

**LEGAL THEORY /
JURISPRUDENCE
SUMMARY**



LAWSKOOL.COM.AU

LAWSKOOL PTY LTD

CONTENTS

TOPIC 1: INTRODUCTION5

 What is a legal system?6

 (i) Obligation..... 6

 (ii) Law as a System of Rules 7

 (iii) Legal Obligations and Morality 11

TOPIC 3: LAW AND FORCE12

 Law as a way of regulating human conduct – different scholarly approaches .12

 (i) Austin: Command theory 12

 (ii) Hart: Objection to Austin..... 12

 Hart’s view:..... 13

 (iii) Kelsen’s theory of law 13

TOPIC 4: NATURAL LAW THEORY AND THE NATURE OF LAWS14

 What is a legal system? 14

 (i) Adjudicating in hard cases: Positivist View Point 14

 (ii) Adjudicating in hard cases: Naturalist View Point 15

 (iii) The moral/political principles: 16

 (iv) Is naturalism undemocratic? 16

 (v) Judges and the political order 17

 (vi) Law as Integrity 17

 (vii) Dworkin’s critics 18

TOPIC 5: LEGAL OBLIGATION, CIVIL DISOBEDIENCE & UNJUST LAWS...23

 Legal Obligations

 (i) Hart on the legal obligations of citizens 23

 (ii) Dworkin on the legal obligations of citizens 24

 Civil Disobedience 24

 (i) Plato’s Crito- on the citizen’s right to disobey unjust laws 24

 (ii) Michael Walzer on Civil Disobedience 26

 Unjust Laws

 (i) Dyzenhaus on the role of the Judiciary in apartheid South Africa 31

 (ii) Dyzenhaus’ theory of the rule of law 33

TOPIC 6: RULE OF LAW THEORY36

 Conceiving the Rule of Law?.....36

 (i) Rule of Law versus the Rule of Power/Persons 36

 (ii) A Standard Account? 36

(iii) Standard Account as a Formal Conception of the rule of law?	37
(iv) The Formal/Substantive distinction	38
(v) The importance of institutions.....	38
Which Conception of the rule of law is Preferable?.....	39
(i) Debating the rule of law	39
Does the rule of law require a law of rules?	41
(i) Braithwaite's Theory of Legal Certainty	42
Legal Reasoning and the rule of law	43
(i) Legal Realism.....	43
(ii) Legal Formalism	44
TOPIC 7: RIGHTS THEORY	45
(i) Absolute v non-absolute rights:	45
What Do Rights Do?.....	45
Constitutionally Entrenched Rights	46
(i) Why do people want to Constitutionalise rights?	46
(ii) Judicial Power and Rights.....	47
(iii) Rights and Legal Authority.....	48
(iv) Law, Rights and Democracy	48
(v) Constitutional rights as collective choices	49
TOPIC 8: LAW AND DEMOCRATIC THEORY	51
What about Democracy?.....	51
Post-structuralism and Democracy: implications for the modern legal system .	51
(i) Post-structuralist theory of Democracy: the challenge to Liberal Democracy.....	51
TOPIC 9: PUBLIC AND PRIVATE SPHERES: THE LIMITS OF LAW	55
Central Classic Tradition	55
Liberalism	56
(i) J.S. Mill	56
(ii) Contemporary liberals.....	56
Criticisms of Devlin.....	58
(i) Hart.....	58
TOPIC 10: CRITICAL LEGAL THEORIES	59
Introduction.....	59

Critical Legal Studies (CLS)	60
Feminist Legal Theory or Law and Gender	61
(i) Different kinds of Feminist Legal Theory	61
SOURCES CONSULTED.....	69

Sample

TOPIC 1: 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.

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.

TOPIC 2: 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 it 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

For further explanation of primary and secondary rules, see the section on Hart's theory of primary and secondary rules in "LAW AND FORCE: *Law as a way of regulating human conduct*" on page 11.

Primary rules:

- Require persons to do/abstain from actions whether they wish to or not;
- 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;
- Confer powers, public or private; and
- 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* and a set of rules becomes a system of rules.



To order the complete version of the Lawskool Legal Theory and Jurisprudence Summary please visit www.lawskool.com.au