

International Law

Academic year 2020-2021

Political Justice and Human Rights: Foundational Questions

DI094 - Printemps - 6 ECTS

Thursday 14h15 - 16h00

Course Description

Human rights have become one of the most powerful political and legal instruments of our time. Individuals and groups increasingly articulate their claims in the language of human rights, typically as a way of stressing the need to preserve some basic goods or fundamental needs as a matter of justice. The evolution of the recognition and institutional protection of human rights, both domestically and internationally, can be seen as the institutional implementation of such demands. Yet the normative underpinnings of the concept of human rights remain disputed. This course aims at critically exploring the theoretical foundations of human rights through the lens of major contemporary theories of justice, including liberalism, communitarianism, multiculturalism and feminism. Students should gain a deeper understanding of these theories, and of their influence on human rights' conceptions and categories. The readings will also expose them to critical challenges posed by those who argue that human rights are culturally specific of the West; or that global emergencies, such as the current pandemic or the threats involved in climate change, render the category of human rights obsolete; or that these rights are very limited a tool to further ideals such as gender equality and to tackle conflicts of identity in multicultural societies. The course aims at unpacking these challenges (and also the way in which reasons of justice play out in public argumentation on human rights) through exploring a number of contemporary controversies, including transnational immigration and the limits to freedom of movement; the status of social and economic rights; the relevance of gender equality in disputes about procreation and family justice; or the clash between individual and group rights in debates over indigenous rights and climate change.

> PROFESSOR

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Syllabus

Course Requirements and teaching methods

The course will be taught through a combination of introductory lectures and an interactive (seminar-style format) method focused on specific topics. We will read some key contributions to contemporary political theory and discuss their relevance in shaping specific human rights debates and conceptions. Besides attending the sessions, students are expected to do the mandatory readings assigned on a weekly basis and engage actively in class discussions. Readings are interdisciplinary in nature and include case studies. A weekly 'reading guide' will be made available in the Moodle page, which will include a selection of key questions that will frame each session and facilitate active learning in a focused way. Students will also be offered the opportunity to volunteer (either individually or in small groups) to give short presentations. No prerequisites, but the course will be of particular interest to students who are willing to engage with interdisciplinary perspectives and have an interest in human rights and legal and political philosophy.

Course Goals

The course aims at improving students' understanding of the evolving ethical and political frameworks within which International Human Rights Law emerged and developed, as well as the role and challenges facing human rights today. Students will also become familiar with major contemporary theories of political justice and explore their impact on the foundations and categories of human rights. By engaging in class discussions over controversial disputes in light of the readings, they should be able to deepen their understanding of such readings as well as to further their analytical and presentation skills.

Evaluation

Students are expected to attend regularly and participate actively as specified in the section on course requirements. They will be assessed on their preparation of, and engagement with, the topics and reading materials; also, on their ability to structure their presentations and response papers coherently, and contribute substantially to the class discussions. The course grade consists of: a 10% component for class (regular and informed) participation; presentations will be given an additional 10% value; a 20% will be given to the response paper (a short assignment on a pre-selected topic); and the remaining component will be determined by the final exam, which will consist of 24-hour take-home exam. Exams will be graded on the basis of clarity, familiarity with the reading materials and concepts or cases examined throughout the course, and the ability to develop well-structured arguments.

Readings

The course does not use a particular textbook, and the list of assigned readings will be available on Moodle. Students are encouraged to explore the literature beyond the required readings when preparing presentations and the response paper. A few books provide key contributions to central

political, legal and philosophical questions regarding human rights and will be used throughout the course:

Contemporary Political Philosophy. An Introduction (OUP, 2002, 2nd. ed.), by Will Kymlicka presents and discusses the most significant developments in Anglo-American political philosophy in the last two decades; *Global Basic Rights* (ed. by Beitz & Goodin, OUP 2009) offers insightful political and philosophical contributions into the notion of basic rights, which permeates current debates on political justice and human rights that we will investigate throughout the course; *Universal Human Rights in Theory and Practice*, by Jack Donnelly (Cornell University Press, ed., 2013) draws on several disciplines (including international law, sociology, political theory and international relations) to offer an extensive introduction to different aspects that are central to understanding human rights; Adam Etinson (ed.), *Human Rights: Moral or Political?* (OUP, 2018) includes essays by an interdisciplinary group of scholars that address central questions raised by the many facets of human rights: moral, legal, political, and historical. Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds.), *International Human Rights Law*, OUP 2010 (third ed) will be used to discuss issues of group rights and women's rights.

Other assigned readings include writings by contemporary political philosophers and human rights theorists, court cases, and articles about public controversies that raise questions about the role of human rights. Students are also welcome to share suggestions for complementary useful references or materials both general and related to the specific topics to be discussed. Each session contains a list of both required and optional readings.

Note: The reading list provided in this syllabus is provisional and needs to be confirmed. Students should be able to access the Moodle page with the final readings for most sessions before the beginning of the semester.

Part I – Conceptual Foundations

The first two sessions of the course will introduce the central themes, using some contemporary controversies involving human rights in conflict as a point of departure. Drawing on readings from political and legal theory, we will identify on-going challenges of definition, legitimacy and justification of human rights and discuss the relevance of so-called 'political' approaches to human rights.

Session 1: Introductory session: Politics, Law, Morality as Intersecting Spheres (25 February)

The goal of this session is to signify the subject of political and social philosophy as a relevant preoccupation for contemporary human rights scholars, practitioners and activists; also, we will identify persistent challenges of justification and relevance involved in claims of human rights that point to an understanding of politics, morality and law as intersecting spheres.

Readings

Required:

Jack Donnelly. *Universal Human Rights in Theory and in Practice*, Cornell UP (2013): chapters 1, 5, 6 and 7.

Charles Beitz & Robert Goodin (eds.) *Global Basic Rights*, Oxford UP (2009): 1-24; 25-48.

Andrew Vincent. *The Politics of Human rights*, Oxford UP (2010): 6-36; 130-154.

Samuel Moyn, *Not Enough. Human Rights in an Unequal World*, Harvard UP 2018 (pages tbc via Moodle) and "Human Rights in Heaven", in A. Etinson, ed. (2014, *Human Rights: Moral or Political?* (OUP), 2018 (pages tbc via Moodle)

Optional:

Ed Bates, "History", in Moeckli et.al. (eds.), *International Human Rights Law* (3-21)
Clapham, Andrew. *Human Rights. A Very Short Introduction*, Oxford, 2nd ed. (2015)
Beitz, Charles. *The Idea of Human Rights*, Oxford UP (2009)
Mendus, Susan. "Human Rights in Political Theory", in *Political Studies* (1995), XLIII: 10-24.

Session 2: Understanding Human Rights Claims (March 4)

Drawing on readings from political and legal theory, this session aims at identifying foundational challenges of definition and legitimacy of human rights discourses and practices. We will begin by exploring different accounts of 'the human' in human rights, as well as introducing problems of justification and legitimacy that will be relevant for the subsequent sections.

Readings

Required:

Samantha Besson, "Justifications", in Moeckli et.al. (eds.), *International Human Rights Law* (22-40)
James Griffin. "The Relativity and Ethnocentricity of Human Rights, in R. Cruft et.al. (eds.), *Philosophical Foundations of Human Rights*: 555-569.
Phillips, Anne. *The Politics of the Human*, Cambridge UP (2015): chaps. 2 and 5.
Ahmed An-Na'im, Abdullahi. "Human Rights in the Muslim World", 3 *Harvard Human Rights Journal*, 13, 1990. Read only the excerpts included in: H. J. Steiner, P. Alston, R. Goodman (eds.) *International Human Rights in Context. Law, Politics and Morals*, Oxford UP, 3d ed.: 531-538.

Optional:

Human Rights, in *Stanford Encyclopaedia of Philosophy* (especially sections 1-4).
Will Kymlicka, "Human Rights without human Supremacism", *Canadian Journal of Philosophy*, vol. 48, Issue 6, 2018.
Walker, Neil. "Universalism and Particularism in Human Rights", in C. Holder, D. Reidy, (eds.), *Human Rights: The Hard Questions*, Cambridge University Press (2013): chap. 2.
Gilabert, Pablo. "Humanist and Political Perspectives on Human Rights", *Political Theory*, v.39, n. 4 (2011): 439-467.
Tasioulas, J., "On the Nature of Human Rights", in G. Ernst, J. Heilinger (eds.), *The Philosophy of Human Rights: Contemporary Controversies*, Walter de Gruyter, Berlin (2012): 17-59.
Valentini, Laura, "In What Sense Are Human Rights Political? A Preliminary Exploration", *Political Studies*, 60, n. 1 (2012): 180-194.
Raz, Joseph. "Human Rights Without Foundations", in Besson, S., Tasioulas, J. (eds.), *The Philosophy of International Law*, Oxford UP (2010): 321-337.

Part II – Theories of Political Justice & Human Rights

Starting from a political and historical approach, we will explore the concept and substantiations of human rights in light of different theories of political justice. A specific practical context is given to each session by focusing on a case or public issue involving controversial human rights claims. Students can volunteer to prepare a presentation on each session (topic and specific focus to be agreed with the Professor)

Sessions 3 & 4: Human Rights and Utilitarianism. The case of Transnational Migrations and Refugee Policy (March 11, 18)

We begin by exploring utilitarianism, and inquire into whether, as a theory of political justice, it is at all compatible with the notion of human rights. The sources of discontent with utilitarian justifications of human rights will be scrutinised against the backdrop of the problem of transnational migrations and refugee claims in the second session.

Session 3

Readings

Required:

Will Kymlicka, *Contemporary Political Philosophy. An Introduction*, Oxford UP, 2002, Chap. 2: 10-48.
Amartya Sen, "Rights Consequentialism", in Glover, Jonathan (ed.) *Utilitarianism and its critics*, Macmillan, 1990: 111-118.

Optional (Background reading)

Paul Krugman, "Dreamers, liars and bad economics", *The New York Times International Edition*, Saturday-Sunday, September 9-10, 2017.
David Luban, "Unthinking the ticking bomb", *Georgetown Law Faculty Working Papers*, July 2008.

Session 4

Readings

Required

Edwards, Alice, International Refugee Law (book chapter), in D. Moeckli, S. Sangeeta & S. Sivakumaran (eds.), OUP, 2014 (third edition): 539-553 (background reading that provides basic info on international refugee law).
Oberman Kieran. "Immigration as a Human Right", in Sarah Fine & Lea Ypi (ed.) *Migration in Political Theory*, OUP 2016: 32-53
Singer, Peter. "Famine, Affluence, And Morality". *Philosophy and Public Affairs* 1.1 (1972): 229-243.
Joseph H. Carens, Refugees and the Limits of Obligation, *Public Affairs Quarterly*, Vol. 6, M. 1 [Special Issue on Refugees 1992]

Optional

Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law, in R. Rubio-Marin (ed.) *Human Rights and Immigration*, Oxford UP, 2014 (especially 19-50).
Veit Bader. "The Ethics of Immigration", in *Constellations*, Vol. 12, issue 3 (2005): 331-361.
Miller, David. "Is there a Human Right to Immigrate?", in Sarah Fine & Lea Ypi (ed.) *Migration in Political Theory*, OUP 2016: 11-31.

Anna Stilz, "Is There an Unqualified Right to Leave?", in Sarah Fine & Lea Ypi (ed.) *Migration in Political Theory*, OUP 2016: 57-78.

Debate: Border Walls and permanent 'refugee crises'. Specific readings will be uploaded on Moodle

Sessions 5 & 6 (March 25, April 1): Political Liberalism and Human Rights

Rawls' influential theory of justice as fairness, as articulated in his landmark book *A Theory of Justice* (1971) will be the starting point of these two sessions. In session 5 we will critically explore his two basic principles of justice, as well as inquire into key notions such as freedom, impartiality and equality of opportunity, which are central to political liberalism. We will try to trace the influence of such conception on conventional legal understandings of human rights and on international human rights law. In week 6, we will examine some of the most influential critiques of liberal (Rawlsian) approaches to human rights, including libertarian and egalitarian critiques taking as a focus the status of social and economic rights.

Session 5

Readings

Required

Will Kymlicka, *Contemporary Political Philosophy. An Introduction*, OUP (2002): Chapter 3: 53-79; and Chapter 4:102-115.

Jack Donnelly, *Universal Human Rights in Theory and in Practice*, Cornell UP (2013), Chapter 4: 55-71.

Legal Documents

Preambles and text of the UN Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

International Covenant on Economic, Social, and Cultural Rights, 1966.

European Social Charter, Council of Europe (see: collected text 2015 edition).

Optional

James Nickel. *Making Sense of Human Rights*, 2nd ed., Blackwell Publishing (2007): Chapter 9.

John Rawls. *A Theory of Justice*, Harvard UP (1971). *Political Liberalism*, Columbia UP (1993), "The idea of an Overlapping Consensus": 143-150; "Justice as Fairness: Political not Metaphysical", *Philosophy and Public Affairs*, Vol. 14 (1985), No. 3: 223-251;

Session 6

Readings [tbc]

Will Kymlicka, Will. *Contemporary Political Philosophy. An Introduction*, OUP (2002): Chapter 3: 53-79; and Chapter 4:102-115.

Stephen Holmes, Cass Sunstein (ed.) *Why Liberty depends on Taxes*, New York, Norton (1999): 35-48; 113-117, 211-219.

Samuel Moyn, (2018). "A Powerless Companion: Human Rights in the Age of Neoliberalism", *Law and Contemporary problems*, vol. 77, 2014.

Michael Sandel, *Justice. What's the Right thing to Do?*, New York, Penguin (2009): Chapter 6, The Case for Equality: 140-166.

Philosophical Perspectives on Economic and Social Rights (excerpts): Steiner, Henry J., Alston P., Goodman, Ryan (eds.). *International Human Rights in Context*. 283-292.

Optional

Elisabeth Anderson, "What Is the Point of Equality?", *Ethics* 109 (1999): 287–337.

Isaiah Berlin. "Two concepts of liberty", in I. Berlin, *Four Essays on Liberty*, London: Oxford UP, 1969

Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*, Harvard University Press (2000): 11-14: 65-71.

Jonathan Wolff, "Not Bargaining for the Welfare State", *Analysis*, 52/2 (1992): 118-25.

Debate: Status on Social and Economic Rights

Sessions 7 & 8 (April 15, 22): Communitarianism and Group (human) Rights

This session explores the communitarian critique of liberalism and, in particular, the objections to liberal conceptions of human rights. We will start by exploring communitarian approaches that usually stress the limits of the "individual rights talk" to offer a proper account of human identity and of the role played by groups and communities. We will try to single out different 'communitarian' notions of rights, identity and culture and discuss how they could be used to justify alternative conceptions of human rights. A specific practical context is given to the discussion in session 8, which will focus on assessing the role played by communitarian arguments in debates over indigenous rights.

Session 7

Readings

Required

Michael J. Sandel. *Justice. What's the Right thing to Do?*, Farar, Sraus and Giroux, New York (2009): 244-269 (or) Will Kymlicka. *Contemporary Political Philosophy. An Introduction*, OUP (2002): Chapter 6: 208-210 (Introduction); 212-221.

Jones, Peter. "Human Rights, Group Rights and People's Rights", *Human Rights Quarterly*, vol. 21, 1, 1999, 80-101.

I.M. Young, "Equality for Whom? Social Groups and Judgments of Injustice", *The Journal of Political Philosophy*, volume 1, n.9, 2001: 1-18.

Relevant International Legal Documents: Universal Declaration of Human Rights (1948); International Covenant on Economic, Social, and Cultural Rights (1966); The African Charter on Human and People's Rights (1981); UN Resolution 47/135, 1992, containing the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; UN Human Rights Committee, General Comment on Art. 27 of the ICCPR (1994); Framework Convention for the Protection of National Minorities (Council of Europe, 1995); UNESCO Universal Declaration of Cultural Diversity (2003); Fribourg Declaration of Cultural Rights (2007); United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

Optional

Michael McDonald. "Should Communities Have Rights? Reflections on Liberal Individualism", *Canadian Journal of Law and Jurisprudence*, vo. IV. No. 2, July 1991, 217-237 (read only 225-237 – skim the rest).

Chandran Kukathas. "Are There Any Cultural Rights?", *Political Theory* 20, No 1 (1992): 105-139.

Jovanović, Miodrag. *Collective Rights. A Legal Theory*, Cambridge University Press, 2012.

Neus Torbisco-Casals, *Group Rights as Human Rights. A Liberal Approach to Multiculturalism*, Springer 2006.

Session 8

Required

Tully, James. "The Struggles of Indigenous Peoples for and of Freedom", in (eds) Ivison, Duncan, Patton, Paul & Sanders Will *Political Theory and the Rights of Indigenous Peoples*. Cambridge UP, 2000. Chapter 3: 36-59.

McCorquodale, Robert. Group Rights (book chapter) in D. Moeckli, S. Sangeeta & S. Sivakumaran (eds.), OUP, 2014 (third edition): 344-346; 361-365).

Makau W. Mutua. 'Savages, Victims and Saviours: The Metaphor of Human Rights,' *Harvard International Law Journal* 42 (2001): 201–245

Tobin, Brendan. *Indigenous Peoples, Customary Law and Human Rights. Why Living Law Matters*, Routledge 2014. Introduction, Chapter 2 (Self-Determination in Practice) and 5 (Ancestral Rights Recovered: Lands and Traditional Territories).

Optional

Moore, Margaret. 'Internal Minorities and Indigenous Self-determination', in A. Eisenberg and J. Spinner-Halev, *Minorities within Minorities. Equality, Rights and Diversity*, Cambridge University Press, 2005 (chapter 13). Pulitano, Elvira (ed.) *Indigenous Rights in the Age of the UN Declaration*. Cambridge University Press, 2012 (see especially introduction by editor).

Focus case: *Debate on Land Claims and Indigenous Rights*

IACtHR (InterAmerican Court of HR): *Saramaka People v. Suriname*, Judgment of November 28, 2007. Series C No. 172.

Kitchwa Indigenous Peoples of Sarayaku v. Ecuador. Judgment of June 27, 2012.

Sessions 9 & 10 (April 29, May 6): **Multiculturalism and human rights**

The debate on multiculturalism emerges in part as a reaction against liberal nationalist views of the state and society that are deeply entrenched in the classical human rights doctrine, and has had a significant impact on traditional debates on freedom of religion, non-discrimination and gender equality. In this session, we will discuss multicultural approaches to human rights emerging from a broad range of (interdisciplinary) literature that focuses on issues of identity and rights. The scope and limits of group-differentiated rights and the so-called "politics of recognition" will be scrutinised against the

backdrop of European debates on Islamic veils and, more generally, over models of immigrant integration.

Session 9

Readings

Required

Kymlicka, Will. *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford, Clarendon Press, 1995: chapter 2 (10-33).

Fraser, Nancy. "From redistribution to Recognition", in *Justice Interruptus. Critical Reflections on the 'Post-Socialist' Condition*, Routledge, 1997 (also in the *New Left Review*, 212, 1995): 68-74

Taylor, Charles. "Multiculturalism and the Politics of Recognition", in A. Gutmann (ed.), *Multiculturalism. Examining the Politics of Recognition*, Princeton UP (1994): focus on sections III, IV, V (skim the rest).

Boaventura de Sousa Santos. "Towards a Multicultural Conception of Human Rights", in M. Heatherstone & S.Lash (eds), *Spaces of Culture: City, Nation, World*. London, Sage, 1999 (Chapter 12).

Optional

Appiah, Anthony K. *The Ethics of Identity*, Princeton UP, 2005: 62-71.

Okin, Susan M. "Is Multiculturalism Bad For Women?", in J. Cohen, M. Howard and M. Nussbaum (ed.), *Is Multiculturalism Bad For Women*, Princeton UP (1999): 9-24.

Okin, Susan M. "Multiculturalism and Feminism: No Simple Question. No Simple Answers", in Eisenberg, A. and Spinner-Halev, J. (ed.), *Minorities within Minorities: Equality, Rights and Diversity*, Cambridge UP (2005).

Torbisco-Casals, Neus. *Group Rights as Human Rights. A Liberal defence of Multiculturalism*, Berlin, Springer 2006.

Session 10

Debate on veils and human rights

Required

ECTHR cases: *Dahlab v. Switzerland*, Application no. 42393/98, 15 Feb. 2001. *Dogru v. France*, Application no. 27058/05, 4 Dec. 2008; *SAS v. France*, Application no. 4385835/11, 1 July 2014

Multani v. Commission Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6 (Supreme Court of Canada)

R v Headteachers and Governors of Denbigh High School (ex parte Shabina Begum) [2006] UKHL 15 (House of Lords, UK).

Read at least one of the following pieces:

McCrea, Ronan. The Ban on the Veil and European Law, *Human Rights Law Review*, 2013 (1).

M.Goldrick, Dominic. *Human Rights And Religion: The Islamic Headscarf Debate In Europe*, 2006, Chapters 1, 9 and 10.

Dworkin, G. "Paternalism", *The Monist* 56: 64-84.

Kramer, Jane. *Taking the Veil. How French Public Schools became the Battleground in a Culture War*, 22 *The New Yorker* 58, 2004.

Phillips, Anne. *Multiculturalism without culture*, Princeton UP, 2007: 114-119 ('Veiling').

Torbisco-Casals, Neus, "Multiculturalism, Identity Claims and Human Rights: From Politics to Courts", *Law & Ethics of Human Rights*, 2016 (sections 2 and 4).
Volpp, Leti. "Feminism versus Multiculturalism", *Columbia Law Review*, June 2001, 1181-1218.

Sessions 11 & 12 (May 13, 20): Gender Equality and Human Rights: Feminist critiques

The last two sessions will focus on exploring feminist critiques of liberal, communitarian and multicultural conceptions of human rights. We will begin by exploring these critiques as well the problem with prevailing understandings of freedom and non-discrimination. In this context, we will examine the meaning of contested concepts such as 'gender' and 'equality'. Issues such as affirmative action and surrogacy will be debated in the second session to illustrate different variants of feminism and the implications of the theories explored.

Readings and focus case tbc

Session 13 (May 27): Presentations of response papers and Q&A

In this concluding session we will return to re-evaluate questions of human rights legitimacy and authority in light of what we have learned throughout the previous discussions. There will be space for brief presentations of response papers that address this preoccupation as well for addressing persisting questions.

Session 14 (June 3): Exam Day