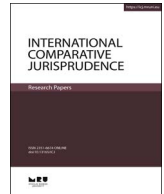


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Arguments for or against an (emerging) Eclectic Theory of Law



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ABSTRACT

Law, as an interdisciplinary concept, has a multidimensional character. It does not simply consist of a set of rules of conduct inherent in human nature and binding upon human society. More than a litany of legal principles and related concepts (e.g., rights, justice, liberty, punishment), laws also consist of a combination of historical, critical, postmodern, socio-political, inter alia dimensions. As such, in various legal systems, they can do any or a few, but not limited to the following: confer powers, define relations, explain or clarify, determine sanctions, permit or forbid human activities, etc. In this paper, using an eclectic theoretical approach to jurisprudence,¹ I argue that no legal theory is ever complete without an adequate consideration of the multifacetedness of human laws, specifically when it comes to legality and morality, which may or may not be influenced by each other, but also by individuals, society, and the world. For one, law and morality have similar root in philosophy. They share some similarities and differences as their detailed treatment of what is or ought to be legal and moral sometimes overlap or clashes. Nevertheless, in various philosophical contexts, everything is related to everything else. Morality and law may be systematically and conceptually related or not despite their similarities and distinctiveness. As such, my argumentative research, or more aptly stated, discussion paper starts with a detailed discussion of the various legal theories' focal points until a comprehensive analysis, interpretation, application, and synthesis of what law is, should be and ought to be is reached. Hence, the delimitation of my article is around various major legal theories and how an evolving conception of law and morality, not to mention other legal aspects, is presented for an implicit understanding of the present world and imminent future.

1. Introduction: seeming problems/issues I want to resolve²

Legal theories, such as historical, natural, social scientific, legal positivistic, radical/critical and similar ones, are beset with challenges and problems. They attempt to offer the primacy of their theories about what the law is, should be and/or ought to be (that is, taking aside in this paper's emphasis other queries about the law in general). Literature has it that each theory wants to pin down a valid and sound solution to the fundamental, abstract, general, and controversial problems of the philosophy of law, partly or entirely (Fernando, 2011). Questions include what the law is, its nature, logic, purpose, substance, form, content, structure, and so on. None has a satisfactory answer when hounded by rival theories with various criticisms (e.g., inherent theoretical weaknesses and practical insufficiencies). As such, to more likely resolve this article's own claim about the use of an eclectic legal theory, I offer first

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¹ Eclecticism, as used in this argumentative paper, is unlike its variants (e.g., Eclectic Theory of Bush II) (Menendez (2008))

² Based on the opinions, claims, or arguments of legal philosophers and legal theorists, as well as, from related facts and information as background data for my arguments (reasons for my claims).

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an overview arguments of the various legal theories' pivotal points, as well as, how their overarching essences or Wittgensteinian family resemblances prefigured to an eclectic theory of law using integrative literature review (Wittgenstein, 1953).

1.1. Part 1: An overview of the various legal theories' claims and their possible place in an eclectic jurisprudence

Natural legal theory, a top-down approach, acknowledges the interconnectedness between law's (of nature) and morality's irreducibility to positive and real laws (Murphy, 2011). Natural legal theorists argue that there are universal and rational laws (also known as ubiquitous and immutable nonpositive laws), which are inherently above human laws and are discoverable only by human rationality. Since natural laws exist objectively per se independently of the subjective will of any person, rightness and wrongness is absolute and that all rational human beings have the obligations and, at the same time, are obligated to obey them. Legal principles and rules that do not obey the natural laws are considered unfit for humans and thus ought not to be obeyed because individuals have their own natural rights,³ which are above any other laws prescribed, for instance, by the state under positive and real law. Otherwise stated, state laws ought not to be contrary to natural laws (Rice, 1999). Examples of laws that reflect the theory of natural law include common and restitutive laws about fairness and justice.

In the annals of history, natural law theory is based on religion but shifted its focus on individual human rights (as subjects) and social contract (as a process) with the state (Emecz, 2015; Rice, 1999). It claims that there are higher, if not highest, natural laws and self-evident primary moral precepts for human conduct where no down-to-earth constructive clarification method of rational justification can possibly attain, except on behalf of the wise men. Hence, the weaknesses of natural law and its variant theories are their over-presumptuousness about unchanging moral and legal codes whose metaphysical bearings remain unaccounted for and non-validatory as they arrive at non-substantive conclusions (cf. overlap thesis). Hence, to talk about universal absolute right and wrong that are reasonable to every rational human beings only because they are accessible only by the wise, yet go beyond the limits of provable human reason are considered out of the tangible context by some rival theories. For instance, the deontological nature of its ethically good primary precepts and the teleological nature of its secondary precepts (i.e., from casuistry to apparent good) also conflicts with other ethical-legal worldviews.

Even among ethical/moral theories, there are ongoing debates about natural laws' importance in various disciplines as to which have primacy over the others. For example, many ethicists and moralists claim that virtue ethics theory alone could not accommodate moral problems because an individual's happiness may or may not be relative from other people (Beauchamp & Childress, 1983; Foot, 1983; Schroeder, 2008). Since no single ethical theory is clearly better than others are, there can be no consensus on their ranking (Beauchamp & Childress, 1983; Fried, 1997). Hence, when a person falls short in one virtue, he or she is also considered to have fallen short in other virtues (McAleer, 2006). Plausibly, being a virtuous individual is more than just having one virtue. Aside from the fact that most, if not all, ethical philosophies have subtle and not-so subtle complexities and weaknesses, using virtue ethics theory alone as a framework in dealing with moral cases is an insufficiency. How much more then when it comes to the legal theories' presupposed primacy over other theories of law, not to mention ethical/moral theories?

Indeed, all ethical/moral theories (e.g., Kant's duty ethics) have their inherent strengths and weaknesses. Humans are not all the same as evidenced by differences in their gender, age, etc. Some people still have not fully developed prefrontal cortex that is why they deal with dilemmas either at a personal or impersonal level (Greene, n.d.). Hence, laws should consider human nature, not to mention nurture, when having to deal with legal issues and problems at the individual and societal levels, respectively. Additionally, questions about law and morality in natural law theory should be taken with seriousness. For instance, should a physician interfere with God's law or not to save people's lives, such as in the case of physician-assisted suicide? Sometimes, humans do not decide rationally at all times for various reasons (e.g., emotional, economic, genetic, etc. factors). If only to human reasons that eternal laws are accessible to, how about revelations, miracles, and related spiritual experiences? Good to have legal-moral theories for the whole of society, as well as, with individual moral decision making. Nonetheless, natural legal theory is said to commit the naturalistic fallacy as it attempts to define good when there is no defining criterion to base what really good is for everyone. Further, the use of human reason may as well not agree with natural law's primary precepts (e.g., abortion due to rape, killing a person out of self-defense, etc.) (Emecz, 2015). In the Eclectic Legal Theory, in part two of this paper, issues, challenges, and controversies about the natural law theory and remaining theories, will be considered in juxtaposed light.

Legal positivism, a middle approach to legal theorizing, claims that laws are posited (i.e., issued) by the state or exist dependently with human will and legal position apply only to citizens living in a certain community, society, or nation (Himma, n.d.). It views laws solely as man's creation rather than from any other sources (e.g., Hart's view). In other words, among legal positivists, law is a product of human reason in the form of commands, hierarchical norms, union of primary and secondary rules, social facts, inter alia. In legal positivism, a law does not need to fulfil any kind of moral content to be valid. Variants of legal positivism include Hart's inclusive positivism and Raz's exclusive positivism (Fernando, 2011). The three (3) positivists' theoretical commitments are: social fact thesis; conventionality thesis; and, separability thesis. First, the social factor or pedigree thesis focuses on legal validity as a function of social facts. Second, the conventionality thesis asserts that social facts give rise to legal validity due to some kind of social convention. Third, the separability thesis rejects the conceptual overlap between the notions of morality and law.

As an anti-thesis of natural law theory, legal positivists argue that individuals do not have natural rights, but simply have to obey

³ Aristotle explained his legal theory with a discussion of ethics, such that state legislations are used for individuals to think, decide and act virtuously in habitual manner. Locke claimed that the social contract binds people to act based on their natural property rights and that the government has to protect its subjects as they obey laws.

legislation whose accompanying punitive character are all imposed exclusively by lawmakers. The legal positivists claim further that laws are independently self-contained and distinctively separate from morality; hence, laws are variable, contingent or mutable. Consequently, Fuller (1964), in his Purposive Theory of Law, criticized positivism, as follows: (1) it is a one-way projection of authority that citizens simply have to act on, (2) its basic concern is simply on lawmakers; (3) it does not view the lawgiver as occupying a distinctive function or office; (4) it views those who impose laws as not having role morality in performing their roles; and, (5) it claims that clear thinking is impossible unless there is a neat separation between purposive effort into lawmaking and the law that emerges from the effort. Despite the inherent strengths and weaknesses of legal positivism, it will also be dealt with in the eclectic legal theoretical approach of this argumentative paper's part two.

Critical or radical legal theory, a bottom-up approach about the multiplicity of truth, overturns and challenges accepted standards and norms in the theory and practice of law (Cornell University Law School, n.d.). Critical theorists of law claim that legal structure and logic develop out of power relations in society. Law is used by the capitalistic ruling class who owns the means of production to subdue the working class. Consequently, the rich exploits the poor by means of the legal system making them richer while the poor, poorer. Hence, laws are created for use by the powerful to remain in power to the disadvantaged of the have-nots in society. It points out how individuals are unequal before the law. Its variants include legal realism theory, feminist legal theory, critical race theory, and postmodern legal theories. For the sake of simplicity, two of its variants are presented hereunder (Wacks, 2015):

Legal realism, a critical theory of law, views laws as being influenced by society and should continue to be moulded by it. Primarily, laws are the products of the background, experiences, and education of lawmakers. In other words, the focus of this specific legal theory is on the decision-making processes of judicial bodies (e.g., courts) whose accumulated decisions become the law or what the courts employ. Laws cannot be uniformly applied in all cases and by all judges because of their uniqueness. Likewise, there is no such thing as impartial judiciary as decisions are not driven neutrally by personal preferences, attitudes, or beliefs of decision makers. Legal resolutions are based mostly on the social sciences and statistics in guiding decision making.

Postmodern legal theory, another critical legal theory, is where laws are made and voted by legislators to be of advantage to individuals and groups in power to the exclusion of the poor. Based on the majority culture or power wielders who legislate, laws become the rhetorical tools that are interpreted in many ways by the people and enforced on the will of the governed. In other words, society is not governed by laws because it is the people who have the stakes: laws are merely unstable representations of the people in society who make the latest interpretation and use of them. It is always those who have and are in power, as well as, those backed up by the powerful majority that make laws for their own interests and benefits.

There are other legal theories, in which other variant theories of law may emerge in the future. For a more balanced view about legal theories, additional legal studies were given space below:

Historical legal theory emphasizes laws that have historically worked out to be utilized in affecting current legal decisions. Laws are considered the manifestations of a change in societal norms. In other words, laws come from the special characteristics of every nation, national spirit, or *volkgeist* (Freeman, 2008; Kasemsup, 2010; The Editors of Encyclopedia Britannica, 2016). Additionally, they are nothing but a system of social customs, traditions, culture, and then state laws that have developed over time. Hence, the laws of one nation may differ from other nations based on their unique historical development. Moreover, right and wrong (e.g., treaties) are dependent on the *volkgeist* of each nation.

Social science legal theory focuses not only on legal principles, but also on related things (e.g., history, cultural practices, and economics) in the development of laws (Ehrlich, Pound, & Ziegert, 1936; Ehrlich, 1962). In considering other sociological factors about the causes and effects of laws, social science theory also includes a legal study about customs, religion, regulations, to name some. Questions that it seeks to address include why a law was enacted and how it influences society. In hindsight, sociological legal theory is in accord with the historical and natural legal theories about the facts of laws as it does not reject positive laws. However, it refutes one of the legal positivistic views that positive laws are absolute and complete sole objects of legal study.

Other than the legal theories mentioned above, “theories [e.g., legal paternalism, legal liberalism, legal pragmatism] regarding the issue of enforcement of morality” are herein mentioned in passing (Butler, n.d.; Fernando, personal communication, 2016; Finnis, 2011; Himma, n.d.). First, legal paternalism is contrary to liberalism; it claims that the government makes and enforces laws, statutes, and regulations to safeguard individuals from making decisions and resorting to risky behaviours that might harm or be detrimental to them. Legal paternalism is in favour of affirmative action. Second, legal liberalism is an approach that was developed against conservatism and paternalism. It is about socio-economic liberalization. Third, legal pragmatism, on the other hand, argues that laws should accord with empirical evidence and not on grand ideas (e.g., morality). Other legal/moral theories’ variants, such as Kantorowitz’ Free Law Movement is concerned with the free pursuit of the law by judges, Ehrlich’s Legal Sociology is concerned about the concept of “living law” where rules are determined based on what humans really do in social life, Santi Romano’s Institutionalism is where law is identified with a legal system in an orderly institution, and so on have their proper place in the Legal Eclecticism’s spectrum or continuum (Sandulli, 2009; Timasheff, 2016; Washington and Lee University School of Law, 2012). The question then is still whether the presence, non-presence or future emergence of other theories of law (and even morality) may also be accommodated under the Eclectic Legal Theory. How about laws that were in effect before, such as in Nazi Germany, but considered to be nothing but false laws (Fuller, 1958)? In the section that follows, all the aforementioned legal theories will be treated fairly and squarely.

2. The advent of an Eclectic Theory of Law

The various legal theories, but not limited to those mentioned above, have similarities and uncompromising differences.

Nevertheless, almost all claim that law is a collection of rules, principles or precepts that serves as a framework on what humans can or cannot do, what other individuals can do or not do to others, and what consequences human decisions and actions have on their own and other peoples' legal rights, duties, obligations, inter alia. Except for radical legal theories, the philosophical study of theories of law point to a collection of laws imposed by authorities that guide societies and judicial bodies to make decisions. Most of them view positive law as a variable (contingent/changeable) and artificial, which partly rejects natural law given its idea that law is a human creation of people in power. A proponent and adherent of positive law theory denies the relation of law among other concepts, such as morality, religion, and custom. In this argumentative paper, after presenting the myriad perspectives of various legal theories, I arrived at an eclectic, holistic, comprehensive, meta-legal and meta-evaluative approach to legal philosophy and jurisprudence (i.e., theory of law): It deals with all kinds of different levels of law (e.g., first-order, second-order). Essentially, the Eclectic Legal Theory treats all other theories of law as having their proper place in a continuum, spectrum or, amorphously, in an undefined state (especially so, for yet unknown legal theories, not to mention nearly interrelated ethical/moral theories that may emerge in the future).

2.1. Part 2: Arguments for or against an Eclectic Legal Theory⁴

2.1.1. What is an Eclectic Theory of Law?

The Eclectic Legal Theory is the approach to legal theorizing where what seems best among the various competing theories and their variants are selected to answer persistent and pressing problems in legal theory (in a positive sense) discriminatingly but holistically in juxtaposition. The claims among the various theories are taken into account in analysing, synthesizing, and meta-evaluating a better theory of law. Clashes in legal theories' claims are bared and laid out as arguments in a continuum and/or spectrum so that they, side-by-side, are offered as parts of the comprehensive view of what the law is, should be and/or ought to be.

Weak points of the legal theories, on the other hand, are not necessarily set aside because it really depends on the methodological lens (e.g., rational justification, conceptual analysis, sociological technique, evolutionary method) used that a theory of law might pass or fail a test. Hence, any legal theories, under the Eclectic Theory of Law, are not treated in arbitrarily as to their primacy of claims. Instead, what is best in a legal theory is given its proper consideration in a myriad of positions in various contexts along the spectrum or continuum of ideas.

In particular, what is considered best in natural law theory is the primacy of eternal laws that are considered immutable. On the other hand, legal positivism does not subscribe to eternal law, but only to positive laws. Granting without accepting that two points are dichotomous, what is vital in eclectic legal theory is the importance attached to laws (whether eternal or ephemeral) and whether they are beneficial or less advantageous to an individual and/or to society, in general. An instance is the conception of what is right (legal) and wrong (illicit). Whether the two points are similar or not in their direction regarding what is legal or otherwise (i.e., moral), they can be taken as located in either extremes of the spectrum, continuum, or positioned in similar or different quadrants, cube, or universe.

Indeed, various theories of law may simply be looking over the same horizon with differing perspectives because of their different position or place in various times. In fact, despite Joseph Story's (Newmyer, 1985) adherence to natural law theory, for instance, he nevertheless combined natural law theory with historical and positivistic jurisprudence both in many of his scholarly writings and judicial opinions. He depended, for instance, on the universality of morality in natural law with firm fundamentals of history in informing positive law. As such, an eclectic approach also considers, not only what is best in any legal theories, but also most, if not all, the multidimensionality of laws in diverse temporal-spatial and related dimensional worldviews.

2.1.2. How an Eclectic Legal Theory answers the question about moral and factual laws?

Prior to a straightforward answer on the question about fact-centred and value-laden, not to mention value-free or value-neutral, eclectic treatment of the subject under consideration, let me talk first about the persistent issue about law and morality in specific legal theories. For instance, both historical and natural legal theorists do not reject positive laws, although positivist theorists only acknowledge laws that are derived from the sovereign and not from social conventions.

In some ways, both historical and natural theories of law do not subscribe to the legal positivistic claim that laws are state commands and that the sovereign can create laws according only with its own will. In other words, historical and natural legal theories admit of positive laws as long as they do not violate rational and moral natural principles. As such, because historical, natural and positive laws have similarities, they may actually be in accord with one another when it comes to reasonable human laws. However, since legal positivists⁵ only adhere to positive laws as the *only* object of legal study and do not entertain social norms and national spirit as laws as the scope of legal studies, they nonetheless have commonality concerning laws that are beneficial for individuals and the community.

On the other hand, excluding positive law theory and a few other legal theories, law and morality are inseparable from any systems of law. Law and morality are seen as interconnected about what is legal and immoral, just or unjust, fair or unfair, and so on.

⁴ The Eclectic Theory of Law is entirely distinct from Reginald Dias (1973) integrative approach (or its variants) as the former considers what is best among the various legal theories without disregarding their inherent differences. For instance, legal positivism is an anti-thesis of natural law theory because they do not agree on the universality of laws. However, they have similar claims about what the law is that it is a system of rules that regulates human behavior. A multi-interpretative treatment of legal theories is well-entertained in legal eclecticism.

⁵ Hobbes, who is considered as a legal positivist, claimed that state laws are the only legal principles totally distinct from morality. As such, rightness and wrongness do not depend on individuals, but rights transferred absolutely by the people to the state or sovereign through a social contract.

As such, it can be deduced that law and morality are closely knit as their concepts overlap and are interchangeably used from one subject to the other; thus, making them indistinct and indivisible, despite their quasi non-intermixture for some unidimensional legal theorists. However, revolutions between the state and religion in many countries and efforts to sever law from morality came the emergence of social contract and positivistic legal theories. Consequently, laws and morality became distinct systems in certain degrees. Nevertheless, law and morality cannot be completely similar or totally distinct from one another. Their impact is as encompassing as history and unwritten laws are. In occasions that they are taken to be distinct, sometimes the methods used are the defining factor and not their distinctions per se. For example, in Professor Jerome Hall (1952) “*Theft, Law, and Society*” and “*Foundations of Jurisprudence*” (Hall, 1973), he effectively combined sociological and historical methods when he stated that historical jurisprudence serves as the bridge between traditional philosophies of law (i.e., positivism and natural law theories) and empirical sociological perspective.

At this juncture of pinning down the conceptual connection or not between “is” and “ought” (i.e., counter-arguments about the separability or overlap thesis on moral versus factual laws), the Eclectic Theory of Law does not lean over any ‘claimed’ dichotomy or distinguishing characters as they are laid out in either side of a continuum or spectrum. Whether there is an “is” and “ought” dichotomy or not, even when they do not overlap or separate, or they do not even have an issue at all in future legal theories, Legal Eclecticism is a multidimensional approach to legal theorizing, unlike its present variants (e.g., Eclectic Theory of Bush II) (Menendez, 2008). It does not subscribe to any single doctrine about law but takes as a given similarities and differences in perspective in arriving at a thorough understanding of meta-laws or laws that are laws unto themselves.

Specifically, meta-laws, meta-legals, or laws beyond mainstream or conventional laws are those that have to be reflectively and consistently used equitably and globally by rational beings. Meta-laws are in themselves bear conferring, punitive, inter alia characteristics. An example of a fundamental meta-law is: An individual should/ought not to do to another individual what he/she does not want it done to him/her. Put otherwise, do what you would like others do unto you. Similarly, act as to benefit oneself and others when employing voluntary consent and/or collective judgment or general consensus (Devlin, 1965). Meta-legal terms include freedom, rights, liberty, justice, power, influence, and countless others.

2.1.3. *What is eclectic legal theory's reply to possible counter-arguments from various legal theories?*

Eclectic Legal Theory is not prone to possible counter-arguments because it may or may not be descriptive and/or prescriptive in its treatment of law and all its accompaniments. Instead, it is a legal theory that is open to possible innumerable views as it organizes and systematizes them into their proper places depending on their inherent similarities and differences. In reiteration, claims and counter-arguments made by the theories for themselves or against other rival theories are considered having a proper location in the Eclectic Legal Theory's quadrant, cube, continuum, spectrum, or universe (to say the least to this latter kind of categorization). More appropriately, Eclectic Theory of Law is amorphous, as plasmatic and as diverse as it claims to be since it is a contingent, evolving (dynamic) and even futuristic in its approach to legal theorizing without relinquishing any mainstream theories of law.

2.1.4. *What makes the Eclectic Theory of Law as key to a better understanding of the philosophy of law?*

In a diverse world, it is only fitting to choose what is best for oneself and one's kind. Since humans have limited views and understanding of the world they live in, similarities and differences abound about one another's claims and counter-arguments. There is simply no best legal theory as they all seem to be scattered in a spectrum or continuum of jurisprudence. As such, just like in law where there is pluralism; so, do in morality, which I referred to here as moral/legal pluralism (i.e., from informal to formal moral-legal systems) housed in various labels, such as legal relativism. As such, in case of conflicts in one another's theoretical assumptions and assertions, each theory's conflicts should not, in the first place, be considered contradictory claims per se and in toto; rather, as possessing only unique family resemblances in perspectives. Hence, questions such as what the law is, what is its nature, purpose, content, structure, form, and so on are opportunities to delve deeply and farther into the analysis, interpretation, and application of law as it is juxtaposed in, by, and for the Eclectic Legal Theory.

3. Inference/Conclusion/Final Answer

To argue is to offer the most compelling evidence. So far, in this paper, I believe that the Eclectic Legal Theory is the most appropriate theory of law in treating the various theories with equanimity. Any theory can be in itself, self-stylistically, the best. However, no such theory is extant because, according to rival theories, weaknesses are inherently present in all theories of law or morality. To avoid doing unproductive counter-argumentations by future legal theorists, I have set out in this paper the use of eclecticism so that any theory of law has something to fall back on as a final recourse. Even when the eclectic theory of law does not implicitly posit or presupposes anything in favour of or in contrast to other legal theories and their variants, it maintains an impartial treatment of other legal theories. The point is that it is still up to any legal theorists to position themselves in this eclectic legal theory's spectrum, continuum or amorphous state. Since, philosophy of law is aligned to the various objects of study in metaphysics (e.g., law's nature), epistemology (e.g., knowability of laws), ethics (e.g., laws effects on humans), politics (e.g., coercive character of laws), and even aesthetics (e.g., law as an art), an eclectic legal theory is of utmost significance in studying the variety of laws, legal systems, and even that of moral laws.

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