

LEGAL THEORY AND ETHICS

EXAM NOTES

1 CLASSICAL NATURAL LAW THEORY

- Classical Natural Law theorists are united by a belief that:
 - o There is a 'higher law' that has an independent existence from human law
 - o That this higher law can be derived/rationalised from various sources
- **MAIN COMPONENTS OF CLASSICAL NATURAL LAW THEORY**
 - o **Applies universally and immutably (applies to everyone everywhere; not context specific and does not change over time)**
 - o **Stands as a higher law (in some way superior to positive law)**
 - o **Discoverable through reason**
- Natural law theorists believe that human law ought to conform to permanent/higher standards of justice and morality. Natural law provides guidance for the creation of human laws
- Different natural law theories derive from different sources (divine revelation, religious texts, human nature, consideration of nature)
- Natural law is a harlot at the disposal of everyone - has been used to support slavery, denial of civil rights, denial of rights to women, revolution, etc.
- **Law's connection to morality** - The existence and content of law necessarily depends on its moral status.
 - o **Morality plays a role in determining legal validity**

1.1 NATURAL LAW IN ANTIQUITY

1.1.1 Plato

- Theory of forms - there is a distinction between what we see through our senses (perceived objects) and the forms which inform these objects. Every object we perceive corresponds to an ideal form expressing its essential nature.
 - o When we see a table, we recognise its similarity to the form of the table. This is how we can recognise all tables as members of the common genus, even though they may differ in their individual characteristics.
 - o Each individual object is like a shadow of its form. Examining objects allows us to deepen our understanding of the form but we can never directly perceive the form.
 - o Human life is like living in a cave. We are chained looking at the back of the cave. Things cross the mouth of the cave which we cannot see. All we see are the shadows. This is how the theory of the form operates - Everything we perceive with our senses is an illusion/shadow of real things (forms)
 - Although we can't see the forms we can use reason to work out what these ideals must be like. By observance of many objects we can rationally determine what the form is
- Plato says we should rely on reason rather than being tricked by perception (believing the object is the form). Reason leads us to conclude that there is an ideal world outside the one we experience through our senses.
- Connection to law - There are forms of everything in the world (including justice)
 - o The most perfect form is the *form of the good* which embodies the underlying purpose of the natural world and is therefore the source of all that is good and beautiful in both everyday objects and other forms.
 - o The purpose of law is to guide and educate citizens – to help them understand and appreciate the form of the good
 - Laws should be set up in accordance with these forms of the good and should be designed to help people understand the form of the good.

1.1.2 Aristotle

- Guided by the notion of teleology (purpose/goal driven).
 - o Natural things have a purpose/goal – a form to which they should aspire
 - o This can be reasoned through nature - Acorn inherently aspires to grow into a might oak
- Nature guides us to what is best. We can use reason to determine what that is.
- What is the purpose of humans?
 - o By nature, humans are political/social animals. Societies are a natural development deriving from our social impulses and needs
 - o For Aristotle, the purpose of political community is to reflect the shared objective of its members: namely to facilitate the pursuit of the good life
 - A well-ordered society is a necessary condition for the full flourishing of the human condition.
- Within political communities, law is needed to support social organisations so that we can achieve and maintain a virtuous life.
- **What kind of laws are required by this account of the good life?**

- 1. Natural law of universal application to all communities (no murder)
- 2. Conventional law applies to individual societies for their own needs (driving on left)

2 DUTY TO ADMINISTRATION OF JUSTICE AND THE COURT

2.1 OVER ARCHING DUTY TO THE ADMINISTRATION OF JUSTICE

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29 LOCAL LAWYER IS AN OFFICER OF SUPREME COURT
(1) A person becomes an officer of the Supreme Court on being admitted to the legal profession under this Act.

- You become an 'Officer of the court'
- This personal duty to the court is not delegable

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3. TERMS USED
In these rules court includes the following —
a) a tribunal exercising judicial, or quasi-judicial, functions;
b) a person or body carrying out an investigation or inquiry under statute or by appointment by a Parliament;
c) a Royal Commission;
d) a person or body conducting arbitration or mediation or any other form of dispute resolution
5 PARAMOUNT DUTY TO COURT AND ADMINISTRATION OF JUSTICE
A practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty, including but not limited to a duty owed to a client of the practitioner

- **Rondel v Worsley**
 - "...as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests."
- **Giannarelli v Wraith**
 - "The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary."
- What is "the court"?
 - Just because you are not in a 'court' doesn't mean rule doesn't apply
- What is the "administration of justice"?
 - Administration of justice
 - Rule of law- everyone should be subject to laws of jurisdiction
 - Laws should be stable, coherent and prospective
- Duty to educate clients
 - Sometimes you need to inform to client that your duty to court is paramount to your duty to the client

2.1.1 Question on Administration of justice

- In a well-known and often cited article about lawyers' duties, David Ipp (former judge of the Court of Appeal of the Supreme Court of NSW) notes that while the duty the lawyer owes to the administration of justice is the "**highest**" duty," it is "**at the same time the most intangible.**" One of the consequences of this 'highest duty' and its 'intangibility' is that sometimes attempts are made by lawyers to interpret the duty **narrowly** so as to minimise its impact on their ability to present the best possible case for their client.
- Q: What might be some of the consequences of adopting a narrow approach to the duty to the administration of justice?
 - "Highest duty"- cannot be attributed a meaning

- Detailed, narrow and specific codes are doomed to fail because they serve as means of evading duties that are not written down.
- Instead it needs to be more general so that specific conduct can be captured under a general duty
- Duties need to be read as a living instrument and evolves with time and changes in technology
- By defining 'highest duty' then people will abide by it by the lowest common denominator
- We need to be seen in public as ethical or public loses faith in us and we lose our self-regulation

2.2 DUTY TO OBEY AND UPHOLD RULE OF LAW

2.2.1 What if your client is engaging in criminal behaviour?

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6 OTHER FUNDAMENTAL ETHICAL OBLIGATIONS
(1) A practitioner must — (e) comply with these rules and the law.
(2) A practitioner must not engage in conduct, in the course of providing legal services or otherwise, which — a) demonstrates that the practitioner is not a fit and proper person to practice law; or b) may be prejudicial to, or diminish public confidence in, the administration of justice; or c) may bring the profession into disrepute .
16 MAINTAINING PROFESSIONAL INTEGRITY
(1) A practitioner must not attempt to further a client's matter by unfair or dishonest means

- "Legal practitioners are bound to uphold the rule of law, which is an essential element in any civilised and properly functioning community ... the community must be able to look to legal practitioners to shoulder responsibility for the maintenance of the rule of law to a greater extent than persons who do not make their livelihood from the law."
- Fidelity to the law - **LPCR - 6(1)(e), 6(2), 16(1)**
- Example: **LPCC v Brickhill** [2013] WASC 369
 - Lawyer did not obey the law