

**LEGAL THEORY /
JURISPRUDENCE
SUMMARY 2010**



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IRAC method of completing exams

- Issues** - Outline the issues that you are going to discuss.
- Rules** - Define the legal rules that are relevant to the question.
- Application** - Apply the legal rules to the facts of the question (this is the hard part!).
- Conclusion** - Tie things up, usually in the form of an advice to your hypothetical client.

Always use your reading time wisely to **PLAN YOUR ANSWER** before writing. This is of utmost importance as it will help you clarify your thoughts and ensure that you avoid following desperate exam strategies that unprepared students commonly resort to, such as:

- i) 'the kitchen sink' i.e. spilling all of your knowledge that is vaguely related to the topic onto the exam paper and hoping for the best.
- ii) 'the garden path' i.e. going off on an irrelevant tangent

Remember that the **APPLICATION IS THE MOST IMPORTANT SECTION** of your answer and should take up the bulk of your time. The actual conclusions you reach are often superfluous. Rather, your marker will be most interested in *how you arrived* at your conclusion.

Question ONE: Model Answer

(In legal theory subjects most assessments would be on a 'take home' basis so you can effectively evaluate and ponder about the issues).

Fuller raised the point that no constitution¹ can be "self executing"². He believed for a law to be effective we must have respect and 'active belief' that it is a morally good law.³

A contrary view was raised by exclusive positivist Raz who objected to Fuller's idea that moral acceptance is required to lift a law to legitimacy. Instead he believing only 'formal sources'⁴ of law can do so because law is a purely factual matter.

Let us consider an oppressive dictatorship. If they were to write a new constitution there is little doubt that 'general acceptance'⁵ would be needed to 'execute'⁶ the law. The citizens may not accept the laws or constitution but choose to obey out of fear, thus the constitution can be 'self executing'. However, for it to be *effective*, 'general acceptance' that it is morally good would be required. Fear and repression *may* execute the constitution but it does not guarantee a long term *effective* functioning of a legal system. As Bix summarises, "[there is a] need for co-operation and reciprocal obligation between officials and citizens for a legal system to work."⁷ Thus Fuller's point can only be partly defended.....

1 Or law for that matter.

2 Meaning it needs acceptance from the public for it to be legitimate.

3 Belief that it is "necessary, right and good."

4 Formal sources of law being: statutes, judicial decisions and the constitution.

5 L Fuller, 'Positivism and Fidelity to Law: A reply to Professor Hard' (1958) 71 Harvard Law Review 630

6 The word 'execute' is defined as 'put into effect' from the Oxford Dictionary, 10th Edition.

7 B Bix, 'Inclusive versus exclusive legal positivism' in B Bix, Jurisprudence: Theory and Context (3rd Ed, Sweet & Maxwell, London 2003) 47-50.

Question TWO: Model Answer

Schauer asserted that “it is exactly a rule’s rigidity even in the face of applications that would ill serve its purpose that renders it a rule,”⁸ to which I do not fully agree. In essence he believes in formalism,⁹ applying a rule to its literal meaning *even if* it frustrates the purpose.

A contrary view was raised by Fuller. Schauer believed:

“There is something shared by all speakers of a particular language which enables one speaker of that language to be understood by another even if the second knows nothing about the circumstances or context in which the first spoke.”¹⁰

Therefore for Schauer there is a ‘literal meaning’ to a rule.¹¹ Fuller stressed that we can only know the meaning of a rule if we interpret its purpose and that it is bizarre to follow a rule if it does not achieve its purpose. Instead he advocates a ‘purposive’ approach, asserting that “judges should ignore the plain meaning of legal rules when the plain meaning dictates a result which defeats the rule’s apparent purpose.”¹²

Let us consider a rule saying shoplifters shall be prosecuted. A woman steals medication for her baby¹³ and is trialed for shoplifting. Despite the moral dilemma that the judge may be faced with, the woman should be punished because it is an ‘easy case’.¹⁴ If we do not do this for ‘easy cases’ we are giving judges too much power to inject their own beliefs and sympathies towards the woman. Interpreting the purpose¹⁵ would produce a range

8 F Schauer & W Sinnott-Armstrong, ‘The Interpretation of Legal Texts’ In F Schauer & W Sinnott-Armstrong (eds) *The Philosophy of Law* (Fort Worth, Harcourt Brace, 1996) 122-4.

9 Though Schauer does admit there is no real good achieved by this approach he believes it would cause less problems than a purposive approach.

10 Meyerson, above n 8, 68.

11 For Fuller there is no such thing as a ‘literal meaning’

12 Meyerson, above n 8, 69.

13 Let us assume that he would have died if she did not retrieve the medication for him or her.

14 It is an ‘easy case’ because her situations clearly falls under this rule. Meyerson, above n 8, 65.

15 As Fuller suggests we should do.

of different purposes leading to retroactivity¹⁶. Hence for the 'easy cases' I defend Schauer's claim that we must make decisions according to the literal meaning regardless of purpose.....

Question THREE: Model Answer

It appears we enjoy legal rights granted from a variety of sources which are enforceable through the courts. However the issue of the enforceability of our 'moral right', often classed as 'human rights' is a contentious topic. There is a plethora of debates centred on *how* human rights should be protected in the legal system. However we first need to answer the preliminary question of whether human rights should be recognised in law at all.

Firstly it should be identified that human rights are derived from the inherent dignity of a human and so cannot be abrogated, they exist simply because we do. However these rights do not have legal enforceability and arguably is not adequately protected. Therefore the issue becomes whether there is a need for legal recognition of these rights. The following will examine some major objections against a legal recognition of human rights.

One prominent argument against human rights is advanced by the utilitarians. It opposes human rights due to its individualistic approach and potential to override the priority of the majority. It is argued that human rights may act as an impediment towards the governments' achievement of social goals that will maximise the benefit for the society. There are obvious problems with the utilitarian's simplistic approach of weighing up the benefits of enforcing an individual's rights as opposed to the benefit to society of not enforcing these rights. It may be reasonable in *some circumstances* to balance the interests of parties in a utilitarian way, accepting losses for some people in return for benefits for others. However this is not true of our *important interests*, which is precisely

¹⁶ Retroactivity as a result of different purpose derived from different judges is a source of injustice itself.

what human rights attempt to protect. Therefore these rights serve as markers for basic interests which individuals cannot be expected to sacrifice for the 'greater good'. Hence the utilitarian argument against legal recognition of human rights is unconvincing.....



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