stages of criminal processing, especially during post-conviction sentencing. Do apologies by wrongdoers and their "being sorry" really make a difference?

- III. Goals of criminal sentencing
 - A. Punishment
 - B. Rehabilitation
 - C. Deterrence
- IV. Purposes of Apology
 - D. The import of a showing of remorse
 - E. Operationalizing remorse, testing for it
 - F. Forced contrition
- V. A case study: Law Means Never Having to Say You're Sorry
 - G. When apologies have currency in criminal matters
 - H. How must one "perform" an apology
 - I. Consequences of genuine remorse

*Duncan, Martha Grace; "So Young and So Untender: Remorseless Children and the Expectations of the Law," 102 *Columbia Law Review* 1469

United States Sentencing Commission Guidelines Manual

Tuesday 7 July

Comparing Constitutions

Tutors: David Erdos & Mila Versteeg

What is a constitution? What is constitutionalism? – David Erdos

The first session will provide students with an opportunity to consider what is meant by the terms "constitution" and "constitutionalism". The following questions will be specifically address:

- Can the terms "constitution" and "constitutionalism" be conceptually defined?
- How did these terms arise historically and geographically (i.e. in time and space)?
- Is a written text necessary for there to be a "constitution" or for a regime to be based on "constitutionalism"?
- Is a written text sufficient to constitute a "constitution" or to ground "constitutionalism"?
- What is meant by the term "constitution convention" and what is its role in both countries with a written text and those without?
- Is the very quest for "constitutionalism" misconceived?

*Jackson, Vicki C. & Tushnet, Mark, *Comparative Constitutional Law*, New York: Foundation Press, pp. 190-207 (1999)

*Scheppele, Kim Lane "The Agendas of Comparative Constitutionalism." 13(2) *Law and Courts* (Vol. 13 (2), pp. 5-22) (2003)

Judicial review and the counter-majoritarian problem – Mila Versteeg

There is an apparent tension between democracy and constitutionalism- or a constitutional document enforced by the judiciary. Constitutions allow unelected judges to overturn democratic decisions. The constitution prevails over majority preferences. This is called 'the counter-majoritarian problem'.

Fareed Zakaria, with respect to democracy, suggests that there 'can be too much of a good thing' and that democratic decision-makers need constraints. Less democracy enhances freedom. But such an 'anti-democratic' position raises questions on the nature of constitutions, constitutionalism and democracy

*Fareed Zakaria, *The Future of Freedom*. W.W. Norton (2003): Chapter 1

*Jon Elster, Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment, 81 *Texas Law Review* 1751, (2003)

*** **Evening event: 5.00pm – 11.30pm Visit to Stratford**
 Pick-up point: St. Catherine's College, Oxford (pick up time 4pm)
 7.30pm – Royal Shakespeare Theatre performance of 'Julius Caesar'

Wednesday 8 July

Transitional Justice and the Courts

Tutor: Phil Clark

There is growing international interest in the area of transitional justice. This field broadly concerns the processes by which communities and states address the legacies of widespread human rights abuses, such as those arising from political repression or mass conflict, and facilitate transition to stable, open societies. Over the last twenty years, the realm of transitional justice has witnessed the proliferation of different legal and non-legal mechanisms designed to address the legacies of human rights abuses, including the South African Truth and Reconciliation Commission, the International Criminal Tribunal for the former Yugoslavia, the Gacaca community courts in Rwanda, and the International Criminal Court.

This session focuses on the role of international, national and community-level courts in transitional justice.

- Should there be different conceptions of justice for different human rights violations?
- Can courts do more than deliver justice after atrocity, for example by also facilitating peace and reconciliation?
- Is international justice more impartial than justice delivered locally?
- Does the advent of the International Criminal Court spell the end of the use of amnesty in addressing major human rights violations around the world?
- Does the principle of ‘complementarity’ help protect national sovereignty and bolster domestic judicial processes?
- Does it matter that all of the ICC’s investigations to date have taken place in Africa?

*Clark, P., ‘When the Killers Go Home: Local Justice in Rwanda’, *Dissent*, Summer 2005, <http://www.dissentmagazine.org/article/?article=205>.

*Pensky, Max. 2008. *Amnesty on Trial: Impunity, Accountability and the Norms of International Law*. *Ethics and Global Politics*, 1, 1-2, 1-40.

Law, Contemporary Governance, and Society in the European Union

Tutor: Justin Cohen

The European Union (EU) is a multi-level system of governance in which actors at the Community, Member State, and local levels converge to pursue common policy. Following the Treaty of Rome, European governance expanded both in membership and in policy coverage. In coordination with European integration, the EU institutions have acquired increasing policy competences that have important implications for the rule of law, governance and society in Europe.

This seminar considers contemporary governance and society in the EU and addresses the roles of the EU institutions and their policy outcomes in complex processes of governance. After introducing the Council, the Parliament, and the Commission, the discussion focuses on the structure, placement and function of the European Court of Justice in the broader EU policy process. The role of the Court of Justice in democracy, constitutionalism and human rights is also explored.

*McCormick, John. (2005). *Understanding the European Union: A Concise Introduction*. Hampshire: Palgrave. Chapter 1 (1-26), Chapter 4 (79-107).

*Nugent, Neill. (2006). *The Government and Politics of the European Union*. London: The MacMillan Press Ltd. Chapter 13 (281-310).

Kennedy, Tom. (2006). “The European Court of Justice” *The Institutions of the European Union*. John Peterson and Michael Shackleton, eds. Oxford: Oxford University Press. Chapter 7 (125-143).

*** **Evening event: 8pm Concert at Sheldonian Theatre, Oxford**

Thursday 9 July

Constitutions workshop – chaired by Prof. Denis Galligan

9.00am – 5.00pm, Queen's College, Oxford

Professor Gerry Leonard, Professor of Law and Law Alumni Scholar, Boston University School of Law, will give a presentation on Jefferson (details tbc)

Professor Mark Graber, Professor of Law and Government, University of Maryland School of Law, will give a presentation on Madison (details tbc)

Friday 10 July

Democracy and the Courts

Tutors: John W. Adams & Daniel Butt

What is Democracy? – Daniel Butt

In order to determine whether the courts act democratically in making law and affecting policy, we need to know what we mean when we refer to “democracy” itself. It is straightforward to define democracy in terms of the rule of the people, but what does this actually mean? To what extent, if at all, is it possible for political institutions within modern day states to represent or implement the will of the demos? This session will draw upon a range of both theoretical and empirical literature both to problematize common assumptions relating to the democratic character of many contemporary societies and to query in what ways democracy is either possible or desirable.

*Joseph Schumpeter, ‘Two Concepts of Democracy’ in *Capitalism Socialism and Democracy* (1947)

David Miller, 'Deliberative Democracy and Social Choice', *Political Studies*, 40. (1991), 54–67

The Role of Courts in a Democratic Society: An American Perspective - John W. Adams

To the extent we accept the proposition that courts make law, and affect and even determine social policy, questions are raised as to the democratic legitimacy of their actions. We will consider three questions: whether the role of courts making law and affecting social policy is justifiable, whether it is necessary, and whether it is democratic.

The counter-majoritarian difficulty inherent in the role of courts raises further issues of effectiveness of judicial determination. It is for good reason that the judiciary is considered the weakest of the three branches of government. Among other things, courts depend on the aid of the executive branch for the efficacy of their judgments. Courts, Hamilton points out in *Federalist Paper No. 78*, have “neither force nor will, but merely judgment.” Yet Hamilton also requires courts to represent the rights of the people when the legislature fails them.

The courts, then, to maintain effectiveness and legitimacy, must resolve disputes and render decisions, especially those in controversial cases, which will be accepted, even if not agreed to, by the people and the other branches of the government. Indeed, public opinion may set the outer bounds of judicial policy making. Does a court's legitimacy, as a result, depend on its ability to assess and reflect public sentiment; or, on the other hand, will the people accept a decision of court, even though controversial, if it is rooted properly in constitutional principles? Should the courts care, as Cass Sunstein frames the issue, if the public would be outraged at their decisions?

If courts must rely on “judgment” to assure legitimacy, especially in a democratic society, then it is important for courts to consider acceptable forms of judicial reasoning. This session will examine various methods of adjudication to assess how well they fit within the notions of a democracy.

*Cass R. Sunstein, “Burkean Minimalism,” 105 *Michigan L. Review* 353 (2006).

*The *Federalist Papers* No. 78.

***** Evening event: 7.15pm – Farewell dinner at Wadham College, Parks Road, Oxford**

Saturday 11 July

Departure