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CHAPTER 1: BASIC THEORIES OF LAW: RACISM AND THE LAW

What is understood by legal theory or theories of law?

Legal theory, or theories of law, delve into how the law functions and operates within societies. It provides a framework to better understand the law, legal systems, and legal reasoning.

The study of law, encompassing its origins, history, principles, and philosophical foundations, offers a profound comprehension of the subject. It demonstrates how the law has both influenced and been influenced by societies throughout history.

A deep understanding of legal philosophy and the theoretical and historical foundations of law ensures that individuals working within legal systems grasp the core principles of the law. This enables legal professionals to apply the law more effectively and to perform legal tasks and activities with greater competence.

5 basic theories of Canadian law:

1. Positivism
2. Natural Law
3. Feminist Perspectives on Law
4. Critical Legal Studies
5. Law and Economics

1. POSITIVISM

- Legal positivism is an analytical jurisprudence developed by legal thinkers such as Jeremy Bentham and John Austin.
- Legal positivism holds the view that source of a law should be the establishment of that law by some socially recognized legal authority.
- It is also of the view that there is no connection between law and morals since moral judgments cannot be defended or established by rational arguments or evidence.
- Positivists consider good law as the law that is enacted by proper legal authorities, following the rules, procedures, and constraints of the legal system.

RE NOBLE AND WOLF V. ALLEY **(1951)**

Background: A restrictive covenant in a deed drawn in 1933 provided that the lands therein described should never be sold to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood and that the restriction should remain in force until August 1, 1962.

The **Court of Appeal** agreed with the lower court's dismissal of Drummond Wren and instead looked at the law of restrictive covenants and held that the language used in the restriction on alienation was too uncertain.

It went onto the **Supreme Court of Canada** wherein the appeal was allowed. The covenant was struck down, nonetheless it was struck down on the basis of technical grounds and no discussion in regard to the public policy argument took place.

2. NATURAL LAW

The history of natural law philosophy can be traced back to Ancient Greece. Philosophers such as Plato, Aristotle, Cicero, Aquinas, Gentili, Suárez, etc. have used this natural law concept in their philosophies.

Natural laws derive their validity from moral order and reason, and are based on what is believed to serve the best interests of the common good.

In the perspective of natural law, good law is a law that reflects natural moral order through reason and experience. It is also important to understand the word moral here is not used in a religious sense, but it refers to the process of determining what is good and what is right based on reasoning and experience.

RE DRUMMOND WREN (1945) (ONT. H.C.)- **NATURAL LAW**

Background: A decision by the Ontario High Court regarding the validity of a racially motivated restrictive covenant. Drummond Wren brought forward an action to have a restrictive covenant placed on a parcel of land he owned to be declared invalid. The covenant prohibited the land to be sold to "Jews, or persons of objectionable nationality". This case pre-dates the creation of the Canadian Charter of Rights and Freedoms, and is an example of how issues regarding human rights were considered before being expressly stated in statute.

Held: Justice MacKay found the covenant to be invalid as a violation of public policy. He cited the recent signing of the United Nations Charter by the United Nations, to which Canada was a signatory, as a determining factor for public policy. He went on to state: *"...It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity..."* Shortly after the case was considered, but not followed, by Justice Schroeder ***Noble v. Alley.***

3. FEMINIST PERSPECTIVES ON LAW

Feminist perspectives on law look at the extent to which women are disadvantaged by legal rules and institutions that arise in societies that are patriarchal and as such subordinate the interests of women and fail to account for the experiences of women in the creation of legal rules.

Early formalist feminism: Person's Case and Edward's Case

Prior to 1916 women were not allowed to vote.

In 1918, Parliament passed the Women's Suffrage Act, SC 1918, c. 20, which gave every female British subject over age 21 the right to vote. Despite these political advancements, women remained barred from holding a Senate seat.

All relied on s. 24 of the British North America Act of 1867 which stated that only "qualified persons" were eligible to be appointed to the Senate.

In 1928, the Supreme Court of Canada ruled that women were not "persons" according to the British North America Act and therefore were ineligible for appointment to the Senate. However, the women appealed to the Privy Council of England, Canada's highest court at that time, which in 1929 reversed the Supreme Court's decision. The Edwards Case opened the Senate to women, enabling them to work for change in both the House of Commons and the Upper House. Moreover, the legal recognition of women as "persons" meant that women could no longer be denied rights based on a narrow interpretation of the law.

Contemporary Feminism: Morgentaler Case- a landmark decision for reproductive rights for women

20th century feminism mixes with sociological and criminology theories and evidence. Case of abortion was one of the most continuous areas of public debate and good start to examine feminist theory in practice.

Dr. Henry Morgentaler was a leader who risked his life to provide women access to safe abortions.

He was integral in the Supreme Court of Canada's decision in ***R v. Morgentaler (1988)*** to overturn the abortion law in Canada as unconstitutional, violating section 7 of the Charter of Rights and Freedoms.

4. CRITICAL LEGAL STUDIES (CLS)

Critical legal studies (CLS) is a theory which states that the law is necessarily intertwined with social issues, particularly stating that the law has inherent social biases.

Proponents of CLS believe that the law supports the interests of those who create the law. As such, CLS states that the law supports a power dynamic which favors the historically privileged and disadvantages the historically underprivileged.

CLS finds that the wealthy and the powerful use the law as an instrument for oppression to maintain their place in hierarchy. Many in the CLS movement want to overturn the hierarchical structures of modern society and they focus on the law as a tool in achieving this goal.

Ref: ***R v. Morgentaler (1988)***

5. LAW AND ECONOMICS

Law and economics theories look at law differently, less grounded in moral theory and more in ideas about efficiency (as opposed to feminism, which deals with producing equality).

Application of law and economics can be seen in various areas of law for example Contract Law, Criminal Law, Law of torts, Family law, Property Law etc.

Efficiency tends to be defined in terms of an ideal where the welfare of each of the relevant parties can no longer be maximized except at the expense of other parties, referred to as a state of "Pareto optimality."

Essentially, per this theory, one examines how efficient an outcome is based on the legal rule applied.

SIMILARITIES / DIFFERENCES IN THEORIES

Both positivism and natural law are concerned with concepts of law and justice, even if they diverge as to how the two relate to one another. Both are also based largely on Western, Liberal ideas about law and society.

In contrast, feminism and critical studies take issue with the liberal basis of law and its relationship to justice; both attempts to establish alternative versions of what justice might be. Law and economic theories look at law from less of a moral theory, and more in ideas about efficiency.

R. V. MORRIS 2021 ONCA 680

The vital question answered in the case is – how should trial judges take into consideration evidence of anti-Black racism at the sentencing stage of a criminal prosecution.

Background: Mr. Morris was found guilty of gun-related offences, including possession of a loaded handgun.

The sentencing judge, having accepted pre-trial sentencing reports detailing the impact of anti-black racism on

Mr. Morris' life and actions, sentenced him to a mitigated 15-month sentence.

The Crown appealed the sentence, arguing that it is unfit and not commensurate with the seriousness of the offence. The Court of Appeal agreed with the Crown and increased Mr. Morris' sentence to two years but stayed the sentence.

Held: The Court concluded that trial judge did make a mistake in holding that systemic racism and its impact on the offender could mitigate the gravity of the offences and by doing this the trial judge diminished the importance of punishment.

CANADA INC. V. KEELE SHEPPARD PLAZA INC. 2021 ONCA 371

Judicial notice of a historical or societal fact can be viewed as both progressive and desirable. In Canada, courts have taken notice of the existence of systemic anti-black racism in Canadian society for several years, applying in the setting of jury selection and sentencing in criminal cases. It is less common in civil cases, but a recent case shows that it can and will be used where appropriate.

In the case of ***8573123 Canada Inc. (Elias Restaurant) v. Keele Sheppard Plaza Inc., 2021 ONCA 371***, the Court of Appeal upheld a judgment in which judicial notice was taken of the existence of anti-black racism in Canadian society.

Background: The tenant had failed to submit a written notice to exercise its option to renew its lease on time, but had stayed on as an overholding tenant for approximately 3 years. The tenant was a wife and husband who operated a restaurant and bar offering African/Black/Caribbean culture foods primarily to a Black community customer base. The tenant invested $150,000 in improvements to the property. The tenant continued to pay rent on time, even during the pandemic.

The landlord brought forward affidavits alleging that the tenant's business did not attract "family-oriented customers" as well as descriptions of conduct of individuals which "might be considered almost a caricature of racially derogatory themes". It was clear that Landlord's motive for replacing the tenant was premised upon racism.

Held: Court observed that landlord used language as would prefer a tenant that would attract 'like-minded family-oriented customers' than 'liquor bar' which is stereotypical labelling. Landlord application suggests that actual issue with Tenant is 'Black-owned and operated business and caters to Afro-Caribbean Community'.

The landlord appealed. The Court of Appeal for Ontario concluded that Justice Morgan was entitled to take judicial notice of anti-Black racism in Canada. Further, Justice Morgan was entitled to conclude that racism was relevant to the refusal to negotiate a renewal.

The law of equity involves, in a broad sense, striving to assess and provide fairness. Racism involves unfair treatment.

This case is a reminder to parties and their counsel to consider and address the effect of racism not just in jury selection or sentencing, but also in commercial settings.

R. V. GLADUE [1999] 1 S.C.R.

Gladue was and indigenous accused of second-degree murder after she killed her fiancée with a large knife that penetrated the victim's heart. The appellant pled guilty to the lesser charge of manslaughter. The two had been arguing about infidelity and insulting one another when the incident occurred and both parties were drunk.

The trial judge sentenced her to three years' imprisonment considering multiple mitigating factors such as the offender being young age mother and having no prior criminal record and multiple aggravating factors such as accused stabbed victim more than once, her intention was to hurt and she was not fearful rather aggressor towards victim.

Accused appealed on sentence unsuccessfully to the Court of Appeal and continued her appeal to the Supreme Court.

Section 718.2(e) CC: all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Section 718.2(e) of the Code applies to Aboriginals in general, not just those who live in aboriginal communities.

When sentencing an Aboriginal offender, the court must consider:

a. the unique systemic or background factors which have played a part in bringing the offender before the court; and

b. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

Decision of the Supreme Court of Canada: The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors.

Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable.

Article: Law and Economics by Micheal Trebilcock (1993)

Summary:

I. A Conceptual Overview of the Economic Perspective on Law

The economic perspective on law analyses the economic implications of the legal system. It explores the choices individuals and communities make under conditions of scarcity and how the legal system structures these choices. The economic perspective employs positive analysis (descriptive or predictive analysis) and normative analysis (prescriptive or judgmental analysis) to understand the economic impacts of legal policies.

(1) Styles of Economic Analysis

(a) Positive Analysis: Positive economic analysis predicts the likely economic impacts of legal policies by considering how individuals are likely to respond to the incentives or disincentives created by the policy. It assumes that individuals are motivated by rational self-interest and seeks to understand their behavioural responses. Positive analysis is individualistic and subjective in its behavioural premises.

(b) Normative Analysis: Normative economic analysis focuses on whether a transaction, policy, or legal change will make individuals better off in terms of their own perceived welfare. It considers concepts of efficiency, such as **Pareto efficiency** and **Kaldor-Hick's efficiency**, to evaluate the welfare implications of a given exchange or policy. Normative analysis is individualistic and subjective, and it assesses the impact of exchanges or policies on individuals' levels of utility.

(2) Limitations of the Economic Perspective

The concept of Pareto efficiency, which is central to normative economic analysis, has limitations. It assumes voluntariness, complete information, and absence of externalities, which are vague and indeterminate concepts. Critics argue that Pareto efficiency does not provide ethical criteria for evaluating morally questionable preferences or addressing issues of justice and distribution. The economic perspective may overlook the importance of constitutive attachments and socially constructed preferences in human life.

II. Applications of Economic Analysis of Law

(1) The Economic Role of Property Rights: Property rights are defined and specified by the law of property and torts. The economic perspective on property rights focuses on internalizing costs and benefits associated with utilization of the rights. It examines issues of externalities, resource allocation, and transferability of property rights to ensure their highest valued social uses.

(2) The Economic Functions of Contract Law: Contract law serves several economic functions. It contains opportunism in non-simultaneous exchanges by providing remedies for breach of contractual promises. Contract law reduces transaction costs by supplying standard sets of implied terms for certain exchanges. It discourages carelessness in the exchange process and assigns liability for negative outcomes caused by detrimental reliance. Contract law identifies and enforces exchanges that meet the criterion of Pareto efficiency.

(3) Tort Law: Economic analysis of tort law focuses on modelling alternative liability rules to minimize the sum of expected accident and accident-avoidance costs. It examines issues of strict liability, negligence, damages calculations, and the role of tort law in risk-spreading or social insurance.

(4) Corporate Law: Economic analysis of corporate law explores issues such as the theory of the firm, alternative modes of organization, limited liability, regulation of takeovers, and the nature of corporate constitutions. It examines the efficiency and distributional implications of different legal regimes in corporate governance and securities markets.

(5) Competition Law: Economic analysis has had a major impact on the evolution of competition law. It has rethought merger law, focusing on factors such as barriers to entry and potential competition. Economic analysis has also reevaluated vertical

restraints, viewing many arrangements as efficient and benign rather than anti-competitive.

(6) International Trade Law: Economic analysis of international trade law examines the rationales for and design of trade remedy law regimes. It questions the economic justifications for anti-dumping and countervailing duty regimes. Economic analysis also explores the relationship between regional trading blocs and the GATT Multilateral System.

(7) Criminal Law: Economic analysis of criminal law focuses on determining the optimal penalty for various crimes and evaluating the efficacy of criminal sanctions. It examines issues of deterrence, under-deterrence, and alternative accident reduction regimes.

(8) Family Law: Economic analysis of family law explores theories of marriage, the impact of no-fault divorce reform, and the determination of support obligations on marriage breakdown. It constructs implicit insurance contracts to compensate for the economic consequences of marriage breakdown.

(9) Access to Justice: Economic analysis addresses issues such as court delay, contingent fees, class actions, lawyers' advertising, and the role of para-professionals in enhancing the efficient provision of legal services.

(10) Immigration Law: Economic analysis of immigration law examines the total intake and composition of immigrants. It questions the efficiency justifications for restrictions on immigration and refutes myths surrounding immigration's impact on jobs and wages.

Article:

Asha Kaushal, "*Multiculturalism and the Irreducibility of Race*" (October 01, 2024). The University of British Columbia Peter A Allard School of Law Research Paper (forthcoming)

Summary: Asha Kaushal's article, *Multiculturalism and the Irreducibility of Race*, explores the relationship between race, culture, and multiculturalism in Canadian legal and social contexts, using *R. v. R.D.S.* as a focal point. Kaushal critiques how multiculturalism and judicial interpretations conflate race with culture, obscuring structural inequalities and undermining racial justice.

Main Arguments:

- **Judicial Conceptions of Race in *R. v. R.D.S.*:** Kaushal critiques the Supreme Court of Canada's judgments in *R.D.S.*, highlighting how the Court conflated race, racism, and culture.
- The case cantered on racial bias and judicial impartiality but failed to provide clear definitions or frameworks for addressing race.
- Justice L'Heureux-Dubé acknowledged systemic racism and emphasized the need for judges to integrate social context into decision-making. However, the broader plurality judgment reflected superficial engagement with race, often subsuming it under multiculturalism.
- Multiculturalism's Impact on Legal Conceptions of Race: Kaushal argues that Canada's policy of multiculturalism has prioritized cultural diversity over addressing systemic racial inequalities.
- Multiculturalism frames societal differences as cultural rather than racial, often rendering race invisible in legal and political discourse.
- The Shift from Race to Culture: The article examines the broader trend of replacing race with culture in academic and legal contexts. After biological race theories were discredited, culture emerged as the primary framework for analysing human differences.
- This shift has resulted in the depoliticization of race, framing inequality as a matter of cultural diversity rather than systemic oppression.
- **Cultural Racism and Post-9/11 Shifts:** Kaushal discusses the rise of cultural racism, where cultural differences are used as proxies for racial hierarchies. Post-9/11, anti-Muslim racism exemplifies this phenomenon, blending race, culture, and religion into discriminatory frameworks. emphasizing the need for an understanding of race as a structural and systemic phenomenon rather than an individual or cultural attribute.

<u>Challenges in Addressing Race:</u>

The article highlights the limitations of judicial reliance on multiculturalism to address racial issues, arguing that culture lacks the structural and hierarchical dimensions inherent in race.

Author's Perspective:

Kaushal argues that the legal conflation of race and culture undermines efforts to address systemic racism. She advocates for a clear distinction between race and culture in legal discourse, emphasizing the structural and material realities of racism. Kaushal critiques multiculturalism for obscuring racial hierarchies and calls for a more robust framework to address racial justice in Canada.

Examples and Context:

- *R.D.S.* serves as a central case study, illustrating how the judiciary struggled to engage meaningfully with race.
- The article draws on historical and contemporary examples, including post-9/11 Islamophobia, to demonstrate how cultural frameworks perpetuate racial inequalities.

Conclusion:

Kaushal concludes that multiculturalism's focus on culture has stalled the development of legal frameworks for addressing race and racism. She calls for an explicit acknowledgment of race as a structural issue and urges the legal system to move beyond multiculturalism's limitations

SAMPLE ANSWERS TO SAMPLE NCA FOUNDATIONS EXAM

QUESTION ONE (25 marks; 45 minutes)

You are legal counsel to Canada's newly elected Minister of Indigenous Affairs. Her mandate letter from the Prime Minister contains the following statement:

"No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."

The Minister has asked you to prepare a memorandum on how the legal interpretation could be shifted in relation to the duty to consult with Indigenous communities about developments in their traditional territories. She stressed the importance of her mandate letter and the overarching goal of promoting a more progressive policy agenda than her predecessor. Write the memorandum and be sure to include reference and analysis of all relevant authorities to support your advice.

Answer:

The recognition of Aboriginal title in Canada is rooted in Section 35 of the Constitution Act, 1982, which affirms and protects Aboriginal rights, including the right to occupy and use land. However, when claims arise in Quebec over lands now held privately under the Civil Code, courts and governments must address how Aboriginal title, a unique common law constitutional right, interacts with Quebec's civilian property regime. This essay argues that Aboriginal title may continue to exist over privately held land in Quebec, despite the differences in legal tradition. Drawing on the Supreme Court of Canada's jurisprudence and recent academic scholarship, especially by Ghislain Otis, I will demonstrate that the Constitution provides a framework for reconciliation that transcends property classifications under civil law.

Aboriginal title, as defined in *Delgamuukw v. British Columbia* and expanded in *Tsilhqot'in Nation v. British Columbia*, is a right to land that is held communally by an Indigenous group and includes the right to exclusive occupation, use, and management of that land. It is not dependent on Crown recognition but rather arises from historic occupation of the land prior to European sovereignty. Unlike fee simple title under the common law or private ownership under civil law, Aboriginal title is

sui generis, it is neither wholly common law nor civil law. It reflects Indigenous legal orders and is constitutionally protected.

In *Uashaunnuat v. Iron Ore Company of Canada*, the Supreme Court left open the possibility of asserting Aboriginal title over private land in Quebec. The Court acknowledged that the distinct nature of Quebec's civil law property system, where ownership is absolute and indivisible, might seem incompatible with Aboriginal title. However, it stressed that Aboriginal rights are constitutional in nature and take precedence over inconsistent statutory or civil rules. Thus, the door is open for recognition of Aboriginal title in Quebec, even on lands now privately owned, so long as it is not extinguished and there is no overriding infringement.

Ghislain Otis, a leading scholar on Aboriginal title in civil law jurisdictions, argues that the coexistence of Aboriginal title and private landownership is not only theoretically possible but also constitutionally required. In his article "Aboriginal Title Claims to Private Lands in Quebec" (UBC Law Review, 2024), Otis explains that while Quebec's legal tradition views land ownership as absolute, the constitutional framework obliges Quebec to recognize sui generis rights that may affect such land. In his view, title and ownership can be understood as layered concepts—private title holders may retain certain uses of the land, while deeper constitutional burdens, such as Aboriginal title, limit how that land can be exploited.

Otis draws attention to the distinction between "dominium" (ownership) and "imperium" (governance) in civil law. While the land may be privately held under dominium, Indigenous nations may assert governance rights (imperium) over it based on their constitutional status. He also highlights the need to interpret the Civil Code harmoniously with constitutional law, not in isolation from it. In this sense, Quebec's private law must evolve to reflect reconciliation obligations.

The federal structure of Canada also plays a key role in determining how Aboriginal title is respected in Quebec. While property and civil rights fall under provincial jurisdiction (s. 92(13) of the Constitution Act, 1867), Aboriginal rights are a matter of federal constitutional law (s. 91(24) and s. 35 of the Constitution Act, 1982). This means that Quebec cannot use its civil law traditions to override constitutionally protected Aboriginal interests. As *Tsilhqot'in* affirmed, provincial legislation of general application may apply to Aboriginal title land only if it meets the justification test under *R. v. Sparrow*, meaning the legislation must serve a compelling objective and be consistent with the honour of the Crown.

Moreover, courts have repeatedly held that provinces do not have the authority to unilaterally extinguish Aboriginal title. In *Delgamuukw*, the Court clarified that only the federal Crown can extinguish Aboriginal title, and only through clear and plain intent, something that has not occurred in most modern title claims. Therefore, the existence of a private title under Quebec law does not by itself extinguish Aboriginal title if such extinguishment was never legally carried out.

A practical concern arises when Aboriginal title claims affect existing landowners. This has led some to worry about the destabilization of property rights and potential expropriation. However, the Supreme Court has acknowledged that reconciliation requires negotiation, not automatic displacement. In *Tsilhqot'in*, the Court allowed for the Crown to justify infringements or negotiate agreements that respect both Indigenous and non-Indigenous interests. In Quebec, this could mean that a declaration of Aboriginal title over private land does not invalidate the private title entirely but imposes obligations (such as consultation or compensation) on its exercise.

In conclusion, Aboriginal title can be recognized on privately held land in Quebec, even though that province's civil law tradition views ownership as indivisible and exclusive. The supremacy of the Constitution means that Aboriginal title, a unique and protected constitutional right, may coexist with or even constrain private property interests. The jurisprudence of the Supreme Court in *Uashaunnuat*, *Tsilhqot'in*, and *Delgamuukw* confirms that the legal traditions of Quebec must evolve in light of Section 35. Ghislain Otis's scholarship provides a persuasive and coherent method for reconciling Aboriginal title with civil law by emphasizing constitutional supremacy, legal pluralism, and layered governance. In the spirit of reconciliation, the civil law must accommodate the constitutional reality of Indigenous rights.