

LEGAL THEORY/ JURISPRUDENCE SUMMARY



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TABLE OF CONTENTS

INTRODUCTION	4
POSTIVISM AND THE NATURE OF LAW(S)	5
What is a legal system	5
(i) <i>Obligation</i>	5
(ii) <i>Law as a System of Rules</i>	6
(iii) <i>Legal Obligations and Morality</i>	10
LAW AND FORCE	11
Law as a way of Regulating Human Conduct	11
(i) <i>Austin: Command theory</i>	11
(ii) <i>Hart</i>	11
(iii) <i>Kelsen</i>	12
NATURAL LAW THEORY AND THE NATURE OF LAW(S)	12
What IS a legal system?	12
(i) <i>Adjudicating in hard cases: Positivist</i>	13
(ii) <i>Adjudicating in hard cases: Naturalist View Point</i>	13
(iii) <i>The moral/political principles</i>	14
(iv) <i>Is naturalism undemocratic?</i>	15
(v) <i>Judges and the political order</i>	15
(vi) <i>Law as integrity</i>	16
(vii) <i>Dworkin's critics</i>	17
LEGAL OBLIGATION, CIVIL DISOBEDIENCE & UNJUST LAWS	21
Legal Obligations	21
(i) <i>Hart on the legal obligations of citizens</i>	21
(ii) <i>Dworkin on the legal obligations of citizens</i>	21
Civil Disobedience	22
(i) <i>Plato's Crito-on the citizen's right to disobey unjust laws</i>	22
(ii) <i>Michale Walzer on Civil Disobedience</i>	24
Unjust Laws	29
(i) <i>Dyzenhaus on the role of the Judiciary in apartheid South Africa</i>	29
(ii) <i>Dyzenhaus' theory of the rule of law</i>	31

RULE OF LAW THEORY	34
Conceiving the Rule of Law?	34
(i) <i>Rule of Law versus the Rule of Power/Persons</i>	34
(ii) <i>A Standard Account?</i>	34
(iii) <i>Standard Account as a Formal Conception of the Rule of Law?</i>	35
(iv) <i>The Formal/Substantive distinction</i>	36
(v) <i>The importance of institutions</i>	36
Which Conception of the Rule of Law is Preferable	37
(i) <i>Debating the Rule of Law</i>	37
Does the Rule of Law require a Law of Rules	39
(i) <i>Braithwaite's Theory of Legal Certainty</i>	40
Legal Reasoning and the Rule of Law	41
(i) <i>Legal Realism</i>	41
(ii) <i>Legal Formalism</i>	42
RIGHTS THEORY	43
What are Rights?	43
(i) <i>Absolute v non-absolute rights</i>	43
What do Rights Do?	43
Constitutionally Entrenched Rights	44
(i) <i>Why do people want to Constitutionalise rights?</i>	44
(ii) <i>Judicial Power and Rights</i>	45
(iii) <i>Rights and Legal Authority</i>	46
(iv) <i>Law, Rights and Democracy</i>	46
(v) Constitutional rights as collective choices	47
LAW AND DEMOCRATIC THEORY	48
What about Democracy?	48
Pos-structuralism and Democracy: implications for the modern legal system	48
(i) <i>Post-structuralise theory of Democracy: the challenge to Liberal Democracy</i>	48
PUBLIC AND PRIVATE DIVIDE: THE LIMITS OF THE LAW	52
Central Classic Tradition	52
Liberalism	53

(i) J.S. Mill	53
(ii) Contemporary liberals	54
Criticisms of Liberalism	55
Criticism of Devlin	55
CRITICAL LEGAL THEORIES	55
Introduction	55
Marxism	56
Critical Legal Studies	57
Feminist Legal Theory or Law and Gender	57
(i) Difference kinds of Feminist Legal Theory	58
SOURCES CONSULTED	59

INTRODUCTION

Legal Theory, or Jurisprudence, is the study of philosophies of law. It also encompasses the examination of legal systems from a theoretical and philosophical perspective. Legal theorists recognise that the law of a nation state does not just exist, nor that its development happened, independent of intellectual traditions. Legal theory and jurisprudential enquiry considers the broader implications of legal systems and the practice of law. In many respects legal theory is the glue, which binds all areas of law and legal practice.

This summary outlines the major aspects and approaches to thinking about the law, legal systems and western legal philosophies. It is written to give a basic outline and understanding of major tenets and developments within legal thought and provides an introduction to fundamental principles which underpin New Zealand's and other nation's legal systems.

This summary is structured in a way to introduce major aspects of legal thought. It is by no means definitive in its coverage of legal theory traditions. This summary is intended to be supplemented with wider reading in order to understand the finer nuances of theorists' arguments and to develop individual critical thought. This summary is merely a

starting point in which to revise major aspects of legal thought and to introduce students to the idea of critically analysing the state of the law at present.

This summary covers the major traditions of legal thought including positivism, natural law theory, as well as legal obligations, law and morality, civil disobedience, and unjust laws. It also covers legal philosophy such as rights based legal discourse, the rule of law, law and democracy and post-structural legal theory. The summary concludes with a brief consideration of critical legal theory and the interaction of law and gender, or feminist legal theory.

Two broad groups of ‘legal theory’ (According to Roger Cotterrell)

- Analytical or normative theory: is based on the philosophical concepts. The aim is to explain the character of law solely in terms of the conceptual structure of legal doctrine, and the relationships between rules, principles, concepts and values within the doctrine.
- Empirical legal theory: is the theory that seeks to explain the character of law in terms of historical and social conditions. It treats the doctrinal and institutional characteristics of law emphasised in normative legal theory as explicable in terms of their social origins and effects.

POSITIVISM AND THE NATURE OF LAW(S)

What is a legal system?

There are **three main perspectives** taken by ‘**positivists**’ on what the law is and what constitutes a legal system:

- (i) A system of obligations for citizens and state;
- (ii) A system of rules that regulate citizen conduct;
- (iii) A system of obligations regulating morality.

(i) Obligation

- A prominent feature of law is that its existence means that certain kinds of human conduct are no longer optional and can be considered mandatory;
- **Two forms of non-optional conduct:**
 1. When one is coerced/obliged or forced to act under threat of force (eg. by a gunman); and
 2. When one is subject to an obligation when one acts according to norms which withdraw certain conduct from the free options of what one may do.
- Whether a person is obliged/obligated by a law is not a matter of what they think but, rather, a matter of whether or not the social conditions for being obliged or obligated exist.

(ii) Law as a System of Rules

Group habits vs. social rules:

- Group habits involve convergent behaviour between members of a social group (without a rule requiring that behaviour); and
- Social rules are a general standard to be followed by the group as a whole.

Rules:

- Deviations from rules are met with criticism and threatened deviations are met with pressures for conformity;
- Breaches of a rule are often met with sanctions;
- Deviation from a rule is accepted as good reason for the making of the criticism; and
- The criticism/pressure is generally seen as legitimate, and is expressed with normative language (eg. ought, must, right, wrong).

Requirements for the existence of a rule:

- Convergence of behaviour;
- Sanction/criticism for breach of that behaviour;
- An element of normativity in the following of rules and sanctioning of

deviation;

- Rule treated as a standard of behaviour; and
- The criticism/sanction is regarded as justified.

Rules impose obligations when:

- Serious social pressure exists to conform;
- Rule is thought to be implied because is believed to be necessary to the maintenance of social life or some implied feature of it;
- Rule may conflict with what the person who owes the duty may wish to do and may involve a sacrifice/renunciation because of a conflict between duty and self-interest.

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