

LEGAL THEORY STUDY NOTES

INTRODUCTION TO LEGAL THEORY

- The law is a system of legal rules created, administered and adjudicated by various agents and institutions, and obeyed by all parties in society.
- For lawyers, this narrow understanding is seen as the best way to engage with the law.
- Studying the law requires an understanding of the content of the rules of law, understanding how to apply rules to the facts and learning standard legal procedures.
- The big question is; what is law? The prescriptive or normative question is what ought to be law?

Thinking About Law I: Law And Politics

- Society, culture, morality, gender, class, race religion, disability, unemployment, homelessness, poverty, news, art, fiction, pop culture, drama and film all have a bearing on law.
- Lawyers are often told to 'leave their politics at the door', which is a crude rendition of legal positivism. Legal positivists separate the is and ought questions and value certainty, stability, formal equality and the rule of law.
- Dworkin and Fuller present the naturalist anti-positivism debate, which is evident in human rights law.
- The law requires impartially reached decisions, which any rational person would come to with all relevant information and analytical skills. This requires a rule-based approach to legal reasoning.
- However, impartiality in the law is also critiqued as it represses differences in pursuit of similarities and thus denies individuality and justice. Feelings, affiliations and commitments are denied.
- Further, true impartiality is impossible to achieve, as people cannot be separated from their personal characteristics, beliefs, values, history, class or gender.
- This justifies the exercise of power by officials, who the public trust if they act rationally and objectively. Their power will not be questioned.
- The Law of the Dominant is another legal political theory which reinforces social, political and economic hierarchies, which are then masked to appear fair, natural and equal.
- There is a difference between formal and substantive equality.
- In Australia, we have a western, white male heteronormative culture which is reflective in the legal system.

Thinking About Law II: Law and Art

- Law is an objective response to emotion, which includes fear, anxiety, trust, reliance, etc.
- The SPQR of Rome and Blind Justice are examples of art that also have a legal purpose.
- Images are a tool for political, legal and social communication.

Thinking About Law III: Law and History

- The interaction of law and history is most clearly seen with the laws regarding colonialism, including in Australia.
- There is an assumption that the law is an inherently just or legal process due to the rule of law. This is not always true, particularly when the law fails to recognise differences.

LAW, OBLIGATION, AND POWER

Early Legal Positivism – Austin And Marx

- John Austin was a liberal positivist from the 1800s.
- Karl Marx was a critical positivist from the 1800s, but 30 years younger than Austin.
- For these legal positivists, the question of 'what is law' revolved around the ¹nature of legal obligations, ²legitimacy of the law, ³risks posed by a legal system, ⁴nature of legal reasoning, ⁵power of the judiciary against the legislature, and the ⁶certainty and stability of law, or rule of law issues.
- Cattanach and Melchior is a key question for legal positivists. They argue that giving birth to a healthy child as a result of a negligent act is not an actionable harm. As there was no legal precedent on this