

↳ S vs. Makwanyane & Ubinu (P.10)

↳ Ubinu Concept (Judge Mokgoro describes Ubinu)

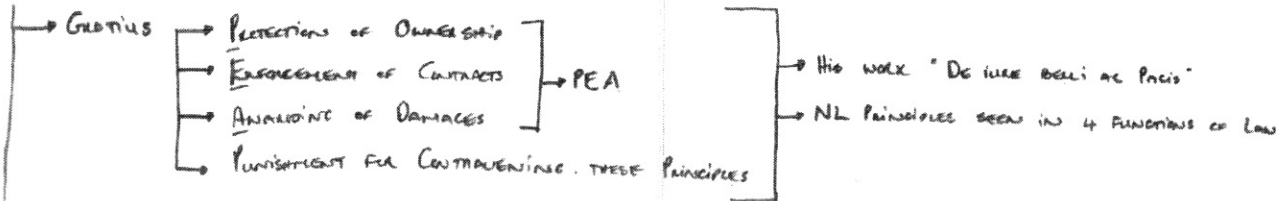
- ↳ TRANSLATES AS "HUMANENESS" (I am, because we are)
- ↳ FUNDAMENTALS/ TRANSLATED AS / PERSONHOOD & IDENTITY
- ↳ SIGNIFICANCE / IS ON <sup>1</sup>CHARACTER SKILLS & ENVELOPS <sup>2</sup>THE VALUES OF GROUP SOLIDARITY & COMPASSION
- ↳ RESPECT FOR HUMAN DIGNITY
- ↳ BECOMES A NORM / WITH POWER / OF BUILDING A DEMOCRACY (IN SA)
- ↳ RELEVANT TO VALUES / WE MUST UPHOLD
- ↳ RECOGNISES PEOPLE / ENTITLED TO RESPECT; DIGNITY & ACCEPTANCE

- ↳ EX OF A "PERFECT WAY OF LIFE"
- ↳ INFLUENCED WAY/LAW WAS INTERPRETED
- ↳ DEATH PENALTY WAS INHUMANE; CAUSE A DEGRADING (VIOLATES UBINU PRINCIPLES)

↳ CONFLICTS UBINU PRINCIPLES & CON VALUES OF HUMAN DIGN & RIGHT TO LIFE

↳ UBINU  
↳ HUMAN DIGNITY  
↳ HUMANITY

### NATURAL LAW PRINCIPLES



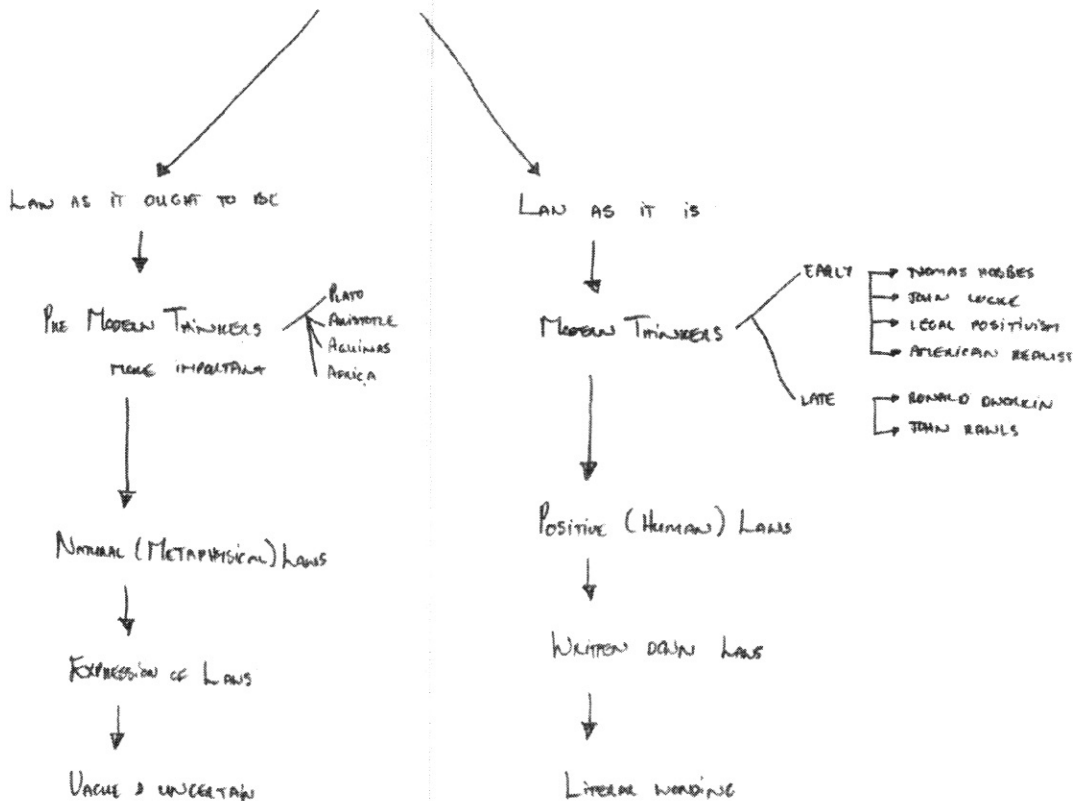
↳ INFLUENTIAL / UNTIL 19<sup>TH</sup> CENTURY

↳ RISE OF POSITIVISM / BROUGHT AN END TO THIS (INSISTENCE ON BEING LAW AS A SCIENCE (LEGAL POSITIVIST (EARLY MODERN))

↳ WORLD WAR 2 ATROCITIES / CREATED NEW INTEREST IN NL

PRE MODERN THINKING CASE LAW = CHRISTIAN EDUCATION SA vs. MIN OF EDUCATION (P.12-13)

### CONFLICT BETWEEN



EARLY MODERN MORAL PHILOSOPHY (2)

MODERN THINKING/IS IN ESSENCE/SEEN IN ENLIGHTENMENT OF THE 17<sup>th</sup> CENTURY & IS BASED ON 3 CHARACTERISTICS

- DISTANT & SCEPTICISM / TOWARDS TRADITIONAL AUTHORITY
- Faith in Power / <sup>1</sup> HUMAN REASON & INTELLIGENCE / TO MAKE ADVANCES IN SCIENCE / FOR HUMAN WELFARE
- SCIENTIFIC METHODS BASED ON
  - EMPIRICISM → KNOWLEDGE COMES FROM EXPERIENCE
  - RATIONALISM → KNOWLEDGE ACQUIRED BY REASON
  - FORMALISM

CHARACTERISTICS

- 1** Rise of NATURAL SCIENCE & ADVANCES / LED TO BELIEF / LAWS MUST BECOME MORE SCIENTIFIC  
 BELIEVE WAS / FOR LAWS TO BE EFFECTIVE / AS OTHER SCIENCES / IT MUST BE SCIENTIFIC
- 2** LEGAL MODERNISM
  - BELIEVED / LAWS → CAN FIND RIGHT ANSWERS / TO LEGAL QUESTIONS / IF USES CORRECT SCIENTIFIC METHODS
  - BASED ON <sup>1</sup> DEDUCTION; <sup>2</sup> ANALOGY; <sup>3</sup> INTERPRETATION; <sup>4</sup> SOCIAL POLICY & <sup>5</sup> INSTITUTIONAL ANALYSIS (D-A-I-SP-IA)
  - SEARCH FOR UNIVERSAL TRUTH / BASED ON FAITH / IN SCIENTIFIC POWERS
- 3** REJECTED PRE-MODERN THINKING
  - REJECTED COMMON GOOD → REPLACED IT WITH INDIVIDUALISM  
 PERSON'S RIGHTS, AT ALL COSTS
  - REJECTED METAPHYSICAL ASSUMPTIONS → REPLACED IT WITH SCIENTIFIC METHODS  
 CAN'T ASSUME / THERE'S METAPHYSICAL WORLD OUT THERE / WITHOUT SCIENTIFIC PROOF
  - REJECTED NATURAL ORDER → REPLACED IT WITH SCIENTIFIC WORLDVIEWS  
 DON'T ACCEPT SOCIAL ARRANGEMENTS / AS ALL / SCIENTIFICALLY / QUESTIONABLE
- 4** EARLY MODERN THINKING METHODS / SUMMARISED AS / RATIONALISM
  - RATIONALISM → KNOWLEDGE ACQUIRED BY REASON / WITHOUT RESORT TO EXPERIENCE
  - AN IDEA / A LAW FRAME / A COMPREHENSIBLE VIEW OF MAN; SOCIETY & LAW / VIA HUMAN REASON

CG	→	I
MA	→	SM
NO	→	SN

SOCIAL CONTRACTARIANS (HOBBS & LOCKE)

- A STATE / IS THE RESULT OF / A CONTRACT / BETWEEN ITS CITIZENS (SOCIAL CONTRACT)
- THOMAS HOBBS (MIDDLE OF 17<sup>th</sup> CENTURY) = MOST BASIC LAW OF NATURE = SELF PRESERVATION
- BELIEVED / LAWS COULD BE MADE / INTO A SCIENCE
  - USED NATURAL LAW IDEA / MEANING <sup>1</sup> RATIONAL STEPS TAKEN BY PEOPLE / TO FURTHER THEIR OWN INTEREST
  - TOOK 'ISOLATED MAN' (STARTING / DEPARTURE POINT) FOR HIS NEW SCIENCE LAW; AS
    - HE'S CAPABLE OF / RATIONAL THINKING / WHICH IS ALSO
    - BASES OF HIS LIFE'S DESCRIPTION / IN A "STATE OF NATURE"
    - IS SITUATIONS / EXISTING BEFORE / STATE FORMATION
  - BASIC LAW OF NATURE / IS SELF-PRESERVATION (SAVE YOURSELF FROM HARM)
    - THREAT / PERIL TO A STATE'S FORMATION / IS / LIVED IN A "STATE OF NATURE" & WAS TRYING TO SURVIVE
    - HERE / LIFE WAS POOR; NASTY; SHORT & BRUTISH (PAINFUL PHASE) (P-N-S-B)
    - CAUSE OF THIS / THERE WAS CONSTANT WAR
    - NO 1 COULD ENJOY <sup>1</sup> ORDER or <sup>2</sup> ECONOMIC PROSPERITY / OF PEACEFUL GOVERNMENT
  - FEAR
    - A PERSON'S FEAR OF OTHERS / IN A "STATE OF NATURE" / IS REPLACED WITH STRANGER FEAR / OF "STATE IN A POLITICAL SOCIETY"
    - A STATE / CAN USE ITS POWERS / IF PEOPLE BREAK THE LAWS
    - PEOPLE ARE FORCED / INTO SOCIETY & LEFT THERE / VIA FEAR
    - PEOPLE MUST BE LEFT / TO PURSUE OWN CHOSEN WAY OF LIFE / RENDERED HIS FREEDOM / DOES NOT THREATEN PEACE
    - CLAIMED / FREEDOM OF RELIGION & OPINION / CONSTITUTED A THREAT / TO PEACE & GOOD ORDER
  - ESCAPING (SOCIAL CONTRACT)
    - GAVE UP INDEPENDENCE & LIFE / TO POWER OF 1 RULER / WHO'LL GUARANTEE SECURITY
    - PEOPLE SURRENDER <sup>1</sup> INDEPENDENCE & RIGHTS / TO 1 / WHO RULERS WITH ABSOLUTE POWER (SOVEREIGN RULER)
    - ALL THAT'S GUARANTEED / IS A SORT OF PEACE / CHARACTERISED BY ARBITRARY & ABSOLUTE POWER
    - HOBBS / A DEFENDER OF ARISTOCRATIC FOUNDATION (17<sup>th</sup> CENTURY)

→ JOHN LOCKE (END OF 17<sup>TH</sup> CENTURY)

→ VIEWS: OPPOSITE TO THOMAS HOBBES / BUT DEPARTURE POINT IS SAME (CAUSE ALL WAS FOR OWN INTEREST !!!)

\* USES "STATE OF NATURE" / BUT WITH DIFFERENT VIEWS

- CHARACTERISED BY PEOPLE / LIVING IN <sup>1</sup> MUTUAL CO-OPERATION & <sup>2</sup> TRUST
- MAN IS ALSO SUBJECT / TO LAW OF NATURE .
- THOUGH THO / HE'S REQUIRED <sup>3</sup> NOT TO INTRUDE ANOTHER'S LIFE OR PROPERTY / BUT CAN ENFORCE SUCH RIGHTS (SELF-GOVERN)
- PRIOR TO STATE FORMATION / PEOPLE ARE NATURALLY SELF-GOVERNING / BUT LEADS TO PROBLEMS
- PEOPLE LACK <sup>4</sup> LAW KNOWLEDGE / ARE IMPAIRED IN RESOLVING DISPUTES / <sup>5</sup> BUT HAVE ABILITY TO EXECUTE JUDGMENTS
- SO / NEED IMPARTIAL / JUDGES & AUTHORITIES
- PEOPLE MAKE (SELF GOV STATE OF NATURE) FORM SOCIAL CONTRACT / CREATING SUCH AUTHORITIES
- TRANSFERRING THEIR SELF-GOVERNING POWERS / TO AUTHORITIES / VIA MAJORITY'S CONSENT
- DOING THIS / THEY GIVE UP THEIR RIGHTS / TO ENFORCE IT / AGAINST OTHERS AS
- THE STATE WILL ENFORCE THEIR RIGHTS
- \* THEIR BASIC HUMAN RIGHTS / ARE NEVER GIVEN UP (INALIENABLE)
- IF STATE NO LONGER <sup>6</sup> PROTECTS OR <sup>7</sup> ENFORCE SUCH RIGHTS / PEOPLE HAVE RIGHT TO REVOLT (BREACH OF CONTRACT)
- PROVIDING JUSTIFICATION / AS PEOPLE HAVE A RIGHT TO CHOOSE / THEIR OWN GOV (ENGLISH REVOLUTION)
- HIS THEORY IS INFLUENTIAL / GIVING RISE TO USA & SA CON
- IDEA THAT / HUMAN RIGHTS ARE INALIENABLE / TO BE RESPECTED BY ALL / IS BASED ON LOCKE'S BASIC IDEA
  1. HE AGREES WITH THE MODERN IDEAS / WOULD AS ORIGINAL AS HOBBES
  2. HE WAS ONLY OPPOSING MEDIEVAL TRADITIONS / ON RELIGION, BELIEFS / LAWS & ETHICS (THE GOOD LIFE → RESTRICTION ON MARRIAGE SINCE)
  3. HE CLAIMED / SHOULD TO RESPECT ANOTHER'S NATURAL RIGHTS / WAS IMPROVED / IN THE "STATE OF NATURE"

SELF-GOVERNING

→ LEGAL POSITIVISTS (19<sup>TH</sup> CENTURY)

\* POSITIVIST / IS A THEORY / REGARDING / "SCIENTIFIC APPROACH TO LAWS & SOCIAL SCIENCES"

→ POSITIVIST CONSIST OF (KNOWLEDGE THEORY → HOW DO WE KNOW) = "POSITIVIST IS, TAKEN AS, LAW AS IT IS"

- 1. LEGAL POSITIVISM
  - IS A MAN MADE LAW
  - BECAUSE / IT MUST BE SCIENTIFICALLY PROVEN
  - SEPARATE LAWS FROM MORALS
  - AN ATTEMPT / TO TAKE THE GOD THEORY OF POSITIVIST / APPLICABLE TO LAW
  - IS A THEORY OF AUTHORITY / (KANTON PRO)
  - AUTHORITY / DETERMINE STRATEGIES / ON HOW JUDGES / DECIDE CASES (LOOK AT WHAT LAW IS / NOT WHAT IT OUGHT TO BE)
  - DEALT WITH / WHAT LEGISLATORS DO OR SPECIFIC RULES
  - DEALS WITH WHAT / HAPPENS IN COURT CASES
- 2. UTILITARIANISM
  - IS A THEORY OF LEGISLATION
  - REGARDING A POLICY / SHOULD BE MEASURED & <sup>2</sup> WE USED / AS BASIS / IN CREATING LEGISLATION
  - JOB OF LAW / IS TO BRING PLEASURE & <sup>3</sup> MINUS PAIN (EMOTIONAL, PSYCHOLOGICAL OR ECONOMIC)
  - UTILITARIANISM / HENCE EPI-TE-LO-GICAL (KNOWLEDGE FROM EXPERIENCE → EMPIRICISM)

→ MOST IMPORTANT LEGAL POSITIVIST → JUSTIN DENTON & JOHN STUART MILL → HIGHLIGHTED CONCEPTS SUCH AS

- LEGAL POSITIVISM
- UTILITARIANISM
- EPISTEMOLOGICAL THESIS
- SOCIAL THESIS
- COMMAND THESIS

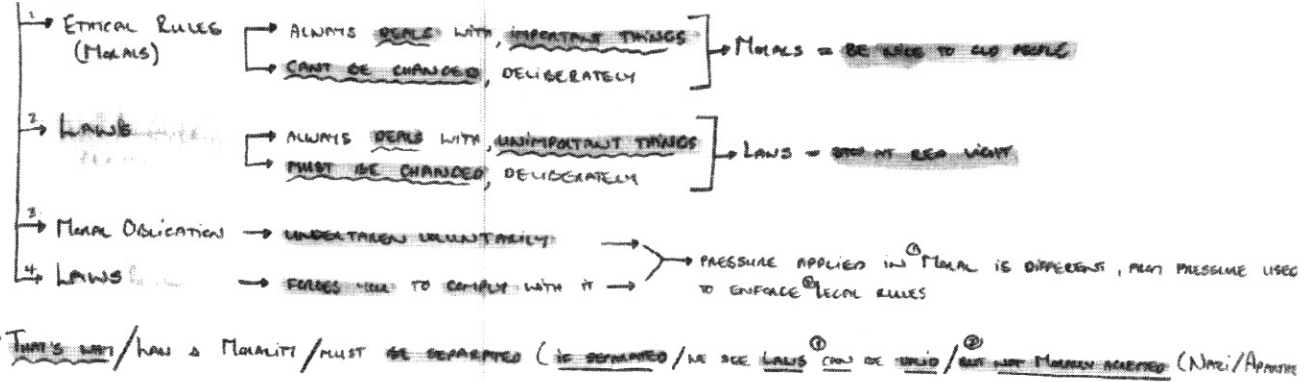
→ ITS 2 THEMES (THESIS) = ETC = ATTEMPT TO MAKE / GEN THEORY OF POSITIVISM APPLICABLE TO LAW

- 1. EPI-TE-LO-GICAL (LAW & MORALITY = SEPARATED) — (LAW IS KNOWLEDGE, NOT MORALITY)
  - POSITIVIST IDEA / KNOWLEDGE OF FACTS & VALUES / LEAD TO DIFFERENT
  - DESCRIPTION OF LAW (FACT) / MUST BE DISTINGUISHED / FROM MORALITY (VALUE)
  - CAN BE DESCRIBED / WITHOUT REFERENCE / TO A MORALITY
  - LAW & MORALITY / MUST BE SEPARATED
    - NATURAL LAW, LINKS IT
    - LEGAL POSITIVISM, SEPARATES IT
  - POSITIVISTS / USED UTILITY / AS THEIR 'SOCIAL SCIENCE' (SCIENTIFIC BASIS / FOR MEASURING SUCCESS (LAW) (STATE OF BEING BENEFICIAL)
  - UTILITY / IS GREATEST HAPPINESS / OR GREATEST WELLBEING / IS THIS WAS PLEASURE OF / RIGHT & WRONG → JUSTIN DENTON
  - SO, UTILITARIANISM IS A THEORY / OF CREATING LEGAL RULES & INSTITUTIONS / NOT ON MORALITY / BUT ON QUESTIONS / IF BRINGS HAPPINESS & MINUS UNHAPPINESS (JOB OF LAW → BRING PLEASURE → MINUS PAIN)
- 2. If Morality, NOT SOUND BASIS FOR LAW, WHAT IS? → CAUTION OF UTILITY

QUESTION: WHAT IS KNOWLEDGE, HOW DO WE ACQUIRE A DISTINGUISHABLE KNOWLEDGE FROM MORALITY? → LAW IS KNOWLEDGE, NOT MORALITY

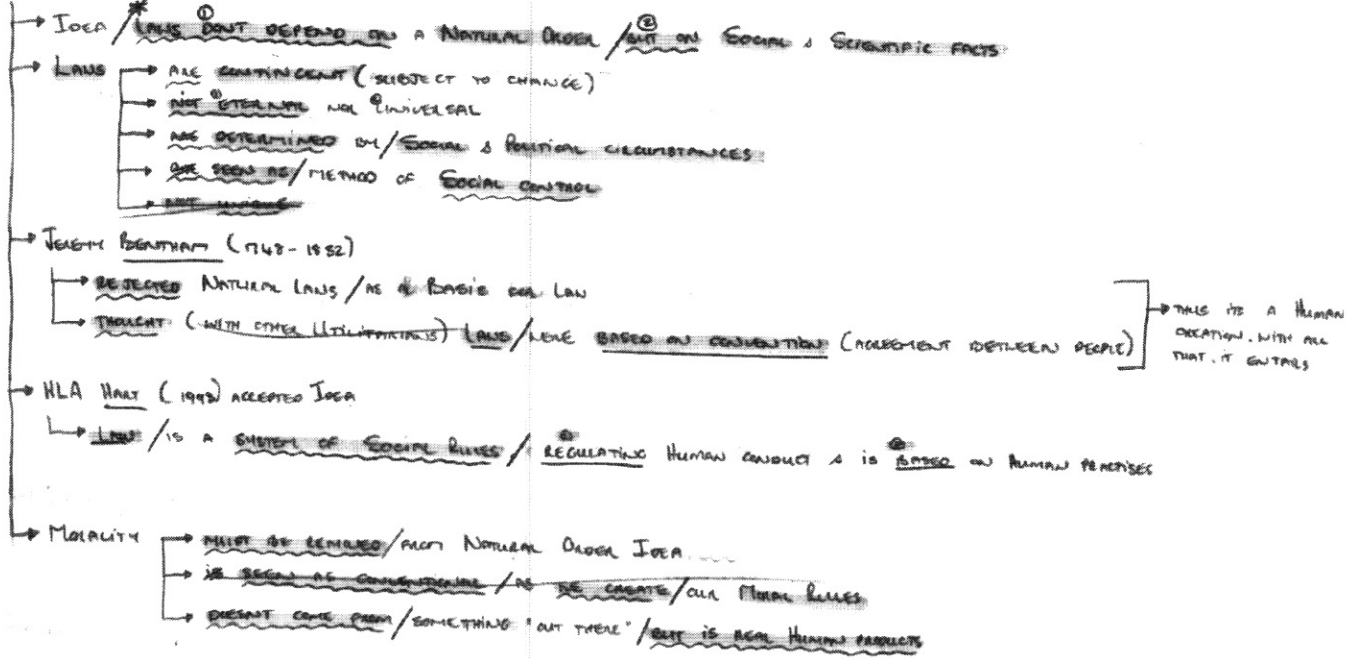
ONCE IDENTIFIED RULES / YOU CAN MAKE ACCURATE PREDICTIONS / ON FUTURE EVENTS

DIFFERENCE BETWEEN LAW & MORALITY

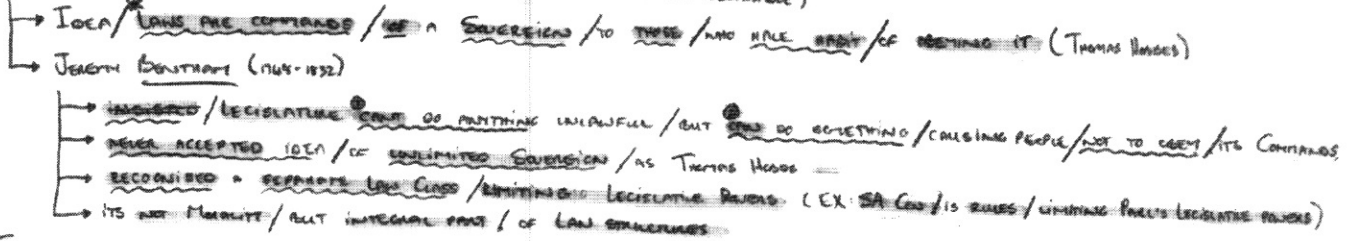


→ REGARDS IDEA, LAW IS BASED ON METAPHYSICAL ASSUMPTIONS  
 → LAW IS BASED ON SOCIAL & SCIENTIFIC FACTS  
 → LAW IS DETERMINED BY POLITICAL & SOCIAL CIRCUMSTANCES  
 → DEFINES LAW AS SOCIAL ORDER BY AUTHORITY'S  
 → VALUES ARE LIMITED, TO WHAT SOCIETY ACCEPTS

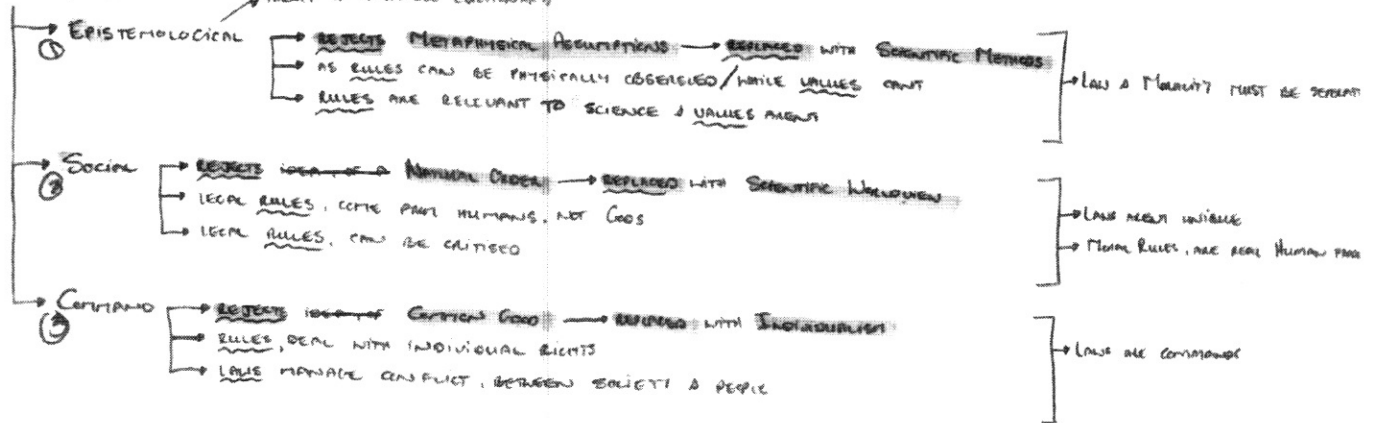
② SOCIAL THESIS (RULES COME FROM HUMANS NOT GODS)



③ COMMAND THESIS (POWER TO COMMAND, LIMITED TO WHAT IS SOCIALLY DESIRABLE)



SUMMARY



→ AMERICAN REALIST (RADICAL & PROGRESSIVE → EMERIT 20' LECTURE)

→ Talented Legal Positivism a Law as it is should work  
→ Laws must be more subjective

- TRAINED IN POSITIVIST TRADITION (SCIENTIFIC APP. TO LAW & SOCIAL SCIENCES)
- FACED PROBLEMS / HAD TO REVISIT TRAD. / TO A IDEAL OF LAW / AS A SCIENCE
- QUESTION "HOW DO YOU REMAIN TRUE ..."

→ REALIST WAS INFLUENCED BY (LP → EX → M)

- LEGAL POSITIVISM
  - INSISTED ON SEEING LAWS / AS A SCIENCE
  - INSISTING COURT DECISIONS / MUST BE BASED ON LAWS / NOT OUTSIDE CONSIDERATIONS (MORALS) } → Formalism (USA Law) → more its coherence
- EXISTENTIALISTS (PHILOSOPHER, EMPHASISING FREEDOM OF CHOICE & PERSONAL RESPONSIBILITY)
  - BELIEVED / WHO & WHAT YOU ARE / ISNT DETERMINED BY GENE
  - DETERMINE YOUR OWN DESTINY & PURPOSE / MAKING FREE CHOICES / ACCEPTING ITS CONSEQUENCES (BUDDHIST KARMA IDE)
- MARXISM (KARL MARX & FRIEDRICH ENGELS → HUMAN ACTIONS & INTS, ECONOMICALLY DETERMINED & CLASS STRUGGLES NEEDED TO CREATE CHANGE)
  - A MODERNIST IDEA / EXPLAINING HISTORY / AS CONTINUING CLASS STRUGGLE / BETWEEN "HAVES & HAVE NOTS"
  - WANT THIS TO END & ESTABLISH A SOCIALIST SOCIETY (USSR, BUT STILL IN CHINA; NORTH KOREA; CUBA (COMMUNIST))
  - LED TO "HUMAN RIGHTS" RECOGNITION & AWARENESS OF SOCIETY FEAR IMBALANCES

→ THEMES OF REALIST

- ADMITTED, COURT DECISIONS ARE BASED ON CONTESTED POLICY CHOICES / BUT DISGUISED BY POSITIVIST ATTITUDES / AS CAN THEIR OWN RESERVATION / ON WAYS IN WHICH JUDGES DECIDE / SAID THEY DID IT / ON BASIS OF THEIR OWN POLICY CONSIDERATIONS & SUBJECTIVE VALUE JUDGMENTS / THIS REALIST EXPOSED ADJUDICATION / AS EXPRESSION OF SUBJECTIVE VALUE JUDGMENTS  
↳ LEARN FROM THEM
- EXPRESSED SKEPTICISM / ON POSSIBILITIES / OF MAKING DECISIONS / BASED ON RULES
- EMPHASISED INTERPRETATION ROLE / CAUSE IF YOU REJECT FORMALISM & CONCEPTUALISM / THEN ITS HARD TO EXPLAIN / HOW CASES ARE DECIDED  
↳ FORMAL STRUCTURE  
↳ PREVIOUSLY VARIANTS  
↳ A CONCEPT (GENERAL IDEA)

→ RADICAL LEGAL REALISM

- WANTED TO DO AWAY WITH FORMALISM / REPLACE IT WITH A CONTEXTUAL APPROACH } REFERS TO SOCIAL, ECONOMIC & POLITICAL CIRCUMSTANCES. JUDGES MUST CONSIDER
- PROBLEM / HOW JUDGMENTS COULD REMAIN SCIENTIFIC & RESPOND TO SOCIAL NEEDS
- TRIED TO SAVE THIS BY SAYING  
↳ JUDGES / MAKE DECISIONS / BASED ON EMOTIONAL FACTORS
- TRIED TO SHOW  
↳ LAWS MUST BE UNDERSTOOD / IN ITS POLITICAL CONTEXT  
↳ DID THIS / SHOWING THAT IT HAS POLITICAL PURPOSE / WHICH MUST BE TAKEN INTO ACC.  
↳ IDEA THAT PROP. IS SOMETHING NATURAL & ABSTRACT, COULD BE USED TO JUSTIFY, MAINTAINING "STATUS QUO"
- LAWS / MUST BE ANALYSED / IN ITS "HISTORICAL & SOCIAL CONTEXT"
- LEGAL FORMALISM / HAD EFFECT OF SUPPRESSING / ECONOMIC INTEREST / OF INEQUALITY
- RADICAL REALIST / WAS A NEGATIVE REACTION TO FORMALISM / POSITIVISM & INDICATED A POLITICAL CRITIQUE / OF LAWS  
↳ CRITICAL EVALUATION

→ PROGRESSIVE LEGAL REALISM

- DEVELOPED FROM LEGAL FORMALISM / USED PRAGMATIC APPROACH / TO REPLACE FORMALISM } TO BRING ABOUT / CERTAIN SOCIAL CONSEQUENCES
- ACCEPTED IDEA / LAW IS A SCIENCE / BUT FOR THEM / ITS A SOCIAL SCIENCE
- WAS LESS POLITICAL IN THEIR APPROACH / TRIED TO ANALYSE LAWS / AS OBJECTIVE (NOT INFLUENCED BY PERSONAL FEELINGS)
- JUDGES / HAD TO ANALYSE SOCIAL & POLITICAL CIRCUMSTANCES (THEY TRIED TO PERFECT, FORMALISM) } → THEIR SOCIAL SCIENCE THEORY  
↳ THEN CAME TO DECISION / REFLECTING REALITIES / OF EXISTENCE & POLITICAL GOALS
- CLAIMED
- SOCIAL SCIENCES COULD BE USED / TO PREDICT & DESCRIBE / WHAT JUDGES DO & THE EFFECT, ON SOCIETY  
↳ CAUSE ITS SOME EMOTIONAL & SUBJECTIVE / JUDGES CAN AND USE THIS / TO COME TO RATIONAL DECISION
- HAD PREJUDICES IN MIND / FOR CHANGING WAYS / THINGS ARE DONE
  - 1. REPLACE ABSTRACT RULES / WITH FUNCTIONAL RULES → A - F
  - 2. REPLACE GENERAL RULES / WITH SPECIFIC RULES → G - S
  - 3. REPLACE ABSTRACT APPROACH / WITH CONTEXTUAL APPROACH → A - C