Late modern legal philosophies

- Relativism: knowledge isn't universal & absolute, but always particular and provincial, i.e., truth depends on your own perspective.
- Refine Rationalism by adding that we need to have rational values in our thinking; lost faith in autonomous human reason.
- Unless we put some collective values & principles of justice back into the technological world, it could destroy its creators.
- Don't reject individualism.
- Temper individualism by including a community aspect in thinking.
- Individuals should together deliberate rationally & collectively about values.
- Try to develop conceptual & normative arguments to explain how subjectivity can be limited in legal decision making.
- Saw EM faith in science & rationality as misplaced.
- Like existentialist: man lives in a void whose absolute, universal truths absent philosophy of the void.
- Seek eternal value or truth beyond the chaos to fill void.
- Rational approach to law rather than "metaphysical one."

- Answer lies in human dialogue & process of rational deliberation about collective values & principles of justice.
- Accept that values play a role in law through rational public debate about shared values.

Rationalism PLUS
Scientific worldview PLUS
Individualism PLUS

Rational values
Normative arguments
Collective rational deliberation about values
Ronald Dworkin

- Focuses on way judges decide new cases by constructively interpreting existing legal materials.
- Adjudication is an interpretative process.
- Interpretative process can be conducted rationally.
- The liberal ideal of a legal order that's neutral towards the individual concept of the ethical good can be achieved.
- Courts are capable of laws' empire, and judges are its princes.
- 3 options of understanding legal institutions in contemp. Western liberal democracies:

1. **Conventionalism** - Rule of law: Principle of legality = central values
   - Refers to positivism
   - Core of convent: idea that the fundamental purpose of our legal practices is to give people due notice of circumstances under which coercive power will be used against them.
   - Enables indivi. to pursue own interests in a purposive manner.
   - The deployment of power by the state is only justified by its compliance with previously announced rules.
   - Rules are central to the conventionalist view of law.
   - No room for values

2. **Pragmatism** - Rule of law: legality = absurd
   - Refers to American realism.
   - Core: idea that the fundamental purpose of our legal practices is to bring about certain social consequences.
   - Deployment of power by the state is justified solely by the good consequences brought about as a result of that deployment.
   - Policies are central
   - Sacrifice to common denominators.

*Neither one of above acceptable to Dworkin.*

Convent = no room for values
Prag = great emphasis on policy

Dworkin: integrity.
3. Law as integrity:

- Political community acts with integrity if it puts principle above the implementation of policy or party political interest.
- Field of law: act with integrity if we put principle above policy.
- Courts should act on a forum of principles.
- Law is constructive interpretation of the community's shared principles.

Noted: realists pointed out that rules don't always determine the decisions of judges: we disown rejected this.

<table>
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<th>Answer to legal problems</th>
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<td>in hard cases, judge has discretion to go beyond the rules; consult other legal materials.</td>
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Constructive interpretation:

- Judges decide new cases by constructively interpreting existing legal materials.
- River metaphor: river flows wherever you stand; judges decide according to the flow of the law; judge can't change the course of the river.
- Judge has to decide case; apply the rule that fits the fact.
- If 2 rules fit, look at principle behind rule that will give rule weight.
- Principle found in history, tradition of every legal system.
- Construct: inter means reading the authoritative legal sources in way which makes of them the best they can be.

- Reading involves judges own understanding of law as a conscientious lawyer who appeals to legal principles when he interprets relevant materials as honestly as he can.

distinction btw rules & principles.


Welfare liberalism is an attempt to reconcile the value of socio-economic equality with the traditional liberal value of liberty.

Politically he that individual should have freedom to pursue a personal conception of the good life. Not absolute, not lead to unjustifiable difference in wealth.

He defends 2 ideas essential to welfare liberalism:

- A rational 2 would subject the pursuit of own life project to certain universal principles of justice.

- 1 of these principles of justice would be that his pursuit must always be to the economic benefit of the least advantaged 2 within political community.

Process of rational deliberation

- A rational individual interested only in advancing own interests would realise the need to co-operate with others.

- Co-operate btw a n of 2 gives rise to group conflict of interests resources.

- For such co-operation to be stable members should shire a common point of view from which claims btw them can be judged.

- They should enter into a social contract with each other based on principles of justice: principles chosen rationally and must be just & fair.

- Justice as fairness: principles of social co-operation just if all the members would have agreed to them in circumstances that are fair.

The 3 principles of justice:

1. The principle of greatest equal liberty

- Each 2 has an equal right to most complete basic liberties compatible with a similar system of liberty for all.

- Basic liberties incl.: right to vote, freedom of speech & association, freedom of the press, right to hold property, freedom from arbitrary arrest & seizure.
2. Socio-economic inequalities btw individuals must be arranged in a reasonable fashion to advantage of all or the maximum benefit of the least advantaged

- difference principle.

3. Everyone should have fair equality of opportunity to fill offices and other positions.

- Rauls & SA Constitution

  - a nr of cons cons provisions can be harmonized with ideas from his theory
  - an analogy can be drawn btw Rauls 1st principle & the provisions relating to the protection of individual rights in B.O.R.
  - eg S9(1), 16(1), 19(3), 25(1)
  - his difference principle is enshrined in S9(2) AA