Contemporary Legal Theories

Modern legal theorists have accepted many of the principles and ideas provided by the historical philosophers. However, they have also challenged many of the historical views of jurisprudence and added their own contributions to the body of legal thought. Although there are many schools of legal thought, some of the more prominent ones are outlined below:

Legal Formalism
Legal formalism treats law as though it were a science or math. Formalists believe that law consists of a body of rules and nothing more; they believe that judges should merely apply the law and have no authority to act outside it. Unlike some natural law proponents, legal formalists argue that judges cannot depart from the law or use their discretion in an unusual case; they must apply the rules made by the state and its agencies.

Law, according to formalists, is enacted by a legislature and derived from the state. The role of the judge is to be remote and disinterested and to apply the law. It is not the judge’s role to make social policy. New cases should be decided according to a scientific application of legal precedent. This conservative view of the law was widely supported in Britain and Canada until recently. The introduction of the Canadian Charter of Rights and Freedoms in 1982 challenged the principles of legal formalism. The Charter opened a debate between those who support the view that judges should merely apply the law and those who argue that the role of judges is to make law.

Legal Realism
Legal realism rejects the principles of legal formalism. Supporters of this theory argue that the law, itself, is often uncertain, vague, and based on the judge’s own view. Some argue that legal decisions are often the result of the judge’s mood or personal prejudices. Contrary to the formalist position that judges should merely apply the law, realists argue that judges, in fact, are the real authors of the law. They say it is the court, not Parliament, which in reality makes the law. They also argue that the “scientific application of precedent” is an illusion and that judges shape precedents to support their own conclusions.

Critical Legal Studies
The theory of critical legal studies (CLS) shares some of the views of legal realism, but goes further in its criticism of accepted legal theories. Supporters of CLS argue that law is not neutral or value-free; rather it is about value choices. The law, according to CLS theory, exists to support the interests of the people in power and can be a powerful instrument for injustice and oppression. According to CLS, judicial decisions are the result of ideological and historical struggles, such as the fight for civil rights or Aboriginal land claims.

Supporters argue that the law should be used as a tool to achieve social justice. CLS supporters point out that the state provides for the health and welfare of its citizens through law, and therefore judges can and should exercise discretion in ensuring that the law also achieves justice.

Feminist Jurisprudence
Feminist jurisprudence is a philosophy of law based on the argument that the legal system upholds political, economic, and social inequality for women. Supporters argue that the logic and language of the law create and reinforce male values. Even laws supposedly put in place to protect women and children, instead support the view that women are the
property of men. For example, supporters of this philosophy argue that laws such as those that dealt with rape were put in place to protect the value of a woman as a marriageable commodity rather than to protect a woman from a violent act.

Supporters of feminist jurisprudence argue that the prevailing theories of law reinforce and preserve male authority at the expense of women. The criticisms voiced by supporters have led to changes in laws affecting employment, divorce, domestic violence, and sexual harassment in North America.

**Law Based on Economics**

Instead of examining issues of law and justice, some legal theorists argue that the discipline of economics offers the best explanation for how the law functions or should function. Embracing many ideas and views, this theory of law included the study of laws dealing with property, torts, and contracts. Those who believe law is based on economics argue that the purpose of all law is resource allocation. In a world where there are scarce resources, they believe that the function of law is to determine how resources should be divided.

Some economic theorists suggest that law should be used as a social tool to ensure the fair allocation of resources. Others argue that the laws should be evaluated purely from a functional perspective. For example, a law that imposed a fine on individuals who failed to wear bicycle helmets would be considered successful only if it saved more money through fewer people’s use of health services due to injuries than it cost to enforce the law. Supporters of law based on economics argue that judges should consider economics in all their decisions rather than such subjective issues as morality and justice.

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