

**LEGAL THEORY /  
JURISPRUDENCE**

**SUMMARY**

**2011**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

# CONTENTS

<b>INTRODUCTION</b>	<b>4</b>
<b>POSITIVISM AND THE NATION OF LAW/S</b>	<b>5</b>
What is legal system?	5
Obligation	5
Law as a System of Rules	6
Legal Obligations and Morality	11
<b>NATURAL LAW THEORY AND THE NATURE OF LAW/S</b>	<b>12</b>
What is a legal system?	12
Adjudicating in hard cases: Positivist View Point	12
Adjudicating in hard cases: Naturalist View Point	13
Is naturalism undemocratic?	15
Judge's and the political order	15
Law as Integrity	16
Dworkin's critics	17
<b>LEGAL OBLIGATION, CIVIL DISOBEDIENCE &amp; UNJUST LAWS</b>	<b>22</b>
Legal Obligations	22
Hart on the legal obligations of citizens	22
Dworkin on the legal obligations of citizens	23
Civil Disobedience	23
Plato's Crito – on the citizen's right to disobey unjust laws	24
Michael Walzer on Civil Disobedience	25
Unjust Laws	31
Dyzenhaus on the role of the Judiciary in apartheid South Africa	32
Dyzenhaus' theory on the RoL	34
<b>RULE OF THE LAW THEORY</b>	<b>37</b>
Conceiving the Rule of Law?	37
(i) Rule of Law versus the Rule of Power/Persons	37
(ii) A Standard Account?	38
(iii) Standard Account as a Formal Conception of the Rule of Law?	38
(iv) The Formal/Substantive distinction	39
(v) The importance of institutions	40
Which Conception of the Rule of Law is Preferable?	40

Debating the Rule of Law	40
Does the Rule of Law require a law of rules?	42
Braithwaite's Theory of Legal Certainty	44
Legal Reasoning and the Rule of Law	44
Legal Realism	45
Legal Formalism	45
<b>RIGHTS THEORY</b>	<b>47</b>
What do Rights Do?	47
Constitutionally Entrenched Rights	47
Why do people want to Constitutionalise rights?	47
Judicial Power and Rights	48
Rights and Legal Authority	50
Law, Rights and Democracy	50
Constitutional rights as collective choices	51
<b>LAW AND DEOCRATIC THEORY</b>	<b>52</b>
Law about Democracy?	52
Post-structuralism and Democracy: Implications for the modern legal system	<b>52</b>
Post structuralist theory of Democracy: The challenge to Liberal Democracy	52
<b>CRITICAL LEGAL THEORIES</b>	<b>58</b>
Introduction	58
Feminist Legal Theory or Law and Gender	59
<b>SOURCES CONSULTED</b>	<b>60</b>

## 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 Australia'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.

## **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:

- A system of obligations for citizens and state;
- A system of rules that regulate citizen conduct;
- A system of obligations regulating morality.

### **Obligation**

- Prominent feature of law is its existence means that certain kinds of human conduct are no longer optional and can be considered mandatory;
- Two forms of non-optional conduct:
  - I. When one is coerced/obliged or forced to act under threat of force (eg. by a gunman); and
  - II. 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.

### **Law as a System of Rules**

Group habits vs. social rules:

- Group habits convergent behaviour btw members of a social group (without a rule requiring that behaviour); and
- Social rules a general standard to be followed by the group as a whole. If not ) criticism.

Rules:

- Deviations meet with criticism and threatened deviations meet with pressures for conformity; and
- Breaches of a rule are often met with sanctions; and
- Deviation from the 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.

*Law as primary and secondary rules*

Primary rules:

- Require persons to do/abstain from actions whether they wish to or not; and
- Impose duties; and
- Concern actions involving physical movement or changes.

Secondary rules:

- Allow persons by doing or saying certain things to introduce/modify/extinguish/influence/control primary rules; and
- Confer powers, public or private;
- Provide for operations which lead not merely to physical movement/change but to the creation or variation of duties or obligations.

Defects of a regime of solely primary rules:

- Uncertainty:

- No means to determine what are or what the precise scope of a rule is because there would be no rule about an authoritative text/official/process of determination (these would be secondary rules);
- Remedy – Introduce a rule of recognition or set of rules becomes a system of rules.
- Static quality:
  - Could only change through slow process of change in conduct (optional, habitual, obligatory, or reverse); there is no means of deliberately adapting the rules;
  - Remedy – introduce rules of change and empower an individual/body to introduce new rules and eliminate old rules such as parliamentary legislation.
- Inefficiency:
  - Disputes about the rules will remain unsolved without an agency empowered to finally and authoritatively ascertain the outcome. Punishment of offenders will be inefficient for the same reason;
    - Remedy – Introduce rules of adjudication to empower individuals to make authoritative determinations, or whether the rules have been violated on a particular occasion such as judicial power.



**To order the complete version of the lawskool Legal Theory / Jurisprudence Summary please visit [www.lawskool.com.au](http://www.lawskool.com.au)**