Department of **JURISPRUDENCE**

Only study guide for LJU4801

LEGAL PHILOSOPHY

University of South Africa

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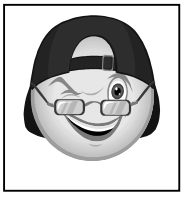
INTRODUCTION

Dear student

Welcome to the module *Legal Philosophy* (LJU4801)! Allow us to introduce ourselves:

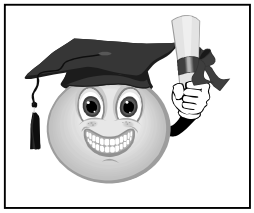
We are Ms SR Smith (left) and Prof IJ Kroeze (right) and we are the authors and lecturers for Legal Philosophy. It will be our task and pleasure to guide you through the study material for this course. Now that you know how we look, we hope you will feel free to contact us if you have any questions regarding the material. We also hope that you will join us and your fellow students online to discuss and disagree on legal philosophy

But we will not be the only "persons" who will be speaking to you in this study guide. Sometimes this little character pops up:



His name is A Student and his job is to ask the questions you might not yet have thought of. (He also likes to make things difficult by asking strange questions, but he doesn't know that we really like students who ask strange questions …)

And then of course there is Prof Expert. He likes to disagree with us as well, but that is also a good thing. He will teach you that every philosophical question has more than one answer and that opinions must and should be different from one another.



This is a module unlike any other you have encountered or will encounter in your studies. You may have heard that this course is "difficult" and that students often fail it. That is not necessarily true! What is true is that this course is very different from most of your other law courses. While most law subjects deal with "black letter law", this course will deal with more difficult and basic questions. Our hope is that your encounter with these kinds of questions will make you a better lawyer.

All the study material you will need for the course LJU4801 is contained in this study guide and in the tutorial letters. It is therefore of the utmost importance that you study it thoroughly and systematically.

In order to pass this course you need to master the material contained in this study guide. To make this easier for you, we have set out the study material in a very specific way. If you follow the method set out here, you will realise what we expect from you and how you should go about meeting this expectation. So, resist the impulse to skip the next part on the approach to this course! If you do not know what we expect from you, how can you know how to answer the questions we put to you? Please take the time and read through the rest of this section carefully. In this introduction we will be dealing with the following aspects:

- The purpose of the course
- How to approach the study material
- Planning your studies
- The assessment of legal philosophy

The purpose of this course

We know that it is unlikely that you have ever had to deal with philosophy as a subject before. That is why we do not expect you to become a philosopher after one semester course. (That is something that takes years of training and is often a painful process!). So what do we expect from you? What should you be able to do?

On completion of this module you should be able to do the following:

1. Analyse a given problem/case and show that you understand this as a philosophical problem and not only as a legal problem.
2. Show an understanding of the nature of the philosophical problem based on your knowledge of basic philosophical ideas.
3. Be able to integrate facts and theory: in other words to properly apply the philosophy/theory to the facts.
4. Use proper grammar, spelling, formulation and full sentences in an essay format to explain your ideas.

You will immediately realise that these are ambitious goals! Let us try to limit them to some extent by explaining them further.

This module is based on a problem approach. By that we mean that learning the content of this study guide is only the beginning. Of course you need to know and understand what is in the study guide. But that is only a very basic start. Because this is a fourth-year course, you need to take a further step. You need to be able to see the philosophical problem "behind" the everyday, ordinary problems. You will realise that this is not simple. It is not meant to be simple. That is why we give you plenty of examples and problems in the study guide.

The next step is to understand the nature of the philosophical problem. This also implies that you already know the work and can therefore recognise the various philosophies hidden in the problems/cases. In a sense you need to develop philosophical x-ray vision! Practice this by applying it to everything you encounter in your life.

The most crucial aspect of this module is the ability to apply your knowledge to the facts/problems/cases you encounter. Mere knowledge of philosophy is useless unless we can apply them to real life and learn something about the way the world works. This is particularly important in law, where we tend to focus only on the rules/legislation. But there is something behind every rule! Your philosophical x-ray vision will open up a new world for you.

How to approach the study material

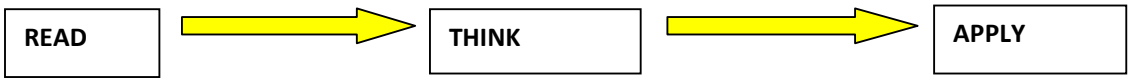
The study material for this course comprises a lot of new information that may be difficult to assimilate. That is why it is important to follow the instructions in the rest of this study guide very carefully. You will see that we have included a number of features to help you achieve the outcomes for this course. Please do not ignore them! They will guide you so that you are able to pass the course. We would like to emphasise a number of features:

You will notice that a number of *concepts* or *terms* are printed in *italics* in the text. Sometimes we give an explicit definition of the term, but often you will have to deduce the meaning from the text itself. In either case, you have to make sure that you can give definitions for the terms so that you are able to explain them to a person who knows nothing of law or legal philosophy. You should not make the mistake of thinking you can get away with rote learning or memorising without understanding in this course. The emphasis is on using the basic concepts and ideas to apply them to problems and cases. Without a firm foundation of understanding, you will not be able to do this.

We have also included a number of *activities* in the study guide. These are meant to help you determine whether you understand what you read. Please do not ignore these activities. They are linked to the kinds of questions you can expect in the exams. In all cases, feedback will be provided. (Please note: feedback does not mean we give you the answer! It means we try to guide you to find the answers yourself.) You should also know that the study material gets more complex as you progress. The activities are designed to help you master the increasingly complex material.

At the end of the study guide, there will be a number of *self-evaluation questions*, included as ADDENDUM A. These questions come from past assignment questions and give a good indication of the kind of questions you can expect in the exams. We then provide exemplar answers to these questions. Please note: these are not model answers! We provide two possible answers to every question – this should indicate to you that there is never just one, correct answer to a philosophical problem. What matters is your insight and reasoning, not whether it is the "right" answer.

So, in all cases, what you have to do is the following:



It is extremely important that you try to answer these questions yourself, before looking at the feedback provided. If you do, you can be confident that you will be able to answer the questions in the exams. Note that it gives an indication of the *type* of question you can expect. It is not sufficient to merely answer these questions – you have to work through all the study material.

You will see that we try to illustrate various philosophies by referring to *case law* and other problems. Where we use case law, we give a short extract from the case and not the full judgement. This is the result of space and cost considerations. If you can read the full judgement, it will be to your advantage. However, the extract will be enough for exam purposes. In either case, you ignore the case law at your peril. But we do not expect the same level of detail about the case law as is expected from you in your other law courses. We need you to be able to briefly give the facts and then move on to a discussion of the underlying philosophy. This is not a course in constitutional law or private law and should not be treated as such.

We also need to say something about your *own opinion*. If we ask for your own opinion, that opinion can of course not be right or wrong! It can, however, be well argued or badly argued. Therefore, you must always give good reasons for your answers and take all other opinions into consideration.

As a fourth year law student you might find it helpful to skim-read though the whole module first just to get a "feel" for the module as a whole. Such a reading will invariably emphasise the importance of implementing the ideas we gave you on how to approach this module from the first unit onwards.

Finally we have a discussion forum on MyUnisa. This discussion forum includes the activities in this study guide. It is intended to both help you plan your studies (by indicating where you should be in the study guide) and to show you what other students are doing. We urge you to post your own contributions on the site – the lecturers and other students will comment on them and this will assist in helping to make your answers better.

Planning your studies

As this is a semester course, the best-case scenario is that you will have only three months to prepare for the examination. If you have not done so yet, we urge you to start with your preparations immediately. Most students find that they have to work through the study material a number of times before they develop the necessary understanding and sensitivity towards the philosophical issues involved. This requires time and dedication. Experience has taught that many students start their preparation for the examination too late. These students discover a week or so before the examination that it is not possible to summarise the study material in the form of a list of facts which can be quickly memorised (as can be done with many other legal subjects). This leads to frustration and eventually to desperation. The study material seems unmanageable and students lose faith in their own ability to pass the course. For the majority of students this crisis is self-generated and can be easily avoided. Start your preparation early and contact lecturers frequently to discuss problems as and when they arise.

Other students decide shortly before the examination, because of a lack of preparation, to study only certain of the prescribed topics. As all the questions in the examination are compulsory, this practice invariable proves to be fatal. An early start and frequent contact with lecturers and fellow students will ensure a basic understanding of all the prescribed study objectives.

In order to avoid the panic that results when you do not have enough time to study and prepare, we suggest that you plan your study. The activities on MyUnisa are an excellent way of keeping track of where you should be in your studies.

In the course of this study guide we will also be introducing you to the idea of drawing up "mind maps". This is a very useful study tool that will enable you to reduce the whole module to 5-6 A3 sheets of paper which should help you with your studies. After the first study unit we will give you an example of such a mind map. More information if provided in ADDENDUM B to this study guide. Hopefully you can produce your own for the rest of the study material.

Assessment of legal philosophy

One of the things students are most concerned about is the question of how lecturers assess their answers. As a result of the nature of legal philosophy, there is never a fixed memorandum setting out the so-called “facts” which you should include in your answer. The memorandum usually consists of general guidelines as to what a student might have included in her or his discussion. Your discussion is assessed as a whole taking into account your grasp of the issues and the coherence of your answer.

So what is it that we expect and don't expect in your answer?

We don't expect excruciating detail. This is not the kind of subject where you have to know what the colour of the plaintiff's tie was. We want you to be able to see the big picture, to see the essence of a certain approach or philosophy. On the other hand, don't waffle. By that we mean that you do need to actually know what a philosopher said or thought and not what you think he should have thought. You do need to know the basics and then apply them to a complex case.

You need to be able to argue about the various philosophies. By that we don't mean that you must have your own, personal philosophy about every little thing. In most cases we give you the pro's and the con's and all we expect from you is to be able to give the various arguments and, sometimes, to choose between them. That is why similarities and differences between theories are important. It shows that you understand the relationships between ideas. These are not always given in your study guide, so you need to think about them and figure them out. With concept maps this should become absolutely clear.

Apart from these general guidelines, it is also important to discuss a number of other issues. These are particularly important for your assignments.

Plagiarism

Plagiarism is a huge problem in academic writing with potentially devastating effects. To put it bluntly, it is a form of fraud and theft. But students seem unclear as to what constitutes plagiarism. The following practices can be regarded as plagiarism:

- Repeating verbatim (word-for-word) the words of another author without putting it in inverted commas and acknowledging the source in a footnote.

- Summarising, paraphrasing or using the ideas of someone else without acknowledging that it is not your own ideas. Therefore, even if you use your own words, you still need to indicate that you got the information somewhere else.

- Using the cut-and-paste method, particularly with internet sources, and pretending that they are your own. This is a particularly easy form of plagiarism to detect with software designed for that purpose.

What this means in practice is that any assignment that is handed in without footnotes and a bibliography will be regarded with a lot of suspicion. If you do that, you are claiming that every single idea, concept or opinion in that assignment is your own. When we mark your assignment, we will check whether that is indeed the case. If not, it amounts to plagiarism and you will get 0% for your assignment.

Please note: your study guide is also copyrighted. If you quote from it, use information from it (whether in your own words or not) or summarise it, you must acknowledge it as the source in a footnote. Failure to do so amounts to plagiarism.

For further information, see Unisa's *Policy for Copyright Infringement and Plagiarism* available on the web.

Modes of citation

As you can gather from the above, referencing is extremely important. In the School of Law there is a prescribed way in which you have to reference. Your footnotes and bibliography must conform to this prescribed style. The prescribed style can be found in your Tutorial Letter 301 that is sent to ALL LLB students every year. Failure to adhere to this style will be penalised.

Writing/grammar

Your assignment must be written in clear, correct and concise language. The following are general guidelines to be taken into consideration:

- Keep your language impersonal and in the passive voice. Avoid using "I think" and "in my opinion" – this is the beauty of referencing: we assume that if there is no reference, it is your own opinion. It is better to keep to formulations like "the conclusion seems to be that" or "it seems clear that".

- Avoid long and complicated sentences. As a rule, every sentence should have only one verb. Long sentences tend to confuse your readers and you want to avoid that at all costs.

- Avoid bullets and lists as if they are poisonous. The point of a legal philosophy paper is to provide a narrative consisting of a coherent, logical and consistent argument. You are not doing the shopping list here! Write in full, simple sentences and keep to the rule of one idea per paragraph.

- Avoid overly complicated terms and vocabulary. As Coco Chanel said: Simplicity is the essence of style.

- Avoid email or sms language at all cost. Use proper spelling and grammar.

- Most work processing programmes have a built-in spelling and grammar checker. Use them! While they are not a substitute for proper proof-reading and editing, they can help to avoid the most basic errors.

To assist you in your preparation, we include the "marking rubric" we use when assessing your assignments and exams. Please use it to understand what it is we expect from you.

MARKING RUBRIC

Dear student

We will provide more general feedback as well as some exemplar answers in tutorial letter 102. Regarding your specific assignment though, the following are aspects that you need to pay attention to. **Only comments next to a ticked box apply to you!** Please take these seriously and try to remedy them before the exam.

☐ You failed to identify the philosophical issue in the question. Remember this is not like your other courses – concentrate on the philosophy.

☐ You do not understand the underlying philosophies you mention here. Go back to the study guide and pick up the basic, theoretical knowledge. You need to show the theory in your answer.

☐ You did not apply the theory to the facts, in other words you failed to integrate your answer. Look at the exemplar answers in your study guide.

☐ Your language usage needs attention. Language is a lawyer's most important tool – pay attention to it.

☐ We cannot read your handwriting. This means we cannot judge your work. If you do this in the exams, you will not pass the exam. Pay attention to it now!

☐ You used bullets/lists/sms-language. You were warned not to do this and you therefore get 0.

☐ You plagiarised from the study guide and/or failed to reference correctly (which amounts to a form of plagiarism). You get 0.

☐ Congratulations! Good answer!

☐ Other: _____
_____
_____

Good luck with assignment 2!

Your lecturers

STUDY UNIT 1

STUDY UNIT 1: DETERMINING THE FIELD OF STUDY

This is an extremely important study unit to master right at the beginning of your studies. It is foundational in the sense that it explains what you are going to be busy with throughout the whole module. If you do not grasp the principles of philosophical thought set out in this unit, you will definitely experience difficulties with the other units!

1.1 What is legal philosophy?

We have been talking about philosophy and legal philosophy as if you all know what that means. But that is not the case, is it? Therefore, before we continue, let's try to explain what is meant by these terms.

We assume that most of you have seen the movie *The Matrix*. (If you did not, try to get hold of it on DVD – it is the best philosophy movie ever.) Did you leave the theatre wondering what was real and what was not? The movie had the effect of making us wonder if the world we regard as "real" might only be a dream. Or have you ever wondered what the point of everything is? Why are we here? Is what we can see all that exists? Is there something more? And how is the world put together? Is it organised or is it random? When you think about politics, you might also have wondered about concepts like "freedom" and "democracy" that politicians always use. What do these concepts mean? And does the meaning change from time to time and from place to place?

If you have ever asked questions like these, you have started the process of philosophy! The difference between yourself and the philosopher is that he/she thinks about the **most basic or fundamental aspects of our world and our existence in a systematic and rational way**. Therefore the philosopher is not only interested in concepts, but in the basis of whatever exists. So, when a philosopher asks: "What is time?" he is not interested in a definition. Anyone can look up the word in a dictionary. No, the philosopher wants to understand what time is and how it relates to everything else. And he does not want an answer that is based on faith or on authority.

This means that philosophy is always based on reason. **Philosophy is basically a *rational* inquiry into fundamental questions**. In the history of philosophy, two basic questions have always been at the centre of inquiry, namely:

1. What is the nature of that which exists?
2. How do we know?

> Rational thinking implies using reason and logic, but without necessarily requiring outside proof of the truth of what you're saying.

You will immediately realise that these are also the kinds of questions that are also asked in religious systems. But in religion, the answer almost always has to do with faith in some form or another. In

philosophy the answer must be based on reason – the philosopher cannot simply accept answers on the basis of faith or authority. His answers must, in a manner of speaking, carry its own rational authority.

But what is wrong with faith and authority? What is wrong with believing in certain things that cannot be proved and that might not be rational?

Well, nothing. But the point is that these kinds of beliefs and authority belong to the domain of religion. Philosophy is not a religion and therefore different rules apply as to what is acceptable and what not.

But philosophy is also different from natural science. In the natural sciences, like physics, the truth of a statement can mostly be measured by observation or experiment. This is not possible in philosophy. It is impossible to answer the question: "What is time?" by doing some sort of experiment. For these questions, *rational* enquiry must try to give an answer.

For these reasons, the philosopher Bertrand Russell's definition of philosophy is probably the most accurate:

> Philosophy, as I shall understand the word, is something intermediate between theology and science. Like theology, it consists of speculation on matters as to which definite knowledge has, so far, been unascertainable; but like science, it appeals to human reason rather than to authority, whether that of tradition or that of revelation. … (B)etween theology and science there is a No Man's Land, exposed to attack from both sides; this No Man's Land is philosophy.[1]

Now you have a basic understanding of what philosophy is. What then of legal philosophy? How is it different from philosophy in general? In order to answer this question, let us conduct an experiment – look at the three terms below and give your own definition of each:

freedom:_____

_____

rights: _____

_____

democracy:_____

_____

Now study your own definitions. Did you define "freedom" as political freedom, in other words freedom from political oppression and persecution? Why? Why not define it in terms of lack of restraint, in other

[1] Russell B *History of Western Philosophy* 2nd ed (London 1961) 13.

words personal freedom? Do you think freedom means something different in politics and in law? What about "rights"? Is your definition of rights based on private-law ideas about subjective rights? Or is it about human rights? If so, why? Do you work with a basically private-law idea of rights? Could there be more to this concept? And what about democracy? Is that a purely political concept, or does it have a legal aspect or component?

All of these questions are typical of legal philosophy.

Remember that legal philosophy is a branch of philosophy and, as such, concerned with the kind of questions we spoke about earlier, namely:

- What is the nature of law?
- And how do you know this?

This then leads to other, secondary questions like:

- What are rights?
- Are they about individual rights or about communities having rights?
- And what is justice?
- How does this fit in with morality or ethics?
- Is it just by chance that some things are both morally unacceptable and illegal, like murder? Or is there something more?
- And what is the role of the state in all of this?

You will immediately realise that very few of these questions have a single, once-and-for-all answer. Your answer will depend on your general philosophy, as well as your upbringing, culture, religion and even gender. The study of legal philosophy is therefore the study of the various answers that have been given to these questions (and many more) over the last two centuries.

The following definitions have been given for legal philosophy. (You will notice that the terms "legal theory" and "jurisprudence" are sometimes used in the place of legal philosophy. For our purposes, these terms can be seen as synonyms.)

> (L)egal theory is both a discussion of law in general and focused on a particular legal system. We look at a group of social systems, but as a means of understanding better our own legal system.[2]

> (I)t concerns thought about law, its nature, function and functioning, on the broadest possible basis, and about its adaptation, improvement and reform.[3]

> Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law. (I)t involves understanding and use

[2] Bix B *Jurisprudence – theory and context* 2nd ed (London 1999) 11.
[3] Dias RWM *Jurisprudence* 5th ed (London 1985) 4.

> of philosophical and sociological theories and findings in their application to law.[4]
>
> At its simplest jurisprudence may be defined as the corpus of answers to the question 'what is law?' … If the subject has such a simple core task, however, why is it that the question has been posed from at least the time of the classical Greeks, some 2,500 years ago, and no settled answer to the question 'what is law?' has been arrived at?[5]
>
> (T)he study of general theoretical questions about the nature of laws and legal systems.[6]

From these definitions you can see that most of them have a number of points in common. But, rather than attempt to provide a definition, it would be better to give a list of the characteristics of legal philosophy. These include:

- Legal philosophy is concerned with the **totality** of legal science. It does not study only a part of law (such as private law) or even the legal rules *per se*. Instead, it attempts to look at law as a whole – the rules, the basic principles, the application and functioning within the broader social and political context.

- Legal philosophy tries to study law using its **social nature** as point of departure. That means that law cannot be seen in isolation, but must be seen as part of a greater social system and of science in general. That is why some legal philosophers draw insights from literature, art, film, language theory, etc. Can you think of other socio-economic and political issues which are open to philosophical debate? For example, if you argue that the government should protect its citizens against unacceptably high levels of crime, is that a philosophical question? We think it is, because you are then arguing about the nature and obligations of a state and various philosophers would give different answers to this problem. Do you agree?

- Legal philosophy is primarily a **theoretical** field of study. Although practical aspects like the functioning of law and the consequences of legal judgements are important, the emphasis is on theoretical and **critical** analysis of the law. That is why the "what is?" and "why?" and "says who?" questions are so important to legal philosophy.

---

4 *Lloyd's Introduction to Jurisprudence* 5th ed (London 1985) 5.
5 Morrison W Jurisprudence from the Greeks to postmodernism (London 1997) 1.
6 Johnson D, Pete S and Du Plessis M *Jurisprudence: a South African perspective* (Durban 2001) 1.

- Legal philosophy is also an **integrated** field of study. This means that legal philosophy tries to see a bigger picture. Not only the law and its concepts are studied, but also the relationship to various other ideas and concepts. That is why it is concerned with questions relating to *justice*, *morality*, *democracy* and so on.

Activity 1.1

Based on everything you have read so far, give your own, preliminary definition of legal philosophy in the space provided below.

_____

_____

_____

_____

_____

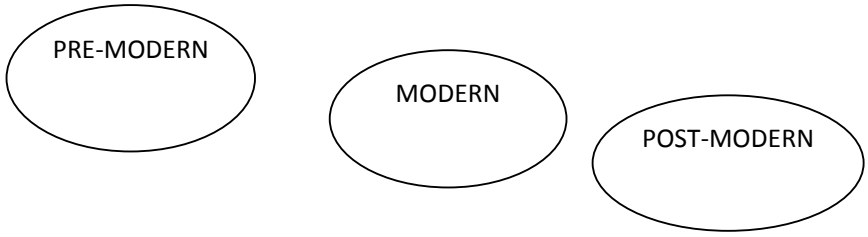
_____

_____

Feedback: This is one of those cases where your definition cannot be right or wrong. It would, however, be a good idea if you included all the elements we listed above in your definition. At the end of your studies in this field, we will return to this definition to see if it's still valid. You might then want to change it.

1.2 Classifying legal philosophies

Because this is an introductory course, a great variety of philosophers and their approaches to law will be discussed. In order to make the various philosophies more manageable we have divided them into three groups. The philosophies in the first group are called *pre-modern* approaches to law, those in the second group *modern* approaches to law, and those in the third group, *post-modern* approaches to law.



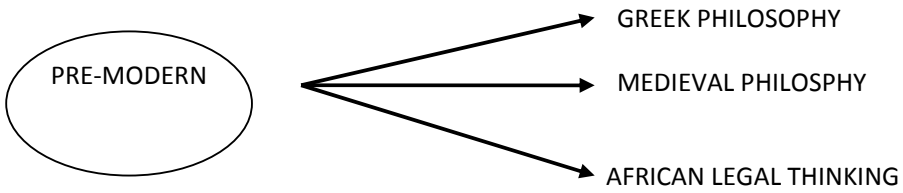
The terms *pre-modern*, *modern* and *post-modern* are usually associated with periods in the history of Western civilisation. These terms indicate major cultural shifts in the history of that civilisation, namely:

- The *pre-modern* era is the time before the 16th century and represents an attitude of blind faith in religion.
- The *modern* era from the 16th century to the 20th century is the period of blind faith in science and reason.
- The *post-modern* era (from the end of the 20th century) is a time of increasing scepticism about science and human reason.

However, these terms are not primarily used to refer to time-periods in the history of the West, but to particular ways of thinking in legal philosophy. Remember also that what might be regarded from a Western perspective as a pre-modern way of thinking about law has always been, and still is, the dominant mode of thinking in many cultures and traditions outside the Western world (African and Muslim legal philosophy, for example). We will now give a very general overview of the three types of thinking. Do not worry about unfamiliar terms now – we will explain them in greater detail in the rest of the study guide.

(a) The pre-modern way of thinking about law

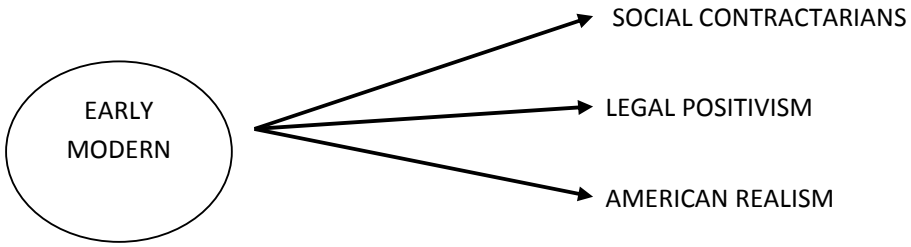
Pre-modern legal philosophies are concerned about the good of the community as a whole (this is also called the *common good*), as opposed to the particular interests of the individual. Pre-modern thinking also relies heavily on *metaphysical* or religious beliefs about the world. It is therefore thinking committed to both the community and a particular religious or metaphysical world-view. Because of this, they also believe in *natural law*. The pre-modern approach dominated thinking in the Western world up to the 16th century and is still the dominant mode of thinking in Christian, Muslim, Judaic and African legal philosophy, to name but a few. In this study guide we will be looking at three kinds of pre-modern thinking:



(Pre-modern legal philosophy will be discussed in Study Unit 2 of this study guide.)

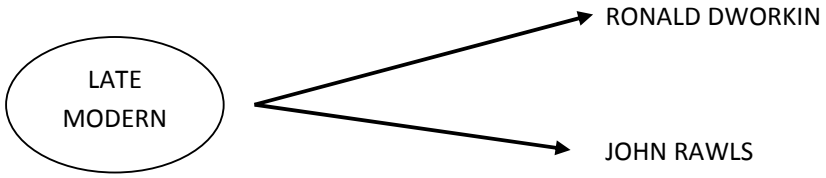
(b) The modern way of thinking: early and late

Modern legal philosophies attempt to replace blind religious faith (associated with the church's domination in the West until the 16th century) with the scientific and rational investigation of law and legal rules. Impressed by the progress made by the natural sciences, early modern legal philosophers desired to distinguish clearly between facts and values and to turn law into a value-free social science. In this process they rejected natural law as metaphysical nonsense that must be replaced with the *scientific method*. Early modern philosophers had faith in the ability of science to rid the legal system of all irrational and ineffective rules. In this study guide we will be studying three kinds of early modern philosophies:



During the 20th century it became clear that the blind faith of early modern philosophers in a science of law and society had come to nothing. Science alone could not save mankind from things like Auschwitz, Hiroshima, Chernobyl, nuclear weapons of mass destruction, chemical warfare, the hole in the ozone layer, the hothouse effect, acid rain and other ecological disasters, genetic manipulation and the cloning of human beings, etc. It became clear that science alone could not deliver peace and prosperity.

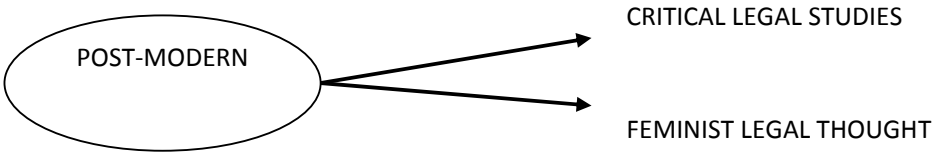
However, the modern thinkers did not abandon their belief in rationality or *rationalism*. They said that values and principles also play a role in law, but that these values and principles must be established rationally. Late modern philosophers share with early modern thinkers the belief that legal rules cannot be based on religious faith but should be rationally investigated, justified and applied. They differ from early modern thinkers because they believe that rational debate about shared values is possible and necessary. We will be looking at two very influential late modern legal philosophers:



Finally all modern thinkers place emphasis on the individual, rather than on the common good. This belief in individualism is their most lasting legacy and is enshrined in most modern constitutions. (Modern legal philosophy will be discussed in Study Units 3 and 4 of this study guide.)

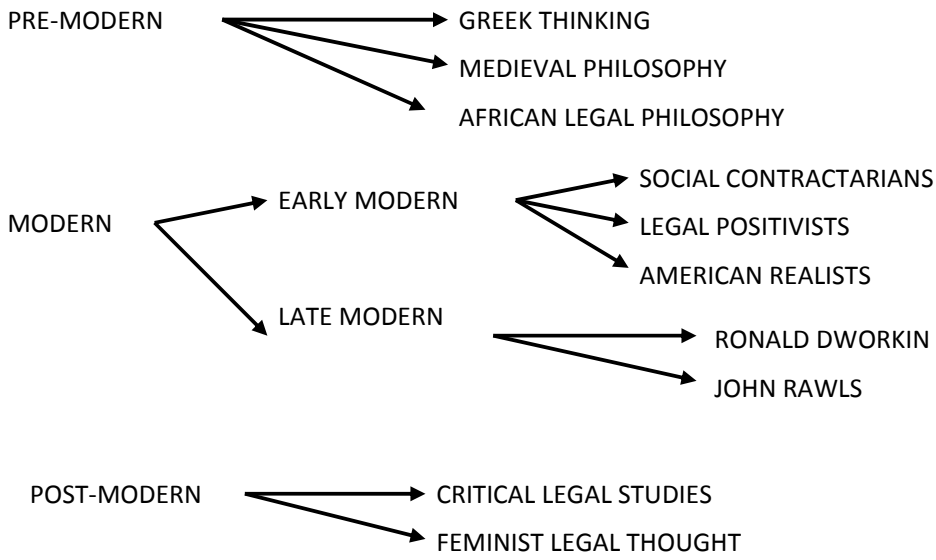
(c) Post-modern philosophies

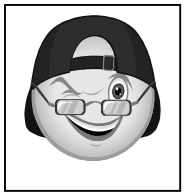
Post-modern legal philosophers share the late modern sense of crisis. But their solution is different. They do not believe the crisis can be resolved by appealing to universal values or principles. Because society has become more pluralistic, we need to find different solutions. Post-modern philosophers therefore criticise the idea of a rational legal order, and explore what modern philosophers regard as irrational modes of thinking as alternatives to legal science. In this study guide we will be discussing two post-modern philosophies:



Post-modern philosophers reject the individualism and rationalism of their predecessors. Instead they use *deconstruction* and other methods to criticise traditional legal thinking. In many ways they represent an MTV (Music TV) approach to philosophy – they criticise legal thinking, but they don't prescribe what the answer should be. Like a good music video on MTV that leaves you to find your own story, they give you a range of options and expect you to actively participate to find a better solution! (Post-modern philosophies will be discussed in Study Unit 5 of this study guide.)

So, if we put all this together, your study material will consist of the following:





Hang on there – how do you decide which philosophies we study and which we don't? There is nothing here about Marxism, for example. And what about the religious philosophies, like Judaism? Are you trying to keep certain things from us?

Well, not exactly. The problem is that we have only so much time for this course. We simply cannot study ALL the philosophies that have ever been brought about in the history of mankind. We have chosen these

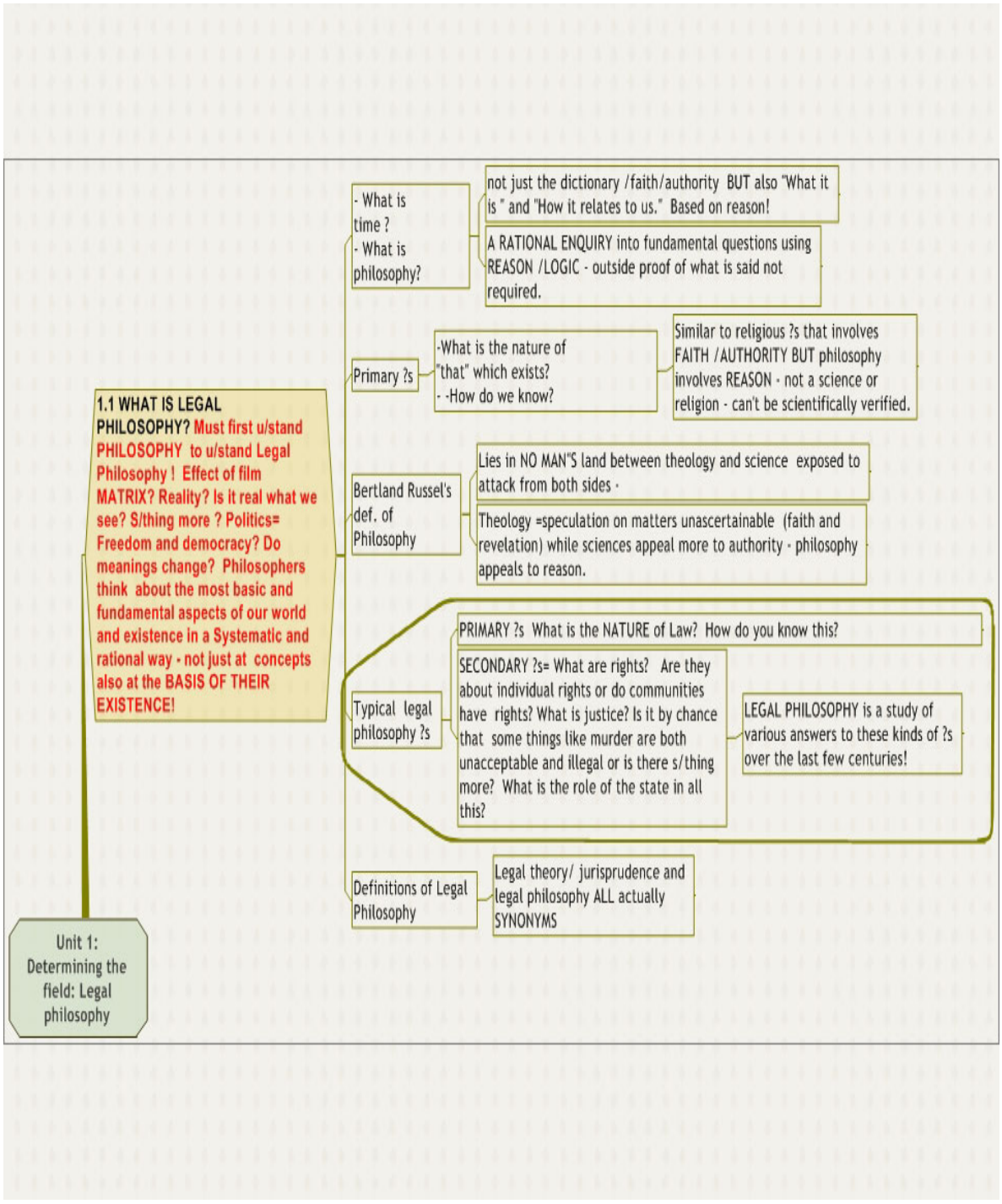
philosophies because they seem the most relevant to South African law. Maybe, if you are interested, you might like to later talk to us about further studies where you can study these other philosophies in depth.

Activity 1.2

Below we give you an example of a mind map. This is an extremely useful tool for study purposes as it enables you to summarise the whole of section 1.1 in one page, as you will see. At the end of the study material (ADDENDUM B) there is an explanation of how these mind maps work. This information and the mind map below were kindly supplied by Dr AG Smith of the Institute for Curriculum and Learning Development at UNISA. You should see whether this makes sense to you and develop your own mind maps for the study units that follow.

See if you can create your own mind map for section 1.2 in your workbook so that you have a mind map of the whole Unit. You can add more detail if you wish to help you recall the main ideas.

As the Units become more complex as we progress, we suggest you make concept maps of the difficult aspects by putting meaningful sections together.



And with that we think we are ready to move on to the first kind of legal philosophy – the pre-modern legal philosophies.

STUDY UNIT 2

STUDY UNIT 2: PRE-MODERN LEGAL PHILOSOPHIES

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2. PRE-MODERN LEGAL PHILOSOPHIES

2.1 Introduction

In this section of the study material we will be dealing with the pre-modern approaches to legal philosophy. It is a part of the work that might feel strange to those students who live in a modern society, but to others it will be very familiar. The important point is that these theories have always been very influential and continue to be so. Against the background of the general purpose of this course, we can now look at the specific purposes of this section.

After you have studied the pre-modern philosophies, you should be able to:

1. define and explain the key concepts in italics in this study unit;
2. give a definition of and explain the development of the idea of *natural law*;
3. compare the key concepts as they are used in the various philosophies;
4. explain how these ideas are used by philosophers to provide the basis for their views on the state;
5. give a practical example of how these ideas might still be relevant in contemporary law.

One thing you should remember from the very beginning is that the word "pre-modern" is not a value-judgement. It does not mean that it is old-fashioned, irrelevant, useless or not to be taken seriously. It simply refers to a kind of thinking that is neither modern nor post-modern.

2.2 Pre-modern society

The societies, within which pre-modern legal thinking thrives, are quite different from the typical twentieth-century societies familiar to most of us. These are *relatively small* and *fairly homogenous* societies. In other words, they are not like the nation-states of our time, but are small communities where people share the same basic values, ideas and practices. They are therefore not *pluralist* in nature.

What on earth does "homogenous" and "pluralist" mean? What would such a society look like?

That is actually a very good question. And the best way to answer it is to give you a make-believe answer. Imagine that, in a galaxy far far away, there is a planet on which all the inhabitants are 1 metre tall, they are green with huge black eyes, no hair and they communicate telepathically. They also believe that their planet was created by the Flying Spaghetti Monster who commands their obedience and tells them how to live. For these people the way they look and act and believe is absolutely natural and normal. If they were to see a being that looked and acted and believed differently, they would be astonished and perhaps frightened. **That** is a homogenous society – a society where everyone looks, thinks, acts and believes exactly the same. A pluralist (or heterogeneous) society is the opposite: one where people look, think, act and believe differently from one another. But let's look at a number of examples from the real world:

- When we speak of Ancient Greece – the Greece of Plato and Aristotle – this is not the same as the Greece of our time. For one thing, there was no single Greek state like today. Greece at the time consisted of a number of city-states that, from our perspective, were fairly small. These were single cities, like Athens, that were independent economic and political entities. Within these city-states most people acted, thought and believed basically the same things. In other words the population was *homogenous*. That is why it is incorrect to refer to "Greek law" or the "Greek state" in this period. Law differed from one city-state to the next. That is also why, when Plato in his most famous book speaks of *The Republic*, he is thinking of one of these city-states and not of a modern republic.

- Medieval European society also consisted of fairly small kingdoms and fiefdoms ruled over by local kings or chieftains. The modern nation-states had not yet come into being. Even where bigger kingdoms did occur (such as in England), local barons and landowners exercised much of the power we think should vest in the central government. Moreover, the influence of the Roman Catholic Church meant that everyone was subject to the same set of legal and moral rules, at least in most instances. Excommunication from the church also affected one's social position. And remember, it is highly unlikely that most of the people in this society would ever have encountered people with a different skin colour, language, culture and religion from their own. This ensured a homogenous society.

- Traditional African societies (with a few notable exceptions) were and are mostly fairly small communities organised around family relationships. This ensures that all members of that society share basic values, ideals and practices. The idea of a strong central government exercising power over local communities is foreign to traditional African thinking. And, like in the case of medieval Europe, it is unlikely that most people would ever have encountered people who look, act and think differently from them. In fact, the few such encounters they had, could have resulted in slavery!

The result is that you have communities where everyone acts the same and has the same values. What is more, these communities seldom come into contact with other, different kinds of communities. Their

isolation and homogenous nature then leads them to regard the way they live as the only way one *can* live. From there it is a small step to thinking that this is the natural or god-given way to live. Therefore, pre-modern thinkers look at their societies and think that they are the way they are because of a *higher, natural or god-given order*.

But this higher order cannot be seen or felt. As a result they assume that it must exist beyond the physical world that humans inhabit. And because that is the realm that the gods occupy, they also assume that god/gods created this natural order. *Metaphysical* thinking is therefore the result of a connection between religious belief and a specific kind of social order. Therefore, not only is there a *natural social order*, but this order has its origin in some form of belief in god/gods.

Lastly the homogenous nature of the society makes it easier to advance the idea of the *common good*. After all, if everyone agrees on the basic conditions of this society, then acting in the interest of the community will also mean acting in one's own self-interest. As a result there is no conflict between individual and community!

To summarise: if you have a society where everyone looks, acts, thinks and believes the same, the members of that community will tend to see this as the natural or normal way to live. They will see their society as a part of the natural order (like the seasons or gravity), but because they cannot physically see that order, they will assume that it must come from some higher being (like a Flying Spaghetti Monster). The other result of such a homogenous society is that members do not see a conflict between the individual and society and so everyone sees the common good as the most important thing.

The example of the Flying Spaghetti Monster might strike some of you are funny and/or irrelevant, but it is actually based on real-life events. The Church of the Flying Spaghetti Monster was established by Bob Henderson as a parody of traditional religions in an open letter opposing the teaching of intelligent design[1] in schools in America. From there it became an international phenomenon and adherents call themselves Pastafarians. Recently a member of this group, a Mr. Niko Alm of Austria, won a court battle that now gives him the right to wear a colander, as religious head gear, on his driver's licence photograph.[2] A strange case indeed.

1 Intelligent design is the fundamentalist Christian opposition to evolution. They teach that the world was created by God and that evolution did not happen.

2 See http://www.thesun.co.uk/sol/homepage/news/3694931/Pastafarians-bid-for-hole-y-hat-on-driving-licence.html (accessed on 17 August 2011).

Activity 2.1

Can you think of societies in the 21st century that can still be regarded as pre-modern societies? What makes them pre-modern? And what role does the homogenous nature of such societies play in making them pre-modern?

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_____
_____
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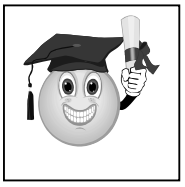
Feedback: There are basically three characteristics of pre-modern society. We have no doubt that there are a number of such societies still in existence today. In particular you might think of states that have an explicitly religious base.

Despite the small number of these modern homogenous societies, many of the socialist heterogeneous societies of Western Europe are increasingly moving towards a more homogenous society. I would argue that is because sometimes too much pluralism could be threatening. I wonder if the students will agree with this.



2.3 Characteristics of pre-modern legal thinking

We have now seen that pre-modern societies have certain characteristics. These characteristics influence the way they see the law. That is why the characteristics of pre-modern legal thinking are linked to the characteristics of the society. The characteristics of pre-modern legal thinking are:

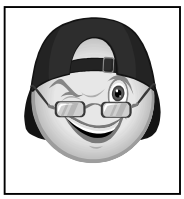
Key concepts:
natural order
common good
metaphysics
natural law

- In the first place it is assumed that there is a *natural order* or natural harmony that applies to social life and the law. This means that social arrangements and laws are assumed to be part of nature and therefore cannot be criticised. After all, if you cannot question the law of gravity then, in the same way, you cannot question the natural way in which society is structured. In legal thinking this meant that the hierarchical structure of these societies were never questioned and were, in fact, justified. It

also meant that laws were often regarded as being beyond criticism. After all, if your laws are part of the natural order, and that order comes from a god then criticism of the laws is indirectly criticism of the god!

- In the second place the belief in the *common good* also played a role. Here the assumption is that the community is more important than the individual. That is why terms like "human rights" are inappropriate for this type of thinking, at least in the *individualistic* meaning that we usually attach to this term. It also means that the idea of individual rights being in conflict with the interests of the group is unthinkable.

- In the third place the *metaphysical assumptions* about reality led to the development of the theory of natural law. The idea of a reality beyond the physical was interpreted to mean that a separate set of laws exists metaphysically and this natural law provided the yardstick for human (positive) laws. In other words, there is an objective reality "out there" by which we (as lawyers) can measure our laws to determine if they are just or unjust. This has been a particularly influential idea in the history of legal thinking and one that is, in fact, still very popular.



Hold on, hold on! What do you mean metaphysical? What does this term mean and how does it have anything to do with law and philosophy?

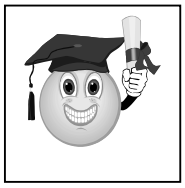
Let us explore the idea of metaphysics a bit further. The word comes from the Greek and literally means "beyond or behind the physical". Think about it this way: do you believe in things that you cannot see, hear or feel? Before you answer too quickly, think about whether you believe in things like ghosts, fairies, angels, devils or gods? If you believe in any of these, you have metaphysical ideas and assumptions! All the Greeks did was to take this a little bit further. We will see in the next section how they understood and explained this.

The one idea in law where all these things come together is in the concept of natural law. Natural law can be defined in the following way:

> *Natural law* is the idea that there is a real, pre-political set of rules that provide the yardstick against which human laws can be measured.

The important thing to remember here is that natural law is a *metaphysical* concept – in other words it is not something physical. Unlike ordinary human laws, you cannot look up the rules of natural law. It exists as a metaphysical entity in that it cannot be touched, seen, measured or proved.

Hang on, that's not entirely true, is it? What about, for example, the Ten Commandments in the Bible? Or the rules contained in the Koran? Don't you think they can be seen as forms of natural law? Aren't they used as yardsticks against which human laws can and should be measured?



Well, in a sense that could be true. But remember our definition of natural law? It is a pre-political set of rules; that means that they existed before the formation of human societies. They are, if you will, part of nature. The rules in the Bible and so on were only written down after political societies came into being. So it is not exactly the same thing, but pretty close.

Activity 2.2

Do you think the Bible (or any other religious text you might choose) can be seen as an example of natural law? And what do you think would be the implication of thinking that?

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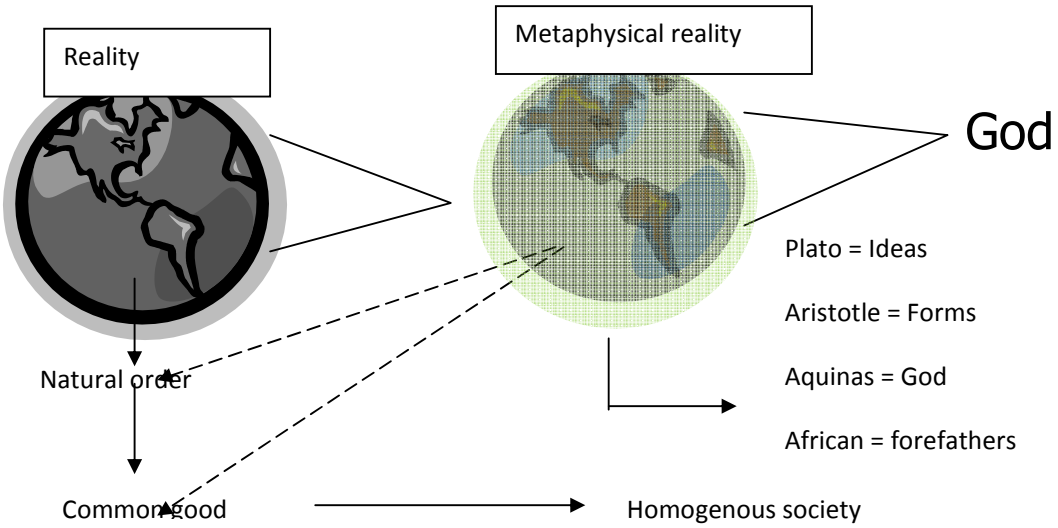
Feedback: We gave you the two viewpoints on this above. For a question like this you need to start with the definition, then the two opposing viewpoints and then decide which one you think is correct. Remember, however, that you must **always** give reasons for your answer!

Many of us study better when we can "picture" the material. Below we give you a picture (literally) that tries to sum up the whole of pre-modern philosophy. Maybe it can help you to get a clearer idea of where everything fits in after you have studied the rest of the study unit.



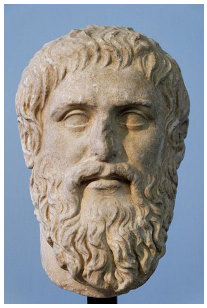
2.4 Specific philosophers

In this section a number of specific philosophers will be discussed further. Note that, in each case, the philosophies are fairly general to begin with. Later they are applied to specific legal problems and questions.

2.4.1 The Greek philosophers

Richard Tarnas suggests that the Greeks were the first people to see the world as a question that needed to be answered.[3] The Greek philosophers Plato and Aristotle continued the tradition of Greek philosophy by asking the first question we referred to earlier, namely what is the nature of reality? To this they gave different answers.

[3] See Tarnas R *The passion of the Western mind – understanding the ideas that have shaped our world view* (London 1991) 1-87.



PLATO

Plato's ideas[4] on law and the nature of justice are linked to his theory of knowledge. Plato wanted to understand what it means to have knowledge and how we tell what is true and what is false. The best way to explain Plato's theories is to re-tell his famous story of the cave. Plato asks us to imagine a group of prisoners tied up in a cave. They are tied up in such a way that they can only look at the wall in front of them. Behind them, outside the cave, a huge fire is burning. Between the cave and the fire, things are moving past creating shadows on the wall. The prisoners in the cave only see the shadows of the things moving past. They do not see the "real" things.

Key concepts:

idealism

essentialism

Plato used this allegory to illustrate how people see and understand the world. Everything that we see are merely shadows of the real things. Plato calls these "real things" the *Ideals* or *Ideal forms*. For example, if you see a tree it is only a shadow or an example of *the* tree. Or if you study a law, you do not see *the* law, but merely a shadow of that. Ordinary people cannot see these "real things" – they see only shadows.

I don't get it! Surely if you see a tree, you see a tree. I am pretty sure if I look at a tree that it is indeed a tree. And anyway, what does this have to do with the law?

In order to answer this question, we must first explain something else about Plato. You see, Plato thought that our senses (sight, touch, smell, taste and hearing) were not always reliable. For example, sometimes you think something really happened and it was just a dream. Or you could be hallucinating. So Plato thought that knowledge we get through our senses was always subjective and therefore could not be trusted. After all, you might see a tree while we see a bush. Who is correct? The answer, for Plato, lies in determining exactly when a tree is a tree. You need to find the ultimate tree, the Ideal tree against which you can then measure all other trees, bushes, plants, etc.

[4] The discussion on Plato is based on his work that is usually translated as *The Republic*. See Goold GP (ed) *Plato: The Republic* Translated by P Shorey (Loeb Classical Library London 1978).

Philosophy begins in wonder.

PLATO

We know all this sounds a bit silly, talking about trees. But if you apply it to law, it makes more sense. One of the most enduring questions in legal philosophy is: what is justice? We ask this question so that we can determine whether individual laws are just or not. Plato says that you cannot tell which laws are just by looking at the laws themselves. You will be blinded by your own subjectivity and preconceptions. You need something outside the law, something higher, and something *metaphysical* to cancel out the subjectivity. Plato proposed that there is an Ideal for justice against which all human laws can be measured.[5]

So, Plato's ideas are a little bit like science fiction. Apart from this everyday world that we can experience with our senses, there also exists another world where the Ideals (like Beauty and Justice) can be found. Ordinary human laws are therefore shadows or examples of the Ideal of Justice and can be tested against this ideal. Unfortunately, ordinary people cannot perceive the Ideals – that is reserved for the philosophers who are trained to do so.

It must be stressed that Plato did not see the Ideals as something abstract. For him, they were **more** real than the concrete world. *They are the hidden essence of things*. (This is what philosophers call *essentialism*.) Moreover, the Ideals cannot be destroyed. They are immortal and, as a result, similar to gods.

Essentialism is the viewpoint that objects or ideas have an innate, unchanging core of meaning. For example, according to Essentialism, "justice" means exactly the same thing in twenty-first century Africa as it did in Greece more than two thousand years ago.

[5] For more information on Plato, see Tarnas *Passion of the Western mind* 16-45.

Plato's *idealism* is a kind of metaphysics where reality consists of Ideals and material objects are only examples of this absolute ideal.

From this you will probably realise that Plato developed a theory of natural law in which the Ideals form the natural law. (That is why this form of natural law is known as *idealism*.) The idea is that human laws should be measured against the ideal of justice, which is a universal, unchanging and absolute standard.

Illustration

Let us see how this works in Plato's own work and life. Plato's teacher, Socrates, was found guilty by the city fathers of corrupting the youth, because he told them to question traditional ideas. (Yes, corrupting the youth was actually a crime!) The punishment for this crime was death by poisoning. But, in practice, people found guilty would normally be allowed to flee and live in exile. But Socrates' attitude (and Plato's as well) was that obedience to the law was more important than one's own life. Therefore he chose to obey and poison himself rather than disobey the law. In this story, therefore, obedience to the law is in accordance with the Ideal of law and therefore takes precedence.

In our own history this kind of conflict can also be seen. During the apartheid struggle, people like ex-president Nelson Mandela organised the Defiance Campaign. As a result of this Campaign, the Transvaal Law Society in 1954 applied to have him struck from the roll of attorneys. They argued that respect for the law was required of an attorney and that his political beliefs and actions made him an unfit person to practice as an attorney. Therefore, like Plato and Socrates, they argued that respect for and obedience to the law is more important than personal convictions. Mandela, on the other hand, argued that the application was in conflict with the idea of justice and that he should follow his convictions even if they are unlawful. The court agreed with Mandela and dismissed the application.

The interesting thing here is that we have two opposing sides in court both arguing from a natural law perspective! From this you can begin to see the problems inherent in this way of thinking.

Up to this point you must admit that Plato's ideas sound good, although they are a bit strange. He is trying to give us a fixed, unchanging set of rules by which we can measure whether a specific law is a good law or not. It gives us something concrete and certain to hang onto in a world characterised by change. But all is not as it seems. To show you what the implications of this theory really are, we am now going to explain to you Plato's ideas on the state.

THE PAINTER RAPHAEL'S PORTRAYAL OF PLATO'S SCHOOL IN ATHENS

The state Plato argued for in *The Republic* can only be understood when you understand the historical developments of his time and his idealism. In fact, his idealism we spoke of earlier is the direct result of history. The city-state of Athens where Plato lived started out as a tribal aristocracy. This tribal aristocracy had a stable and rigid social life, but it was starting to break down, mainly due to population growth and contact with other cultures. It was, in other words changing from a homogenous society to a pluralist society. However, the transition was far from smooth. It was resisted by the old families of Athens to such an extent that many members of these families committed treason during the civil war with Sparta.

Plato was born during the war and was 24 years old when it ended. Athens lost the war and consequently suffered epidemics, famine, civil war and a tyranny known as the rule of the 30 Tyrants. Plato therefore equated change with chaos and decay. Because things were changing all around him, he thought there needed to be something that never changes. This is the reason for the existence of the Eternal Forms or Ideals in Plato's theory. In the metaphysical world of Forms, nothing ever changes. The Ideals are eternal, universal and unchanging. This is also true of the Ideal State.

Plato's theory of the Ideals can be seen in the hierarchical nature of his ideal city. According to him, political power should be the exclusive prerogative of the philosophers, because only they can know the invisible, eternal Ideal of the Good. Because of this, freedom of the citizens must be severely limited by the ruling guardian philosophers in order to ensure that every citizen's behaviour corresponds to what is prescribed by the metaphysical Ideals.

More importantly, everyone had a specific role within this state. You were either a philosopher-king, a warrior or a worker. And if you were born a worker, you could never become anything else. Your role in the society and in the state was set down for all eternity. (This is reminiscent of the caste system that used to be followed in India.) And you could not complain – your station in life was according to the natural order and no one can argue with that! But it was even worse if you were a woman. Women simply did not have a role to play in the state – they were simply expected to bear children and obey.

Now can you see that this is a potentially dangerous idea? If everything is set our according to predetermined rules and laws, then change and transformation is simply not possible. Society will forever remain the same en no progress is possible. But let's see if Aristotle had a better idea.

ARISTOTLE

Key concepts:

realism

distributive justice

corrective justice

Aristotle was also trying to find answers to the questions; what is the nature of reality and how do we know?[6] Like Plato, Aristotle's views on law and justice are also related to his theory of knowledge. But, while Plato's philosophy is characterised as *idealism*, Aristotle's thinking can be called *realism*. But that doesn't mean that Aristotle was not a metaphysical thinker. He was just a different kind of metaphysical thinker.

Unlike Plato, Aristotle thought that we could trust what we see and hear and feel. So that when we see a tree, we really see a tree and not just an example of a tree. But that still left him with the problem of how to decide what it is that we see. There still had to be a way of categorising things so that you can say whether they are good or bad. Aristotle solved this by saying that all things have a natural purpose, a goal that it is striving towards.

Therefore Aristotle believed that all things have a natural purpose or *telos*. Everything is therefore always moving towards its natural goal – its *Form*. To put this in another way, all things have both matter and form. The form provides the potential of a thing, while the matter is the actuality of a thing. The form is the unchanging essence that determines the purpose of the matter. (This is why Aristotle is still an essentialist – he believes that things have an unchanging, essential meaning.)

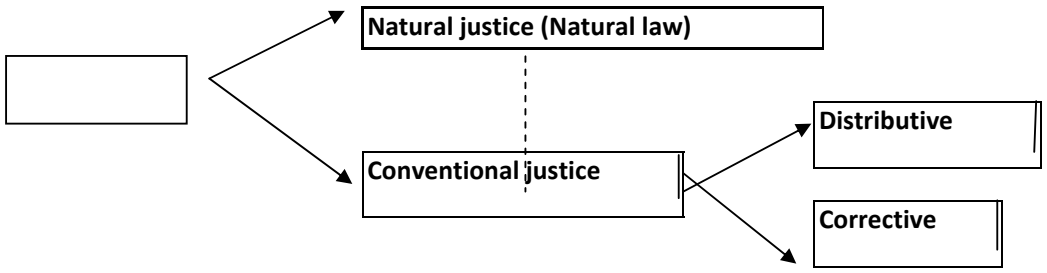
Realism is the view that objects exist independent of the consciousness of the person studying that object. In other words, what we see and hear and feel is objectively real.

OK, this is getting to be way too weird. What is the purpose of a thing? What is this about matter and form? And, sorry to ask, but what does it have to do with law?

6 This discussion is based on Aristotle *Politica* Translation B Jowett (New York 1943)

You're right, this is a bit esoteric and strange. Let's look at an example or two. If you have an acorn, what do you have? Well, on the one hand you have just an acorn, but it has the potential to become an oak tree. So the acorn is the **matter** and the oak tree is the **form**. And all the acorn wants to do is to achieve its goal of becoming an oak tree! Therefore the purpose of the acorn is to be a tree. Or say, for instance, that you have a piece of clay. You can make a ball with this, or a bowl or whatever. The clay is the **matter** and the **form** is the eventual product that you create to achieve its purpose. But these forms have the potential to transform matter into its real purpose.

In the case of law, Justice (the form) is used to transform laws (matter) into their real purpose, namely to achieve justice. Aristotle uses different terms for these. He distinguished between natural justice (this is true justice – the form) and conventional justice (human laws – the matter). Natural justice is universal and unchanging (the Form) while conventional justice is based on convention or agreement and can be changed (the matter). Although his philosophy on this is by no means clear, it is assumed that conventional justice is based on natural justice (or natural law). According to Aristotle there are two kinds of conventional justice, namely distributive and corrective justice. *Distributive justice* means that those who are equal should be treated equally and those who are not equal should be treated unequally. This is the kind of justice that is used when distributing wealth, honour and other assets of the community. *Corrective justice*, on the other hand, is the kind of justice used by courts to correct an imbalance that has occurred. This is used, for instance, where damage has occurred through a delict or breach of contract. Schematically it looks like this: (You can extend this scheme to include more information.)



You can therefore see that the Forms play the same role in Aristotle's thinking that the Ideals play in Plato's theory.[7] This is therefore also a continuation of the theory of natural law.

[7] See Tarnas *Passion of the western mind* 55-68.

Activity 2.3

Both Plato and Aristotle are *metaphysical* thinkers and both are *essentialist* thinkers. But how they understand these concepts is different. Explain what the differences are.

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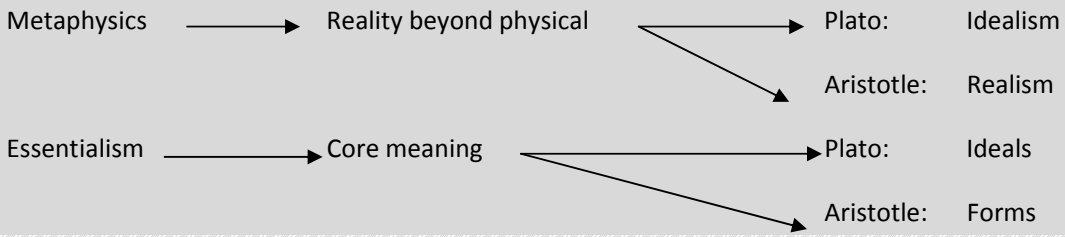
Feedback: You should first of all explain what *metaphysics* and *essentialism* mean in general. Then explain the differences. Below is a scheme for understanding this. However, you need to expand this by providing your own definitions or expanding our definitions. **But please remember, this is a study tool only! Do not use it in the exams.**



But let us see how these very philosophical ideas are translated into Aristotle's version of the ideal state. Aristotle's conception of the state, law and politics is closely tied to his metaphysical belief that the essential purpose or task for human beings (the form) is to cultivate the virtues and practical common sense needed to live a good ethical life. This, however, included the concept of a hierarchy among human beings. Only some human beings were considered capable of full human development – others, such as women, non-Greek barbarians and slaves, were thought to possess lesser degrees of humanity and were allotted social roles accordingly. Their purpose was not the same as that of free, Greek men. For example, women played a less significant role in community life than men, because in classical Greece, women were thought to posses inferior degrees of humanity. Humanity was assumed to be represented at its fullest only in the Greek

male. To challenge the subordinate roles of women and slaves was to challenge the essential nature of women and slaves. Discrimination was therefore justified by his views on the natural purpose of things.

Activity 2.4

Can you think of societies that still exist in the early 21st century that still discriminate against women in this way? Would it be fair to say that those societies are all pre-modern? _____

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Feedback: Many heterogeneous societies still discriminate against women. What does this suggest about heterogeneous societies? Perhaps some heterogeneous societies still conform to the idea of a natural order?

All men by nature desire to know.
ARISTOTLE

For Aristotle the most important thing in any state was the extent to which citizens (Greek men, that is) developed the virtues. The moral education of citizens was the most important consideration. According to Aristotle, people combined into the state not merely to ensure survival, but to make a truly moral or good life possible. Unfortunately, Aristotle reserved this good or full life for male Greek citizens only.

According to Aristotle, the state as a community differs radically from other types of community. The state is not only larger than the household or the village, but it is substantially different. The state begins because of survival, but it continues for the sake of the good life. The state gives the opportunity for the development of the highest human powers. Man is distinctly a political animal; that is a citizen who first and foremost participates in the affairs of his community. This implies that the state is a natural phenomenon. Just as it is natural for an acorn to grow into an oak, it is natural for the family to grow into the state. It is only in the city-state that the distinctively human nature can come to the fore. This happens on the city-square where deliberation and judgement about the common good of the city takes place amongst the (male) citizens. The life of a citizen participating in the public affairs of the city, that is a political life, is the highest life possible for (male) human beings.

Activity 2.5

In the same way you did in activity 2.3, compare Plato and Aristotle's views of what would be an ideal state.

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Feedback: The important thing here is to give both similarities and differences between the two. But the question behind the question is whether there are any real differences between the two. Or are they simply using different methods to get to the same results?

2.4.2 Medieval philosophy: Aquinas[8]

St THOMAS AQUINAS

St Thomas of Aquinas was by far the most outstanding philosopher of the medieval period. He took Aristotle's ideas and combined them with traditional Christian ideas about the law and society. In accordance with Christian theology, Aquinas believed that a divine God created the universe and everything in it, including human beings. God's will gave everything in his creation a prescribed place or purpose.

Key concepts:

eternal law

divine law

natural law

[8] This discussion is based on Thomas Aquinas *Summa Theologica* (Die deutsche Thomas-Ausgabe Graz 1934).

The soul is known by its acts.

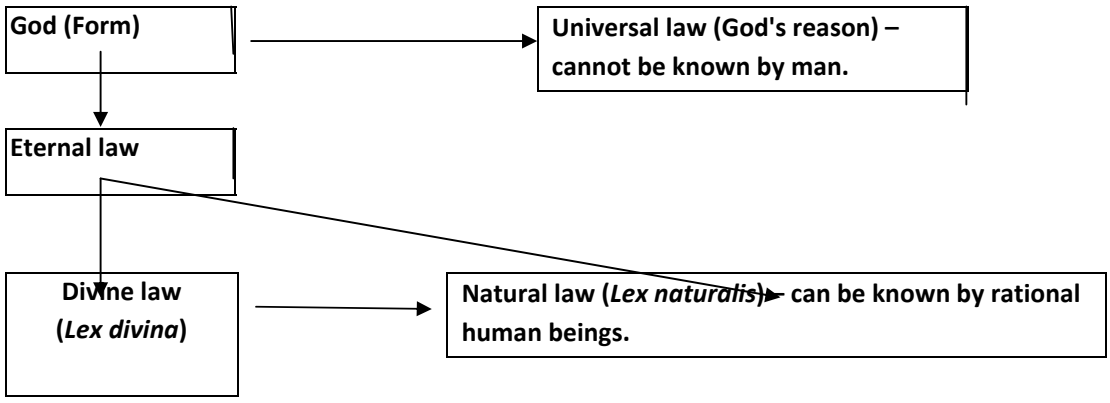
THOMAS AQUINAS

Because the whole universe is the creation of a single divine will, all the parts of the creation work together towards a single harmony and the glorification of God. Every human is part of a household, which in turn is part of a community of human beings. The community of human beings is at the same time part of the whole community of the universe that is governed by divine reason. God rules over his universe and ensures the harmony of his creation by means of an eternal law.

According to Aquinas, the universe therefore consists of a hierarchy, from God at its summit, down to the lowest being. Every being acts under the internal urge of its nature, seeking the good, or form of perfection natural to its kind, and finding its place in the ascending order according to its degree of perfection. The higher in all cases rules over the lower, as God rules over the universe, and humankind over nature on earth. (Aquinas clearly gets this idea from both Aristotle and the Bible.)

Regarding law Aquinas firstly argued that the natural purpose of man is to be an *animal sociale et politicum* – a social and political being. Man's natural purpose and inclination is to take part in a social and political life, and therefore some kind of political organisation is natural to him. The state is therefore, in Aquinas' views, a part of God's design for the world. In this organisation there is also a hierarchical order that is as natural as the laws of nature. (You can guess where women fit into this scheme.)

In the second place he further developed the idea of natural law. This idea was, throughout the Middle Ages, the dominant view of law. Aquinas derived from Aristotle the idea that the highest good is God, who is pure Form and the cause of all that exists. There is a universal law, which is the law that flows from God's reason. But man cannot know this universal law. That is why God created the eternal law. The eternal law is revealed in two ways: through divine revelation (the *lex divina*) and through natural law (the *lex naturalis*). The natural law is recognised by rational human nature and it becomes the general norm of behaviour. Any human law that is in conflict with the natural law is not law but a corruption of law. Schematically his hierarchy of laws can be depicted in the following way:

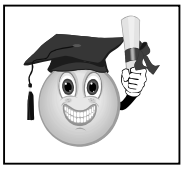


From this you can see that Aquinas "christianised" Greek thinking. By this we mean that he took classical Greek ideas and mixed them with ideas from the Christian faith. But he also introduced the idea of a connection between natural law and rationality. For him, natural law can be known through human reason and rationality. This idea will be taken further by the early modern thinkers, as you will see later.

Once again these ideas might seem very attractive to you. Many people believe in the same kinds of things that Aquinas did. But, as they say, the proof of the pudding is in the eating! Let's see what this means in practice by looking at Aquinas's ideal state and comparing it with those of Plato and Aristotle.

Aquinas's point of departure is that government is an office of trust for the common good of the whole community. The ruler is justified to do anything, solely because he contributes to the common good of society, and so to the common good of the whole universe. According to Aquinas, as stated above, everything in the universe is ruled and measured by the eternal law of God. Animals and plants each derive an inclination towards its proper end from the eternal law of the universe. Human beings, however, share in the eternal law in a more perfect way, because they are rational creatures. Humans participate in the eternal law of the universe through the light of reason. This is then called the natural law.

Using Aristotle's understanding of human nature, Aquinas states that every human being has a natural inclination to be virtuous, but must also be trained in order to make virtue perfect. A human being, however, cannot train himself or herself, and has to receive training from someone else if he or she is to arrive at the perfection of virtue. Such training can be done by mere instruction (for those who are inclined to act virtuously by the gift of God). But there are some who have to be trained by fear of punishment. This is the discipline of the law. According to Aquinas, the law is the means by which human beings are trained to become virtuous. The law is aimed at turning human beings into good or virtuous people.



It seems to me that you are contradicting yourself. When you spoke about the definition of philosophy, you said it is not the same as religion, although it addresses the same kind of questions. But this seems to be about religion, not philosophy.

To a certain extent you are correct. In pre-modern philosophy the distinction is not yet as strongly drawn as in later philosophy. For example, Aquinas argues that every society needs a government — not because human beings have sinned and there is a need to keep the peace and punish evil-doers: government would be required even if there were no evil-doers. Government exists to protect and promote the common good, and to direct every human being to his full potential. And this common good is determined by Christian views. So there definitely is a mixture of philosophy and religion.

Aquinas also held that the laws of the state did not have to correspond to the popular will of the people (as in a modern-day democracy), but had to correspond to the truth of the revealed word of God. *True law* is both formally promulgated and gives expression to the eternal law. *Perverted law* only looks like law (it is formally promulgated), but lacks the proper content. Aquinas insists, however, that perverted law is still law even though it is unjust law. If a human law or judgment deviates from God's master plan (the eternal

law), it cannot be just. Even so, an unjust law remains a law because the power to promulgate laws is itself derived from God.[9]

Activity 2.6

How does Aquinas's view of the ideal state compare to the Greek ideas? Is there any difference? Or do we here see the start of the kind of modern society that we are more familiar with? _____

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Feedback: Of course you have not yet studied modern societies but we would like you to try to answer the question anyway. At this point all we require is that you look at the differences between pre-modern societies and the society you live in. If you have forgotten what Greek ideas were all about, go back to your answer to activity 2.4.

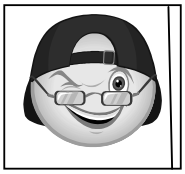
[9] For more information on Aquinas, see Tarnas *Passion of the Western mind* 175-191.

2.4.3 African legal philosophy

You will remember from our discussion about the definition of philosophy and legal philosophy that we stressed certain aspects like rationality and science. These are typically Western ideas and concepts. Rigour, objectivity, critical thinking and rationality are regarded as the essence of philosophical thought. This view is typically Western and can be summarised in the famous words of the philosopher René Descartes: "cogito, ergo sum" ("I think, therefore I am").

Key concepts:
communitarianism
ethnophilosophy
ubuntu

When we look at African philosophy it quickly becomes clear that these criteria are not necessarily present. Some people in fact think that Africans are incapable of developing a scientific and reason-oriented culture. African philosophy seems to encourage unanimity in thought and to discourage critical reflection and assessment of established beliefs and taboos. African philosophy is regarded as unable to be self-critical, objective or rational and is therefore regarded by many Westerners as a myth and not a reality. There are other questions to be asked, such as: What is "African" philosophy? Is there only one kind of African philosophy, or are there many? May only people living in Africa as Africans pronounce or report on African philosophy? Can non-Africans contribute to African philosophy?



Hey, this is beginning to sound a lot like racism! It seems as if Africans are depicted as stupid and irrational and unable to be as good as Europeans. Haven't we gone beyond this by now?

If this is your reaction as well, you are in good company. African philosophers have come to question these assumptions and have tried to address the questions raised. They argue that colonialism tended to see Africa and the African person in a stereotypical way. That is why, when a distinction is made between Western and African philosophy, people use categories such as rational thought versus emotion; scientific criticism versus magical belief; developed ideas versus primitive intuition; individualism versus communality/communitarianism; and literary versus preliterate/ oral tradition.[10]

> Until the lions have their storytellers, tales of the hunt will always glorify the hunter.
>
> AFRICAN PROVERB

In every case, the less favourable adjective is attached to Africa and its inhabitants. African philosophers like Kaphagawani ask whether some Western philosophy did not also come from communal thought, were also unsystematic, intuitive or irrational and were originally not written down?[11] Philosophers like Oruka argue that we should perhaps accept that African and Western philosophy are essentially different, and that African philosophy need not follow the Western pattern, but should rather be allowed to reflect on human life and nature in an intuitive way.[12]

These ideas have led to a strong movement away from the Western view of philosophy. Proponents of an *authentic African tradition* are Ghanaian philosophers such as Kwasi Wiredu. They believe that African tradition has something worthwhile to say, and that African thought will give expression to the desire for independence, authenticity and a post-colonial African identity. What is being put forward now is a diverse and alternative reality, while the narrative (storytelling) element in African philosophy is increasingly emphasised.

Kaphagawani, for example, sketches **three typically African approaches** to philosophy:

i. *Ethnophilosophy* describes communal thought and collective thought which are orally transferred. It is not a body of logical thoughts of individuals. It relies on metaphysical assumptions and traditional African wisdom and tends to combine philosophy, mysticism and religion while reason and critical analysis take a back seat. In order to create a collective philosophy it does not distinguish between different African cultures and tends to gloss over the differences.[13]

ii. *Sage philosophy* represents the thoughts of individuals who are concerned with the fundamental ethical issues of their society, and who have the ability to offer insightful solutions to some of those issues. A sage (wise person) is the custodian of the survival of his society. This kind of philosophy represents a culture's world view, and also reflects critically thereon.[14]

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10 See Wiredu K (ed) *A companion to African philosophy* (London 2004).

11 See Kaphagawani DN "What is African philosophy?" in Coetzee PH and Roux APJ *The African philosophy reader* (London 1988) 86-98.

12 Oruka HO *Philosophy, humanity and ecology* (Nairobi 1991).

13 See Ochieng'-Odhiambo F *Trends and issues in African philosophy* (New York 2010).

14 See Odera Oruka H (ed) *Sage philosophy: indigenous thinkers and modern debate on African philosphy* (New York 1990).

iii. *Nationalistic-ideological philosophy* attempts to produce a unique political theory based on traditional African socialism. (Such as the ideas of, for example, Kwame Nkrumah, Julius Nyerere, Kenyatta and Leopold Senghor). This political philosophy seems to be neither capitalist nor socialist, but African (although it is not clear what exactly is meant by this.) According to this view, African philosophers have a political role to play. They should indicate the best options of social and political organisation for Africa's conditions.[15]

Based on what we have learned so far we can now go on to look at the **basic ideas of African philosophy**. These are very general ideas that can be found in most African philosophies.

In the first place African philosophy regards sage philosophers as being responsible for addressing the fundamental issues relevant to their society. They therefore have a political role to play. They have to indicate the best options of social and political organisation for Africa's conditions. The public sphere of social life is stressed which is the arena where all individuals pursue the common good as their individual good. In this arena social forces meet and debate to determine the common good in the true political sense of the word.

The South African Constitutional Court's logo represents the traditional African process of deciding cases – a group discussion under a tree. As such it represents the Court's desire to have a truly African approach also to constitutional matters.

For example, Nduka discusses the various concepts of justice in Ibo culture, including its concept of natural justice.[16] This includes a belief in the *metaphysical*, mystical relationship between the living and their dead ancestors. Ibo culture emphasises *status* (e.g. a lower one where women are concerned) as the defining element in the application of justice. A second example is Nigerian indigenous law which also accepts that everyone is born with a certain status and has specific obligations as a member of the community. According to Ebo it allows for the spiritualisation of law, sacred rituals and ceremonies, and the spirit of the ancestors.[17]

You should immediately realise that these elements of *metaphysics* and *inequality* are very similar to the ideas of the previous three pre-modern thinkers we have discussed. Although the specific elements might be different, the ideas are related. A very useful exercise at this point would be to try to think whether these ideas and elements are also present in South African indigenous law.

In the second place the most striking feature of African philosophy is probably its emphasis on the *common good*. It considered conflicts among members of a political community as destructive. Conflicts therefore have to be settled. This is not difficult, as members of a political community will have essentially the same

15 Njoku FOC *Development and African philosophy : a theoretical reconstruction of African socio-political economy* (Lincoln 2004).

16 Nduka O "Traditional concept of justice among the Ibo of South-Eastern Nigeria" in Woodman G (ed) *African law and legal theory* (New York 1987) 19-32.

17 Ebo C "Indigenous Law and Justice: Some Major Concepts and Practices" in Woodman G (ed) *African law and legal theory* (New York 1987) 33-42.

interests, goals and values. The community is always regarded as more important than the individual. According to this African communitarian (also communal) view, members of a society have to exercise their talents and skills to the benefit of society. Talents and abilities are seen as common assets. Individuals feel strongly bound to the community, and have a strong sense of a common life and the common (collective) good. The emphasis is on the group and solidarity with other members of the community, rather than on the individual's autonomy. The individual can only flourish through membership of groups. Identity is defined by relationships with other members of the group and cultural membership gives value to the individual's life. Man's humanity can thus only be realised in a social context. He is the product of his society.

Indigenous law reflects many of these characteristics. Ebo states that Nigerian indigenous law is preliterate (in other words, it is an oral tradition of law). It also emphasises group solidarity, the maintenance of social equilibrium, the restoration of the balance upset by an unjust act, and the importance of restitution and of saving face (i.e. that no one should be seen to be the loser).

Maybe we have become more familiar with the Western idea of individual rights and so on, but isn't this emphasis on the community also dangerous? Isn't there a danger that the individual's goals will not be recognised and encouraged?

You are of course correct that this can be dangerous. The dangers of unlimited communitarianism (for example that it is undemocratic) have been recognised by some African philosophers. Gyeke for example proposes a moderate or restricted communitarianism which will accommodate communal values and social commitments but also individual rights and the individual's self-realisation. He views the individual as embedded in community life, but nevertheless accepts that the individual cannot be fully defined by communal structures or social relationships. Gyeke's restricted communitarianism allows for human rights but does not grant them a pre-eminent or absolute status. When a choice has to be made between values, priority will not be given to rights but rather to a more highly ranked value or a more preferable goal of the community.[18]

In the third place a core element of African philosophy is the concept of "ubuntu". This is truly an elusive concept. It means inter alia humanity, humaneness, morality and compassion. It stresses conciliation, harmony through social relations within the group, self-fulfilment through taking part in the collective whole, duties towards others, caring, warmth, empathy, respect for older people who have more knowledge of life than younger ones, and communication, and it emphasises group solidarity as opposed to individual interests. It condemns dog-eats-dog competition and adversarial relations. Instead of confrontation, it seeks cooperation. In the case of *S v Makwanyane*[19] Judge Mokgoro described *ubuntu* in the following way:

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18 Gyeke K *An essay on African philosophical thought* (Cambridge 1987).

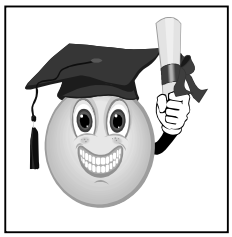
19 *S v Makwanyane and another* 1995 3 SA 391 (CC) par 308 (hereinafter referred to as *S v Makwanyane*).

Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly priced. It is values like these that s 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.

Ubuntu can perhaps be regarded as an expression of an African world view which stresses the universal brotherhood of Africans. In contrast to Descartes' idea ("I think, therefore I am") *ubuntu* says: "I am, because we are" or "I am, because you are" or "a human being is a human being because of other human beings". Of course this is strongly connected to communitarianism. The community defines the person, and the individual is subject to the social group, for example the state and nation.

There are a number of criticisms that have been raised about the usefulness of the concept of *ubuntu* especially as a legal concept. The problem is to decide whether the principle will prevail when the interests or the wishes of the individual and the community as a whole are in conflict. It is also pointed out that it is a vague term regarding community morality and that it leads to conflicting interpretations in court cases, especially in *S v Makwanyane.*

One can also argue that there is an interesting connection between the African idea of *ubuntu* and the Christian concept of "love your neighbour as you love yourself". Sadly, as noble as both ideas are, our currently violent society is not showing much of this in our day-to-day living as a community.



Activity 2.7

In this discussion we have tried to show that African legal philosophy is an example of pre-modern thinking. Not everyone agrees with this. Do you think that it is pre-modern or is it something else? Give reasons for your answer: _____

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Feedback: This question is not as difficult as it might seem at first. To answer it you need to look at the three general characteristics of pre-modern thinking (metaphysics, common good, natural order) and argue whether these are present in African legal thinking or not. Please do not think that you need to agree with us on this!

You will see that we do not talk about traditional African views of an ideal state. That is because African philosophy is not primarily concerned with the idea of a state, as the social arrangement is still mostly one based on family and tribe. The exception to this is the nationalistic-ideological philosophy of Nkruma and Nyerere we referred to above.

2.4.4 The further history of natural law

After Aquinas the theory of natural law is developed in various ways in Western philosophy. On the one hand the Spanish moral philosophers, who had an influence on Roman-Dutch writers like Grotius, developed his ideas further. Through the works of Grotius these ideas were also introduced into South African law. On the other hand non-Catholics also developed the doctrine of natural law. Some of these still try to link natural law to God, while others use a secularised, rational natural law idea.

Grotius, in his work *De iure belli ac pacis*,[20] states that the principles of natural law can be seen in four functions of the law, namely:

a) The protection of ownership;
b) The enforcement of contracts;
c) The awarding of damages; and
d) The punishment for contravening these principles.

Because Grotius is so influential in South African law, these ideas can also be found in contemporary judgements. (See 2.5 below.) The same kind of development can be seen in English law, where the very influential William Blackstone associated natural law with ethics or morality.[21] Here again you find the idea of morality as the yardstick for law.

The theory of natural law was very influential in legal philosophy until about the nineteenth century. The rise of positivism brought an end to this. But the atrocities of the Second World War created new interest in natural law. The Nuremberg war crime trials were conducted on the basis that there are higher laws that both citizens and states must comply with. In contemporary legal philosophy the theories of Lon Fuller and John Finnis are modern adaptations and restatements of the theory of natural law.[22] We are not going to study these philosophies due to time and space constraints.

2.5 South African law

From the discussion above, you might get the impression that the pre-modern philosophies have very little to say to twenty-first century law. But that is not entirely correct. In the first place all of the subsequent philosophies rely on the groundwork done by the Greeks. They provide the framework within which the philosophical dialogue of Western thinking has taken place. The very influential theory of natural law was first formulated here. In the second place, some of the ideas prevalent in pre-modern thinking can sometimes be found in contemporary case law, although in a slightly different form. Let us give you two examples of this.

---

20 Grotius H *De iure belli ac pacis* (Leiden 1939 Ed BJA de Kanter-van Hettinga Tromp).
21 Blackstone W *Commentaries on the laws of England* 4th ed (Oxford 1770).
22 See Fuller L "Positivism and fidelity to law: a reply to professor Hart" 1958 *Harvard LR* 630-671 and Finnis J *Natural law and natural rights* (Oxford 1980).

- The idea of natural law is found in various cases in South Africa. In one case natural law is seen as the basis of the institution of private ownership of land.[23] In another the right to a hearing was held to be based on natural law and justice.[24] The courts have also held that freedom of contract has its origin in natural law[25] – an idea derived from Grotius – and have on several occasions pointed out the relationship between human rights and natural law.[26] And, finally, the court has also used the concept of natural law in the interpretation of legislation.[27]

- The idea of *ubuntu* in traditional African legal thinking was most famously discussed in the case of *S v Makwanyane*. From the judgement of Langa J, you can see the important role the common good plays in this philosophy:

> The concept (of *ubuntu*) is of some relevance to the values we need to uphold. It is a culture that places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[28]

2.6 Application

It is not easy to find examples of pre-modern thinking in case law. However, one recent example will give you an indication of what such an argument might look like. In the case of *Christian Education South Africa v Minister of Education*[29] the applicants were a group of private Christian schools. They were unhappy with section 10 of the Schools Act which prohibits corporal punishment. They argued that it is a central tenet of Christian faith that parents (and those acting with parental authority) should physically punish their children. To substantiate this, they quoted from the Bible: Proverbs 22:6; Proverbs 22:15; Proverbs 19:18; Proverbs 23:13 and 14 and Deuteronomy 6:4 – 7. The court summarises the argument of the applicants in the following way:

---

23 *Port Elizabeth Municipality v Minister of Safety and Security* 2000 2 SA 1074 (SE).
24 *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 4 SA 385 (T).
25 *First National Bank v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG).
26 *Yates v University of Bophuthatswana* 1994 3 SA 815 (BG) and *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BG).
27 *Monnake and others v Government of the Republic of Bophuthatswana* 1991 1 SA 598 (BG).
28 *S v Makwanyane* [307].
29 *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

> It has further claimed that according to the Christian faith, parents continue to comply with their biblical responsibility by delegating their authority to punish their children to the teachers. By signing a document entitled 'consent to corporal punishment', they indicate that they understand corporal punishment to be inseparable from their understanding of their Christian faith and an expression of their religion. They further acknowledge that, if they do not wish a child of theirs to be subjected to corporal punishment, they are at liberty to remove such child from the school; otherwise they authorise the school to apply corporal correction. The correctional procedure to be followed includes giving the parents themselves the option to apply corporal punishment should they so wish. Should such option not be exercised, the correction is to be applied in the form of five strokes given by the principal, or a person delegated by him, with a cane, ruler, strap or paddle.[30]

The court did not accept this argument that religious teaching or community *mores* should supersede positive law and did not find the section to be in conflict with freedom of religion and thus unconstitutional. However, it is interesting to note that the applicants relied upon verses from the Bible as a sort of *natural law* that is "higher" than state law. Also note that they claim *community* rights in the sense that these rights should be regarded as more important than the children's individual rights. Finally there is a definite indication of the idea of a natural order from the verses quoted. Just as in Aquinas's thought the hierarchy is preserved: parents know better and should therefore "correct" children by means of corporal punishment. Although the appellants did not win their case, it remains an interesting example of pre-modern thinking.

2.7 Critical comments

As you will see also from the next section, a large part of legal philosophy is concerned with the conflict between the "law as it ought to be" and the "law as it is". Pre-modern thinkers typically think that the law as it ought to be is more important than the law as it is. (You will see in the next section that modern thinkers concentrate on the law as it is.) You might agree with this, but you also have to think critically about this. We are here going to discuss only two points of criticism that you need to think about. Please note that you do not need to agree with us or even have a completed answer to these criticisms. But you do need to think about them!

1. When you think about natural law, you need to ask: how do we determine the content of natural law? In other words, it might be nice to think that there is such a thing as natural law, but how do you actually know what it says? You cannot look it up as if it were legislation, can you? You might

[30] *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) [5].

argue that it is contained in books like, for example, the Bible or the Koran, but even then these rules need to be interpreted. Let us give you just one, fairly contentious, example: let's assume that natural law includes the prohibition of killing. That seems clear enough. Most people would probably accept that killing is bad, **except** in the case of, for example war, abortion, capital punishment for murder, the burning of witches, a holy war and so on. What these exceptions prove is that the prohibition on killing is not nearly as widespread or as absolute as is argued.

2. But the biggest problem in our opinion is that we no longer live in the kind of societies that support pre-modern thinking. Our societies are quite simply no longer homogenous. Think about this: would you be happy to live in a society where religious or cultural ideas of right and wrong are imposed on you, regardless of whether you believe in or belong to them? And what do you do if your ideas of what natural law requires are in conflict with those of others?

Questions like these are at the heart of legal philosophy! You have mastered the ideas of others, now you must start to evaluate them for yourself.

2.8 A small problem

The following is an extract from an internet news story that appeared in Arabianbusiness.com:[31]

> A majority of Egyptians wants the country's peace treaty with Israel to be annulled and says its laws should "strictly" follow the teachings of the Koran, a survey by Pew Research Center's Global Attitudes Project found.
>
> Fifty-four percent of 1,000 Egyptians surveyed want the government to end the peace treaty with the Jewish state, Pew said in an emailed statement. About 60 percent of those surveyed said "laws should strictly follow the teachings" of Islam's holy book.
>
> The Washington-based center conducted the survey between March 24 and April 7, more than a month after the ouster of President Hosni Mubarak, who had maintained the peace treaty with Israel signed in 1979 by his predecessor Anwar Sadat.

Many people like the idea of a premodern state. It is much easier dealing with people who share your ideas and culture, than to deal with differences. But an example of such a state would be one like the proposal for the "new" Egypt, namely Shari'ah (or Islamic) law. Can you think of the potential problems of such a state? In particular, how would such a state cope with people (probably the minority) who are not Muslim?

It would be a good exercise to write a brief essay in which you explore these ideas and their implications. Think of South Africa as well: if we do have a premodern state, what would it look like? And how would we deal with the diversity?

[31] See http://www.arabianbusiness.com/egyptians-back-sharia-law-end-of-israel-treaty-poll-shows-396178.html [Date of use: 29 April 2011].

STUDY UNIT 3

STUDY UNIT 3: EARLY MODERN LEGAL PHILOSOPHIES

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3. EARLY MODERN LEGAL PHILOSOPHIES

3.1 Introduction

The philosophy of early modern thinkers are already more familiar to us than the pre-modern ones. These are the theories that have shaped modern societies in a very basic way and, as such, are important for us. Against the background of the general purpose of this course, the specific purposes of this section can be identified.

After you have studied the early modern philosophies, you should be able to:

1. define and explain the key concepts in italics given at the beginning of each section as well as elsewhere in the unit;
2. identify how *individualism*, *scientific method* and *rationalism* play a role in the three philosophies discussed;
3. compare the ideas of Locke and Hobbes regarding the social contract;
4. illustrate the basic ideas of legal positivism by using case law;
5. give a practical example of the relevance of the Realist critique for South African law.

Just as was the case with pre-modern thinking, the term "modern" does not imply a value judgement. We don't mean to say that these philosophies are "better" than the pre-modern ones. They are called modern because they share a number of characteristics.

3.2 The early modern world[1]

Modern legal philosophy is not confined to any historical period. Historically, the modern era started in the fourteenth century and, before that, it is impossible to speak of modern philosophy. But modern philosophy did not arise out of the blue – it was the result of very specific social and political conditions. Here we will focus on those conditions as they affected the thinking of over four hundred years of Western theory.

Key concepts:

renaissance

reformation

revolution

humanism

Enlightenment

Briefly stated, modern legal thinking rose out of the era of *Renaissance*, *Reformation* and *Revolution*. The *Renaissance*, stretching from about 1350 to 1600 refers to a revival of the Greek and Roman tradition in art and literature after the Middle Ages. Along with this revival came a new interest in and understanding of Greek philosophy and science. This rediscovery led to what is known as *humanism* or a humanist attitude, namely the spirit of calm, critical and independent judgement that is based on intellectual freedom and self-reliance. In a nutshell, these early modern philosophers tried to emulate the rational attitudes of the famous Greek and Roman thinkers. (Please note that this definition is very different from the one usually associated with the term "humanism".)

The Protestant *Reformation* had its beginnings in the fourteenth century and led to the eventual fracturing of Catholic unity in Western Europe. This resulted in the secularisation of public life and the emancipation

[1] This section is based on Tarnas *Passion of the Western mind* 223-320.

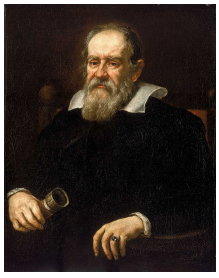
of the individual from spiritual authority. In other words, the church lost its grip on people and on public life. Society was no longer homogenous. The best known figures of the reformation are people like Martin Luther and John Calvin.

Cogito, ergo sum.
(I think, therefore I am)

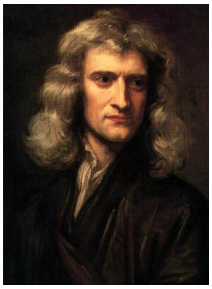
DESCARTES

The Renaissance and Reformation together resulted in the *scientific revolution* in Western Europe from about 1540 onwards. The scientific revolution was preceded by a series of technical innovations of immense importance, such as those pertaining to astronomy, navigation, gunpowder and the printing press. This led, especially from the seventeenth century onward, to the idea that limitless discoveries might be made in every branch of knowledge and that this will lead to limitless improvements in the condition of human life. The attitude was one of experiment and exploration based on inductive reasoning.

The beginnings of modern science can be found in the early modern period. It started with the revolutionary ideas of Copernicus about the planets. This was taken further by Galileo, who proved that the sun was at the centre of the universe and not the earth and that the earth rotates on its axis. Further developments in science came through the work of scientists like Newton, Bacon and Hobbes. Science was forever and radically changed by their contributions.



GALILEO



SIR ISAAC NEWTON

This scientific revolution, for its part, gave rise to what is known as the *industrial revolution*. Production no longer took place in the home or in small industries, but in huge factories that could draw on cheap labour to mass-produce commodities.

But another kind of revolution was also underway. The great *political revolutions* of the seventeenth and eighteenth centuries in England, France and the United States would see the rise of new nation-states that were based on new ideas like the rule of law, democracy and human rights. These revolutions produced philosophies that are still influential and relevant today.

The essence of modern thinking can be seen in the *Enlightenment* of the eighteenth century. The Enlightenment was the inevitable culmination of all that went before. It refers to a shared mood or temperament that was based on three characteristics, namely:

- A profound distrust of and scepticism towards traditional systems of authority.
- Faith in the power of human reason and intelligence to make unlimited advances in science conducive to human welfare.
- A scientific method based on *empiricism* or *rationalism* and *formalism*. (These terms will be defined later.)

Activity 3.1

What is the meaning of the terms "secularisation" and "inductive reasoning" mentioned above?

_____

_____

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Feedback: These are terms that you can easily look up in a dictionary of encyclopaedia.

3.3 Characteristics of early modern legal thinking

Key concepts:

modernism

individualism

scientific method

rationalism

empiricism

In legal thinking in general, the rise of natural sciences and the advances made in them led to a belief that law must also become more scientific. The belief was that, in order for law to be as effective as other sciences, it must also be scientific in the way that mathematics (for example) is scientific. *Legal modernism* is the belief that one author on his own can find "right answers" to legal questions if he only used the correct scientific method. This method is one based on deduction, analogy, precedent, interpretation, social policy, institutional analysis and so on. It is a search for universal truth based on faith in the power of science. It is based on a view of language that assumes that words and concepts can objectively capture the meaning of events relevant to law.[2]

[2] Van der Walt AJ "Modernity, normality and meaning: the struggle between progress and stability and the politics of interpretation" 2000 *Stell LR* 21-49; 226-243.

I think you need to explain this a little bit more. What do these terms mean in a concrete situation? What, for example, does "deduction" mean? All of these things sound as if they should be used by someone in a laboratory, not by lawyers and judges!

That is exactly the point! In mathematics, you learn very early on that 1+1 = 2 and that is always the case. The early modern thinkers tried to make law as certain and predictable as that. So that any method that looked a little bit like the natural sciences (maths, physics, biology, etc) was acceptable. Deduction is particular is a method whereby you study a large number of things (like atoms, for example) and then deduce a general rule for these phenomena and use that to predict the future behaviour of them. In law that translates into studying a large number of court decisions about for example contract law, then you make a general rule regarding contracts and use that to predict how courts will in future decide cases having to do with contracts.

The point is that, to a very large extent the early modern legal philosophies rejected pre-modern thinking. Although some writers still make use of some of the concepts found in pre-modern thinking, they have, for the most part outgrown these ideas.

Individualism refers to a view of society where the position and rights of the individual is emphasised rather than that of the community.

The *first* idea that early modern thinkers reject is the idea of the common good. In its place the early modern philosophers accepted the idea of *individualism*. The rights of the individual are placed at the forefront. Society and the community are seen as threatening to individual freedom and privacy. Therefore more emphasis needs to be placed on absolute and inalienable rights of individuals in order to protect them from society – the law then polices the boundary between the individual and society. From this the idea of a basic conflict between the individual's interests and that of society is born.

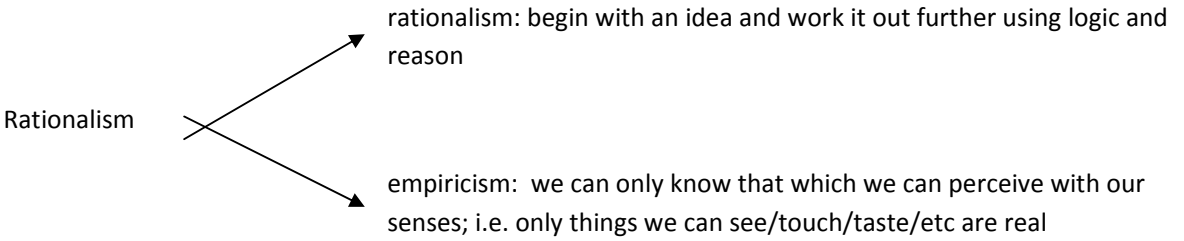
In the *second* place early modern thinkers also reject the metaphysical assumptions of their predecessors. In the place of these metaphysical assumptions they accepted that law must be a science based on *scientific method*. We have already pointed this out above. Although there is considerable difference as to what this scientific method can and should entail, they all agree that one cannot assume that there is a metaphysical world "out there". The scientific method required empirical evidence and logical deduction.

In the *third* place early modern thinkers rejected the idea of a natural order. They replaced it with a *scientific worldview*. In other words, they were no longer willing to accept that certain social arrangements are natural and cannot be questioned, simply because they have always been accepted as natural. These thinkers regarded everything as questionable on scientific grounds – even things that were for a very long time regarded as natural and even godlike. It was on this basis that they criticised the social inequalities of their time. We can summarise the differences between pre-modern and early modern thinking in the following way:

EARLY MODERN THINKING

REJECTS THE FOLLOWING:	**AND ACCEPTS IN ITS PLACE:**
COMMON GOOD	**INDIVIDUALISM**
METAPHYSICS	**SCIENTIFIC METHOD**
NATURAL ORDER	**SCIENTIFIC WORLDVIEW**

In a certain sense the methods of the early modern thinkers can be summarised in one term: Rationalism. However, we need to distinguish between Rationalism (with a capital R) and rationalism (with a small r). *Rationalism* means the idea that one can frame a comprehensive view of man, society and law through human reason. But Rationalism works in one of two ways in practice. On the one hand *rationalists* begin with some prior insights that they then rationally work out through logical constructions and ideas. So they begin with an idea or a hypothesis and then work out rationally if and how this can work. On the other hand *empiricists* reject the rationalist arguments. For them knowledge can only be based on facts – things that we know through experience or physical observation. Both these types of thinkers can be found in the modern period, but they are collectively referred to as Rationalists. In the next section you will see how this works in practice.



To summarise, early modern thinking is characterised by optimism about science and rationality and by faith in the progressive potential of scientific discovery. It is based on faith in an objectively knowable universe that operates according to rational, universal and absolute principles.

The attempt by early modern thinkers to turn law into a science, on an equal footing with the natural sciences, had a far-reaching impact on legal thought. The state and its laws could no longer be justified, as in pre-modern times, by referring to humanity's natural place in a God-created cosmos. The rejection of the pre-modern assumptions about the community left the human being behind as an isolated individual. From now on, thinking about law and society would have to start from the human being as individual. **Law can no longer be justified by natural law, but could only be justified in terms of the interests of the modern individual.**

Activity 3.2

Above you were asked to explain how early modern *society* differs from our own. Based on that, now look at the characteristics of early modern *philosophy*. How do you think our ideas are different from the early modern ideas? Have we in all cases rejected these ideas or are some still relevant? _____

_____

_____

_____

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_____

_____

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_____

Feedback: In activity 2.2 we stated that you do not have knowledge of modern thinking yet. You now have that knowledge! Use it to complete this activity and then go back to activity 2.2 and decide if you need to amend that answer.

3.4 Specific philosophers

3.4.1 The social contractarians

John Locke and Thomas Hobbes are both regarded as social contractarians. That means that they think that the state is the result of a contract between citizens. Although this idea is a very old one, it was in the chaos of England's Glorious Revolution that it truly came into its own. This Revolution was the result of a conflict between the king and his subjects over the nature and origin of royal authority.

Key concepts:
state of nature
social contract
natural rights

Because of excesses in the government of Charles I (particularly regarding religious freedom), he was deposed and a republic under Oliver Cromwell was proclaimed. It turned out that Cromwell was as bad as the King had been! So, after his death, the heir of the deposed king was invited to return to the throne. Once again very little changed and James II was eventually deposed and replaced by the Protestant William of Orange and his wife Mary (James's Protestant daughter).

The problem with this chain of events is that it made a mockery of the idea of the divine right of kings to rule! The old idea had been based on the view that a king gets his power from God and that no earthly power can remove him from this office. How then can the revolutions be justified? To this question Thomas Hobbes and John Locke gave contradictory answers. One might almost say that they provided justifications for the two sides to this argument.

3.4.1.1 Thomas Hobbes[3]

Thomas Hobbes

Thomas Hobbes is a typical early modern thinker who believed that law could be made into a science. He wrote in his book *Leviathan* of the "infallible rules and true science of equity and justice" and of the duties of subjects and rulers as "a science built upon sure and clear principles". He still uses the idea of natural law, but now it means nothing more than rational steps taken by individuals to further their own interests.

> The praise of ancient authors proceeds not from reverence of the dead, but from the competition and mutual envy of the living.
>
> THOMAS HOBBES

[3] This discussion is based on Hobbes *Leviathan* (Oxford 1946 Ed M Oakeshott).

In all social contract theories, the *state of nature* refers to the situation that existed before states were formed.

Hobbes, like all modern thinkers, took "man" (typically the isolated male individual) as the starting point of his new science of law. This individual man, capable of rational thinking, is also the basis of his description of life in the *state of nature*.

According to Hobbes the most basic law of nature is that of self-preservation. He thought that, before the state came into being, all people lived in a state of nature and all were simply trying to survive. But because there were no social associations, all people were constantly preyed on by other people and in constant conflict with them. That is why life for man in this state of nature, in his famous phrase, was "solitary, poor, nasty, brutish, and short." Because of this the state of nature was a constant state of war of everyone against everyone. No one could enjoy the amenities, order or economic prosperity of a peaceful community.

In order to escape from this terrible situation, all people gave up their independence and rights in favour of the rule of one of them who will guarantee their security. This is called the *social contract*. Thus everyone surrenders their independence and rights to one man, the sovereign, who rules with absolute power. In this way Hobbes was the defender of the idea of an absolute monarch – someone who has no limits to his power and whose subjects have no recourse to any rights against him. All that they are guaranteed is a sort of peace and security characterised by arbitrary and absolute power.

Therefore, the war-like state of nature can be overcome because man can create for himself a world of more freedom and wealth than existed before by using his *reason*. How can this better life for mankind be achieved? By rationally thinking about the problems created by the state of nature, men enter into a *social contract* with each other, establish an all-powerful state and exchange the war of all against all with protection by, and absolute obedience to, the state. Once the state is established by agreement, absolute obedience to the laws of the state is rationally required. The state has no other obligations to its citizens but to protect them from others. As a result the citizens also do not have the right to revolt.

The individual's fear of other individuals in a state of nature is replaced with an even stronger fear of the state in a *political society*, as the state can use its power against the individual if he breaks the law. Human beings are forced into society and kept there by fear. You will immediately see that this view of human nature differs from the pre-modern understanding of human nature. It is a radical departure from the pre-modern concern with the common good. Therefore, Hobbes recognised the existence of a private sphere in which the individual ought to be left to pursue his own chosen way of life, provided that his freedom to do so does not threaten the peace. Hobbes himself interpreted this principle rather restrictively and claimed, for instance, that freedom of religion or opinion could constitute a threat to the peace and good order in society and could therefore be severely limited.

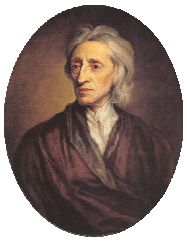
Hobbes's vision of man, society, and law did not immediately find support. It was only during the 19th century that Hobbes's views were again taken into serious consideration. The reason seems clear. The 19th century saw the industrial revolution and the rapid growth of a capitalistic industrial economy. The power

of the machine and the nature of economic relationships provided fertile ground for Hobbes's vision to flourish in the reworked guise of *utilitarianism* (see 3.4.2 below).

But is this idea not what many people today are calling for? Sometimes you hear people saying that we should have a strong ruler who will not tolerate the chaos that we often find in modern democracies. Is this a continuation of Hobbes' ideas?

Yes, you are exactly right! Always in times of upheaval people want to return to stability and of course an absolute ruler at least guarantees stability. That is why they speak of a "benevolent dictator" and in Africa we have seen a number of these absolute rulers. We have also seen what the consequences of that idea can be, haven't we?

3.4.1.2 John Locke[4]



John Locke

> New opinions are always suspected, and usually opposed, without any other reason but because they are not already common.
>
> JOHN LOCKE

The very influential view of John Locke is the opposite of that of Hobbes, although their point of departure is the same. Locke also used a state of nature as starting point, but his state of nature was very different. For Locke the state of nature is characterised by people living in mutual cooperation and trust. In the state of nature man is also subject to the law of nature which he can know through his reason. Through the law of nature he is required not to injure the life, liberty or property of others and he also has the right to enforce those rights against others. However as this state of nature exists before the formation of states this is a form of self-government.

Locke postulated that prior to the formation of states (in the state of nature) humans are naturally self-governing. However he foresees that self-government would lead to certain problems. Self-governing individuals lack knowledge of the law, they are biased when disputes need to be resolved and they may not have the ability to execute a judgement. This creates a need for impartial judges and an authority that has the ability to execute a judgement. Locke suggests that humans in this state of nature, of self-government, will form a social contract to create such an authority.

[4] This discussion is based on Locke J *Two treatises on civil government* (London 1947).

Via the social contract people transfer their power of self-government to the authority of the state for the benefit of the majority. To do this they give up their right to enforce their other rights to the state. Henceforth the state will enforce the rights of individuals and not the individuals themselves.

However, the basic human rights can never be given up. The right to life, liberty and property are inalienable rights that all people have by virtue of the fact that they are human. If the state no longer protects these rights or encroaches on the rights of citizens, the citizens have the right to revolt. It is therefore a simple case of breach of contract: if the government breaches the contract, the citizens can take away their power and right to govern.

From this it should be clear that Locke provided the justification for the English revolution and for the right of people to choose their own government. This theory has been immensely influential. The American Constitution starts with the words: "We the people of the United States do ordain and establish this Constitution for the United States of America" – indicating a sort of social contract to form a new government. Similarly the South African Constitution in its preamble seems to point towards a kind of social contract – one where the past is replaced by a new dispensation. At any rate this is the first theoretical justification for a doctrine of human rights to be found. The idea that human rights are inalienable rights to be respected by all is based on this basic idea of John Locke.

Although Locke wrote towards the end of the 17th century, his break with pre-modern thought was not as radical as that of Hobbes, who wrote during the middle of the 17th century. By insisting on restrictions on the monarch (the state), Locke was in a sense still applying the Medieval tradition regarding the relationship between law and ethics (the good life). In terms of this tradition, ethical principles are broader than the rules of positive law. The wider natural law, on which positive laws are based, exists naturally and does not depend on recognition by the state. Locke claimed that the duty to respect the natural rights of individuals was inherent in the state of nature. The basic rights and duties of individuals are not created by the state, as Hobbes claimed, but come from God and precede the state and its positive laws.

So is it fair to say that Hobbes and Locke arrived at different ideas regarding the state and rights because they had different ideas regarding human nature? That Hobbes thought people were violent and war-like, while Locke thought they were peaceful and nice?

Well that is certainly one way of looking at it! The interesting point is, we think, that they both were individualists, but what that meant in reality was very different. So you can see that your ideas about law and rights and the state are influenced by other ideas as much as by your culture and upbringing.

Activity 3.3

There are fundamental differences as well as similarities between Hobbes and Locke's views on the state of nature and the nature of human rights. What are these differences and similarities?

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Feedback: This is a favourite question! Use the scheme below in order to study – please don't use it in the exams. It's merely a study aid – you need to rework this into an essay.

	SIMILARITIES	**DIFFERENCES**
State of nature	Both have the idea that the state of nature exists before political states come into being	**Locke**: Is situation of mutual co-operation and harmony. **Hobbes**: State of war of everyone against everyone.
Social contract	Both have the idea that citizens conclude a social contract to establish a political state	**Locke**: Purpose is to protect property. **Hobbes**: Is the result of fear – purpose is to stop the war.
Human rights	Both have an idea that people have rights that are rational and individualistic.	**Locke:** Rights are natural and cannot be given up – only right to enforce rights are given up. **Hobbes**: Rights are conventional, that is given and determined by the absolute ruler.

Earlier we promised to show you how rationalism and empiricism works in practice. Well, now's the time! Both Locke and Hobbes are rationalists according to the definition we gave above. Let's see how this works:

An example of rationalism is the idea of the social contract:

JOHN LOCKE

State of nature = harmony (This is an idea, it cannot be proven) → Social contract (This is still an idea – no proof) → Political state with human rights (This is reality!)

THOMAS HOBBES

State of nature = war (An idea, cannot be proven) → Social contract (Still and idea – no proof) → Absolute sovereign, no rights (Reality)

From this you can see that, although they both use the same method (namely rationalism) they arrive at vastly different conclusions. Already you can see that the so-called scientific method of early modern thinkers by no means guarantees the same results in all cases. You will see more of this as you continue to work through the material.

3.4.2 The legal positivists[5]

Jeremy Betham

Photo courtesy of Michael Reeve

John Stuart Mill

[5] This discussion is based on Bentham J *The limits of jurisprudence defined* (New York 1945); Austin J *Lectures on Jurisprudence* (London 1873) 88-107; Mill JS *On liberty* (New York 1975); Hart HLA "Positivism and the separation of law and morals" 1958 *Harvard LR* 593-629.

Key concepts:

legal positivism

utilitarianism

epistemological thesis

social thesis

command thesis

authoritarianism

Legal positivism is one of the most misunderstood and vilified of all theories of law. It is also one of the most important. That is why we are going to devote quite some time to this theory. We are first going to give a brief history of positivism. Then we will look at three major themes in positivism and then the South African debate on positivism will be discussed. In our discussion we will focus on the ideas of Jeremy Bentham (1748-1832), John Austin (1790-1859), John Stuart Mill (1806-1873), and HLA Hart (1907-1993) as well as a number of contemporary South African writers.

It is important to realise that the term "positivism" has nothing to do with being positive or being negative about something. It does not indicate something that is either good or bad. Instead it is a theory that has to do with a scientific approach to law and social sciences.

Before we begin it is, however, important to distinguish between *legal positivism* and *utilitarianism*. Both are a kind of positivism but there is a difference. Utilitarianism is a theory of *legislation* and legal positivism is a theory of *adjudication*. Utilitarianism claimed that pleasure and pain could be measured empirically and that you could use that as the basis for drafting legislation. The job of the law is to maximise pleasure and to minimise pain. ("Pain" and "pleasure" is not limited to physical pain or pleasure, but can include emotional, psychological or even economic pain and pleasure.) In other words, the utilitarians were empiricists.

Adjudication is a terms used to describe the study of how judges decide cases. In other words, it does not deal with what legislators do (legislation) or with the specific rules, but with what happens in court cases.

Legal positivism is more difficult to explain, as it includes the three themes set out below. In all cases, however, legal positivism is built on utilitarianism. It therefore also uses an empiricist approach, but in the field of *adjudication* instead of legislation.

3.4.2.1 The origins of legal positivism

Legal positivism is based on the general theory of *positivism*. You will remember that we said philosophy tries to answer two questions: what is the nature of that which exists? and how do we know? In philosophy these are called the ontological and the epistemological question. *Ontology* therefore refers to theories about reality, while *epistemology* refers to theories of knowledge.

Positivism is a theory of knowledge that addresses the question: How do we know? In the pre-modern era philosophers mostly dealt with ontological questions about the nature of the universe and of god. Their

philosophies were based on metaphysical assumptions. The Enlightenment brought an end to this way of thinking. Instead the emphasis was on rational, scientific and empirical study. Philosophers had to deal with the epistemological question of how to explain the way in which the new sciences worked.

The positive method in social sciences was first set out by Auguste Comte (1798-1857).[6] He rejected all metaphysical speculation and stated that science must concern itself with facts. Once facts have been established empirically, you could deduce general rules from them. Once you have identified the rules, you could make accurate predictions regarding future events. (Remember, this is the definition of deduction we spoke about earlier.) This theory fit the natural sciences perfectly (think about a geologist collecting data to predict the eruption of a volcano). But Comte was interested in the social sciences. He wanted to make sciences such as sociology more scientific by introducing the positive method. Scientists had to study the facts, draw conclusions from them and make predictions – in that way the social sciences would also become scientific.

3.4.2.2 Themes in legal positivism[7]

Legal positivism is an attempt to make the general theory of positivism applicable to law. It became the dominant theory from the eighteenth century and is still very influential. But that still does not explain what legal positivism is. In general three basic themes or theses can be identified in legal positivism, namely the epistemological thesis, the social thesis and the command thesis.

Thesis?! What on earth is a thesis? It sounds like some kind of a disease.

A *thesis* is a short way of saying a theory or viewpoint about something. It is philosophical shorthand for a way of stating your position on something.

6 See Comte A *The foundation of sociology* (London 1976).
7 See also Jori M (ed) *Legal positivism* (New York 1992).

(a) The epistemological thesis

The *epistemological thesis* is based on the positivist idea that knowledge of facts and knowledge of values are acquired in different ways. As a result the description of the law (facts) must be distinguished from the description of morality (values). Therefore it is not only possible but also necessary to describe law without reference to morality. As a result law and morality must be separated. Therefore, in the legal context, the terms "rights" and "duties" can only have a meaning determined by positive law. That is why neither natural law nor natural rights can be the basis for rights – they do not form part of positive law.

> All this talk about nature, natural rights, natural justice and injustice proves two things and two things only: the heat of the passions and the darkness of the understanding.
>
> BENTHAM

This is very confusing. Surely law and morality is closely linked to one another? And what does knowledge have to do with it?

That is exactly the point where natural law and legal positivism differ most radically. While natural law links law and morality, legal positivism separates them. Think about this example: how do you know that it is not acceptable to be disrespectful of older people? Well, you were probably taught that by your parents and family. It is through your upbringing, culture and religion that you "know" what is morally right and wrong. But how do you know that you have to stop at a red light? Easy – the legal rules tell you that not stopping is illegal. And you know this by studying laws and rules. So, you acquire knowledge of law and of values in two different ways. That is the basis of all positivist understanding of the law.

But if morality cannot be the basis for law, what would be a sound basis? For Bentham, Austin and Mill the answer to that was the criterion of *utility*. All laws and social institutions had to be measured against this ideal. And this was not merely an abstract idea – they were all passionate law reformers who wanted to change the outdated English legal system. Utility was the scientific basis for measuring the success of their legal reforms. But what is utility? Bentham stated that "it is the greatest happiness of the greatest number" and that this was "the measure of right and wrong". Utilitarianism is therefore a theory of creating legal rules and institutions based not on morality but on the question of whether it maximised happiness and minimised unhappiness.

To many people the insistence on the separation of law and morality is the main reason why this theory has been rejected and criticised. But Hart has shown that utilitarians realised that legal rules are influenced by moral considerations and that moral rules might become legal rules. What they deny is the use of morality to determine whether a legal rule is valid. The validity of legal rules is one question (determined by facts), but the morality of that rule is quite a different thing.

The later positivists, like Hart, have a much more nuanced view of the separation of law and morality. He says that, before you can truly speak of a society, people must accept and agree to a number of basic rules. This is what he calls the "minimum content of natural law". These kinds of rules occur in both law and morality, but they are not the same. There are four important differences between law and morality, namely:

- Ethical rules always deal with important things, while law often deals with very mundane and unimportant things.
- Ethical rules cannot be changed deliberately, while legal rules must be changed deliberately.
- Moral obligations are undertaken voluntarily, while legal rules force you to comply with them.
- The kind of pressure applied to obey moral rules is different from the pressure used to enforce legal rules.

That is why law and morality must be separated. What is more, if you separate them you can more easily see that some laws may be valid (like those in Nazi Germany or Apartheid South Africa), but they are not morally acceptable.

Activity 3.4

The four differences above may seem strange to you. We are for instance used to thinking about law as something important. Look at the following example: Let's say there is an ethical rule to not lie to your friends and there is a legal rule that you must stop at a red light. Try to apply these four differences to the example. Do you agree that the differences are valid? _____

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Feedback: Draw up a table with two columns. In one write down the characteristics of legal rules (unimportant, etc.) and in the other the characteristics of moral rules. Now test the example against these characteristics. Don't worry, if you agree with Hart that does not necessarily make you a positivist!

(b) The social thesis

The *social thesis* is about the idea that law does not depend on a natural order, but on social and scientific facts. Therefore laws are contingent: they are not universal and eternal, but determined by social and political circumstances. Of course it is quite obvious that this attitude stems from Comte's insistence on scientific method. But the interesting result of this is that law is increasingly seen as not very unique – in fact, it is just another method of social control.

We have already seen that Bentham rejected natural law as the basis for law. He and the other utilitarians thought that law was instead based on convention – that is on agreement between people. It is therefore a human creation with all that that entails. What is more, morality must also be removed from the idea of a natural order. Consequently, morality is also increasingly seen as conventional: we as people create our moral rules as well. They do not come from something "out there" but are very real human products.

Hart also accepted this idea that law is a system of social rules. It is "social" because it regulates human conduct, but also because it is based on human practices. It differs from other kinds of social rules only because of its "systemic quality". In other words, law is a system of social rules.

(c) The command thesis

One of the oldest ideas in legal theory is the idea that law is essentially a command by a sovereign to those who have a habit of obeying those commands. (Does this remind you of Hobbes?) In legal positivism it is often linked to the social thesis, so that the power to command is limited to that which is socially and empirically desirable. For instance, Bentham insisted that the legislature cannot do anything that is unlawful, but it can do something that will cause the citizens not to obey their commands.

> We have a constitution. We have our liberties, our rights. Our kings have boundaries to their authority.
>
> BENTHAM

For him the (unwritten) English constitution and the rights and liberties contained in it, are the boundaries within which this power is exercised. Therefore Bentham never accepted the idea of an unlimited sovereign, as Hobbes did. He recognised a separate class of laws that restricted legislative powers. This is not morality, but an integral part of the structure of law.

Can you give an example of such a class of laws? How does this work in a modern democracy?

It is in modern democracies that this is most common. The constitution of South Africa, for example, is a set of rules that, amongst other things, limit the legislative power of parliament. The result is that parliament cannot make laws that are in conflict with the Bill of Rights. But that does not mean that the constitution is an example of morality! On the contrary, it is a piece of legislation and, as such, part of the positive law of the land.

Hart's theory (and his most important contribution) was developed as a direct result of his criticism of the utilitarian command theory. His basic problem with the theory is that it does not make pro-vision for such legal instruments as contracts and marriages. It is impossible to explain how a contract can be a command, since it is not issued by the legislature. Therefore Hart thought that law is a combination of *primary duty-imposing rules* (these are typically commands, such as the rules of criminal law) and *secondary power-conferring rules* (in other words rules that give citizens power to change the legal position, like contracts).

There are three kinds of secondary rules, namely:

- rules of recognition – these are rules that tell you whether a rules is a valid legal rule, for example the procedures followed to pass a law in parliament;
- rules of change – which regulate the way in which legal rules and status can be changed by individuals, like those relating to marriage;

- rules of adjudication – those rules that tell you how to go about settling a dispute in a court of law.

Activity 3.5

Can you think of a concrete example from South African law for each of these kinds of rules?

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Feedback: This is a question that apparently gives students more trouble than necessary. The trick is to think of *very concrete* and *practical* examples and to be as specific as possible. For example: (1) Rules of recognition: the specific rules that must be complied with if a municipality wants to make a rule about rubbish removal. (E.g. notice must be given to residents.) (2) Rules of change: the rules that make it possible for you to change your status from single to married. (3) Rules of adjudication: the rules that apply when you want to lodge an appeal against a decision of a court. PLEASE do not use our examples! It gets very boring and shows you are not thinking.

According to Hart a legal system is therefore a combination of primary and secondary rules and not merely a collection of commands. But Hart also acknowledges two further requirements for a legal system, namely that it must be generally accepted by the public as law and accepted by officials as standards of official behaviour.

3.4.2.3 Evaluation

> Whatever crushes individuality is despotism, by whatever name it may be called.
>
> JS MILL

It seems clear that the positivists were very insistent that law must always be seen as the result of human action. There is no room in a legal science for romantic notions of a reality "out there". Therefore it is no longer possible to hide behind ideas of natural law to justify laws that are sometimes unjust. If law is a social fact, it can be criticised on the same basis as all social facts. It is because of this critical potential that legal positivism is so important. The American Realists and Critical Legal Studies, as well as the feminists, continued this tradition of critical thinking, as you will see later.

But most South African writers do not agree with this positive assessment of legal positivism. This will be studied next.

3.4.2.4 The South African debate

The South Africa debate has focused on the role of legal positivism in the interpretation of statutes. In this regard the activities of judges in apartheid South Africa has come under scrutiny. South Africa courts have always insisted that they cannot act as a *censor morum* (a judge of morality) as in the case of *Preston v Biden's Trustee*.[8] This was also the attitude in *R v Sachs*:

> (B)ut where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute.[9]

You will immediately realise that this is a far cry from what we expect from our judges today. No court will accept that the legislature can have "autocratic power over individuals"! But writers thought that this attitude was the direct result of legal positivism – and specifically the epistemological thesis.

The best example of this is John Dugard's criticism, who blames legal positivism for the "mechanical and wooden" interpretation of statutes by courts. The problem is, according to Dugard, that a judge can never be completely objective – his training and background will influence him. Therefore it is impossible to apply the law without referring to morality. It would therefore be better if there were a clear set of norms against which the laws can be tested.[10]

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8 *Preston v Biden's Trustee* (1883) 1 Buch 322 333.
9 *R v Sachs* 1979 4 SA 392 (A) at 399 H.
10 Dugard J "The judicial process, positivism and civil liberty" 1971 *SALJ* 181-200.

It should be clear that Dugard's criticism is mostly concerned with the command thesis and the separation of law and morality. In his opinion, that is why South Africa courts have not protected human rights. Other writers have, however, pointed out that legal positivism must not be confused with *authoritarianism*. As we have seen, legal positivists never advocated a blind obedience to the law, but instead encouraged critical thinking.

Authoritarianism is the view that those in power are always right and should not be questioned. In other words: might makes right!

A *formal* vision of law looks at the rules only, while a *substantive* vision looks at what is behind the rules.

After the introduction of the Constitution, the question of the role of legal positivism has once again come to the fore. Many argue that the previous "formal vision of law" must make way for a more "substantive" vision of law. For this, it is argued, legal positivism is not an appropriate theory.

What is more, Cockrell points out that the Constitutional Court's flirtation with a substantive vision of law has been less than successful. Their "rainbow jurisprudence" is problematic, in the first place because it lacks substance and, in the second place, because it denies the existence of deep conflicts regarding values. Moreover, Cockrell points out that, in constitutional adjudication, the court is not called on to seek guidance from natural law.[11] As we said before, the rights and values in the constitution are institutional rights and values – that is, rights and values conferred by positive law. As a result the legal positivist approach is still appropriate.

This approach is echoed by Fagan in his analysis of the differences between the tasks of the legislature and the courts respectively. According to him, the task of the legislature is to create statutes on the basis of moral considerations. This is uncontroversial because of the institutional character of the legislature. But courts do not share this institutional character. Courts can only invalidate statutes if they do so on the basis of decisions that are different from those that should guide the legislature.[12]

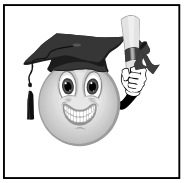
3.4.2.5 Conclusion

There are many aspects of the positivist doctrine, especially the ideal of utility and the rather crude psychology it rests on, that seem naïve and unsophisticated to lawyers of the twenty-first century. What cannot be denied is that the positivists were the first to insist on an analytical approach to the law that also took social facts into consideration. This insistence on an analytical approach to law has made scepticism toward and criticism of existing legal norms and structures possible. The Realist movement and the Critical Legal Studies movement would not have been possible without the groundbreaking work of the positivists. At the same time the emphasis on the social thesis meant that the positivists never lost sight of the society within which the law operated and the values of that society, as the natural law thinkers tended to do.

11 Cockrell A "Rainbow jurisprudence" 1996 *SAJHR* 1-38.

12 See See Fagan "In defence of the obvious – ordinary language and the identification of constitutional rules" 1995 *SAJHR* 545ff; Fagan "The longest *erratum* note in history" 1996 *SAJHR* 79ff; Fagan "The ordinary meaning of language – a response to Professor Davis" 1997 *SAJHR* 174-181.

It seems as if your analysis of legal positivism is a little bit too positive! It can also be argued that positivism was to blame for what happened in Nazi Germany where judges were unwilling to judge the moral content of the law. And the same could be said of apartheid South Africa.



We would argue that the idea that the separation of law and morality lead to dictatorship, oppression and apartheid cannot be accepted. In the case of Nazi Germany, for example, this argument fails to take into account the influence of German idealism and other philosophies. In the case of South Africa, much the same argument can be made. Certainly the idea that parliament has unrestricted powers that cannot be challenged by the courts is foreign to positivist thinking. At any rate, why positivism should lead to oppression in South Africa but not in England, the home of positivism and empiricism, is not easy to explain. But it does suggest that other factors played a role in this development. What seems clear is that there is no logical reason why positivism should necessarily lead to conformism and authoritarianism.

The point seems to be that all laws contain implicit or explicit moral values as a matter of historical fact. The mistake of apartheid judges was not in trying to separate law and morality, but in uncritically accepting the morality contained in apartheid legislation. It would equally be a mistake to uncritically accept the morality implicit in post-apartheid legislation.

Activity 3.6

In the case of *R v Sachs*[13] the Appeal Court said the following:

"(W)here the statute under consideration in clear terms confers on the Executive autocratic power over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. … The dictum is no authority for saying that the Courts may restrain the executive when it acts within the powers conferred by a statute."

This decision is often quoted as an example of positivist adjudication. Do you agree that it is positivist? Give reasons for your answer. _____

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13 *R v Sachs* 1952 4 SA 392 (A).

Feedback: The important part of this question is that you must take all three theses of positivism and see if you can find them in the quote. It then becomes clear that it says nothing about the epistemological thesis or the social thesis. There is something of the command thesis here in the idea that the Executive might have "autocratic power". Even then, it is more in line with what we call authoritarianism than legal positivism. The point is that, without the other two theses, this is not positivism, but authoritarianism.

We said in our discussion of the social contractarians that they were rationalists. Positivists, on the other hand, are excellent examples of empiricists. Look at the scheme below and decide whether you agree with us. (By the way, this is also an excellent summary of the whole of legal positivism!)

The epistemological thesis rejects metaphysical assumptions	The social thesis rejects the idea of a natural order	The command thesis rejects the idea of the common good
↓	↓	↓
That is because rules can be physically observed while values cannot be so observed	Legal rules come from humans, not from gods	Rules deal with individual rights
↓	↓	↓
Therefore rules are relevant to science and values are not	Therefore legal rules can be criticised	Therefore law manages the conflict between society and the individual

3.4.3 The American Realists[14]

3.4.3.1 Introduction

The early twentieth century in America was a really tough time. The markets had crashed, leading to an economic recession which eventually turned into an economic depression. Unemployment and poverty was at an all-time high and an extended drought meant that many farms were re-possessed by the banks. This meant that hunger was also a constant threat.

Key concepts:

formalism

conceptualism

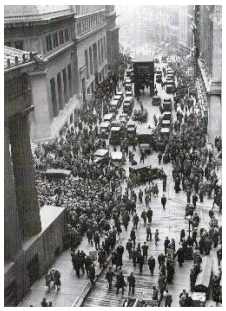
sociological movement

pragmatism

radical realism

progressive realism

indeterminacy



A solemn crowd gathers outside the Stock Exchange after the crash, 1929.

The reaction of the American government at the time was to focus on job creation, poverty alleviation and the protection of workers. The last-mentioned was because workers were so desperate for work that they could easily be exploited. These measures led to one of the best known cases in American history.

[14] This discussion is based on Minda G *Postmodern legal movements: law and jurisprudence at Century's end* (NY University Press New York 1995).

The facts in *Lochner v New York*[15] was briefly as follows: the state of New York had passed legislation to limit the working hours of bakers to 40 hours per week. What is now accepted as fairly standard labour practice was, however, fiercely resisted. The legislation was challenged as being unconstitutional as it violated the freedom of contract clause in the American constitution. The court duly found that the legislation was indeed unconstitutional.

The problem for legal thinkers was this: how can courts make decisions that frustrate legitimate government goals? Put another way: how can appointed judges make decisions that frustrate the democratic will of the people?[16] What had happened in *Lochner* was that the court had taken a typically positivist decision – asking only if the legislation was in conflict with the constitution, without taking the social situation into consideration.

But remember that these thinkers were all trained in the positivist tradition, so they faced a further problem: how do you remain true to the ideal of law as a science, but at the same time allow them to be responsive to societal needs? To this question they gave to different answers, but to understand this we first have to understand where they were coming from.

3.4.3.2 Who/what influenced the Realists?

The Realists were influenced by

LEGAL POSITIVISM + EXISTENTIALISM + MARXISM

We will look at each of these in turn.

By now you know what positivism is, but in essence it is an insistence on seeing law as a science and insisting that court decisions must be based on the law and not on outside considerations, such as morals, policy, opinion or belief. This basic idea is known in American law as formalism, but the basic ideas remain the same and we will use these terms as synonyms. But, of course, it is exactly the positivism that created the problem in *Lochner* in the first place.

The second influence is Marxism. Marxism is a very modernist idea that seeks to explain history as the continuing class struggle between the "haves" and the "have nots". Based on this they want the class struggle to end by giving workers ownership of the means of production and establishing a classless society. It is obviously from this that 20th century concerns about the rights of workers arose.

These ideas led to the Bolshevik revolution in Russia and, eventually to the establishment of the USSR. Unfortunately the experiment wasn't a great success as it failed to establish a classless society and resulted in famine, poverty and persecution. The USSR collapsed in 1990, but communism, as it became known, is still the dominant philosophy in China, North Korea and Cuba. Just shows you that philosophy can have real-life consequences!

15 *Lochner v New York* 198 US 45 (1905) hereinafter referred to as *Lochner*.

16 This is known as "the counter-majoritarian difficulty" in American law.

The rise of Marxism worldwide led to the recognition of workers' rights and an awareness of power imbalances in society. In a society like America, with its emphasis on individualism, capitalism and non-interference, you can see how this might create problems. And yet, *Lochner* had shown the need for the protection of workers' rights. The Realists had to find a way of harmonising these conflicting ideas.

Existentialism may seem like a daunting philosophy to understand, until you realise that most of us struggle with the same problems every day. Think about this:

- Have you ever had your "fortune" told in which someone tells you that you are destined to meet a "tall, dark stranger" and live happily ever after?
- Do you read your horoscope religiously, believing that your life is determined by the date and time (and even place) of your birth?
- Do you believe that God/god has a divine plan for your life that will be fulfilled if you only follow your calling?
- Does your culture/group/family membership determine what you can and cannot be and do?

The existentialists rejected all these ideas. For them who and what you are is not determined at birth or by anything outside yourself. You determine your own destiny and purpose by making free choices every day and accepting the consequences. They say: "We are doomed to freedom" and, more famously: "Existence precedes essence". It is also, curiously, very close to the Buddhist idea of *karma*.[17]

If you take these seemingly disparate ideas and look at them closely some interesting themes develop. They are all concerned with the rejection of metaphysics, the advancement of rights, liberty and choice and the awareness of societal problems. These are all typical concerns of modernism and they all find expression in Realism.

3.4.3.3 Basic themes

As is the case with many philosophies, the Realists were not a single group who all agreed about their theories. In fact, there are two very distinct groups of Realists that we will discuss later. But they do share a number of general ideas and we will now look at these ideas in more detail.

In the first place, all Realists agree that decisions by courts are based on contested policy choices, but that these choices are disguised by positivist attitudes. The Realists claimed that their own observations of the way in which judges decided cases showed that judges frequently decided cases on the basis of their own policy considerations and subjective value judgements. To find out what the law is, one has to observe and describe *what courts in fact do*. By focusing on what the courts in fact did, rather than on what they said they did, the Realists exposed adjudication (the application of the law) as the expression of subjective value-judgements.

[17] Note that *karma* is not, like many Westerners think, cosmic revenge. It simply means that your actions will determine your life.

Isn't this just another form of empiricism? The positivists studied legal rules and we said that that is empiricism. If the Realists study what courts do, isn't that also empiricism?

Absolutely correct. But they took the positivist attitude even further by claiming that even an empirical description of the rules of law (like Hart did) was not a truly scientific approach to law. While the rules could be empirically described and learned by students, the rules did not decide the outcome of cases. Description and analysis of the rules of the law should be replaced by empirical observation of what courts in fact did when they decided cases.

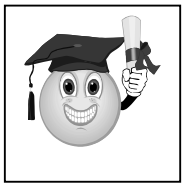
In the second place, the Realists all express a deep scepticism about the possibility of making decisions based on rules. In other words, not only were judges not deciding cases based on rules, it was basically impossible to do so anyway. They based this claim on two further ideas. Firstly they thought that reality was simply too complex to be understood in terms of rules. Secondly, the rules do not take economic and political power into consideration. For example, in *Lochner* the court upheld freedom of contract without realising that the parties to the contract were not equally powerful. It is easy for a powerful person to dictate the terms of the contract and the other party might be powerless to object.

In the third place, the Realists emphasised the role of interpretation. If you reject formalism and conceptualism, then it becomes difficult to explain how cases are decided. How do we find the meaning of words? This problem can be illustrated by using an example.

Illustration

Let's pretend there is a park that has a notice board saying: "No vehicles are allowed in the park". According to the formalists, these words or concepts contained in the rule determine the outcome of a case. Realists claimed that this is metaphysical speculation. Words do not have essential meanings. Is a parent who is pushing his or her child in a baby pram contravening the prohibition? What about a family on their bicycles? And what about an army tank placed in the park to commemorate a war? To attempt to solve these questions with reference to the essential meaning of the word or concept "vehicle" is to enter into metaphysical speculation. The word or concept "vehicle" does not have one, fixed and determinable meaning, but will change depending on various factors. The same applies to all the key concepts and words used in legal directives.

Oh please, you can't be serious! Every lawyer knows that to understand the meaning of a term in legislation, you have to start with the clear meaning of the word and then interpret it according to the intention or purpose of the legislation.



That might be true, but only if you accept the formalist claim that meaning is inherent in the language we use. In other words, that it is possible for words to have a single, simple and clear meaning. The Realists shows that even a simple word like "vehicle" can have multiple meanings that all "fit" into the specific legal rule under consideration. The Realists, therefore, also rejected pre-modern metaphysics, but even more

radically. They argued that even the words and language that we use can be metaphysical speculation. What is more, the Realists unmasked legal formalism as the last remnants of metaphysics and not as the start of legal science.

This unmasking has had a far-reaching impact on Western jurisprudence. If words and concepts do not have fixed or essential meanings, then it would imply that the words and concepts used in the formulation of legal rules could not determine the outcome of disputes nor could they limit what judges could do. The application of law suddenly becomes problematical. Legal formalism, as the science of adjudication, becomes impossible and the positivist emphasis on rules or commands of the legislature becomes irrelevant**.**

But if it is true that words do not have fixed meaning, how is it at all possible for a court to make decisions? If we cannot say what the word "vehicle" means how will we decide if anyone has contravened the prohibition?

Ah, you have touched on a very raw nerve there! And we promise we will deal with your question later. But for now, just be aware of the impact something like this has on law as a science. It takes away all the certainty that law prides itself on.

But, as we stated above, the Realists did not all agree about everything. While they shared the ideas set out above, they differed about how this problem is to be solved. This is the distinction between the radical realists and the progressive realists.

3.4.3.4 Radical legal realism

We said at the start of this discussion that the core problem for Realists was how judgements could remain scientific and yet respond to societal needs. The radical realists tried to solve this problem by showing that judges do make decisions based on subjective factors and that this should be openly acknowledged. In other words, if judges make decisions based on other considerations, they might as well base it on legitimate social and political considerations. Let's look at their argument.

The radical realists attempted a political criticism of positivism. They tried to expose the ideological assumptions of the formalists. Felix Cohen, for example, showed that the idea of merely applying the law as it is rests on a certain view of the role of law in society. They therefore tried to show that law must be understood within its *political* context. They did this by showing that law has political power that must be taken into consideration. For example, the idea that property is something natural and abstract, could be used to justify maintaining the *status quo*. After all, if it is natural why would there be anything wrong with it? It can then become a weapon in the hands of people who are economically and politically powerful. The radicals wanted to replace formalism with a more contextual understanding of law. Law must be analysed within its historical and social context.

The formalist description of law as a comprehensive and neutral system of rules was motivated by two considerations, namely legal certainty and the belief that judges had to speak law and not make law. The Realists were emphatic in their rejection of this depiction of law. For the Realists, the formalist depiction of the law (as an objective and easily ascertainable system of rules) simply served to disguise the conservative

values of judges and their support of the free-market economy. Legal formalism had the practical effect of favouring and entrenching the economic interests of the wealthy.

Radical Realism was therefore a negative reaction to formalism/positivism and they advocated a political critique of the law. It was largely ignored and forgotten by the mainstream of legal philosophy until the 1970's when it was discovered by the Critical Legal Studies movement, which we will study in a later section.

3.4.3.5 Progressive legal realism

The progressive group of realists developed from the pragmatism of Holmes. They accepted the basic idea that law is a science, but for them law was a *social* science like, for example, sociology or psychology. They were less political in their approach and instead tried to analyse law objectively. They tried to perfect formalism by giving law and legal concepts a non-legal and a-political source of certainty and authority. The authority of law is, therefore, not found in concepts themselves, but in the scientific study of human behaviour, for example. In other words, judges had to analyse the social and political circumstances and then come to a decision that reflected the realities of existence and of political goals.

These realists therefore claimed that the social sciences could be used to predict and describe what judges do and what the effect of this is on society. Because this is done rationally and scientifically, judges can then use this to come to a rational decision. In this way the dream of a legal science could still be fulfilled.

> Law is not a brooding omnipresence in the sky.
>
> HOLMES

The progressives had a specific programme in mind for changing the way things are done. It can be summarised as follows:

→ Replace abstract rules with functional rules.

→ Replace general rules with specific rules.

→ Replace abstract approach with contextual approach.

In all cases, social desirability is the basis for the rules.

What do these kinds of rules mean? How would it change anything in a practical sense of how the law functions?

Remember that the progressives were trying to make law more scientific but in a specific way. They did not believe in abstract or general rules like the formalists did. For them that is too easily manipulated. An abstract rule might be something like "property is an inalienable right". But if you have functional rules – that is rules that explain how things work or function – you can more easily predict what a court will or will not do. The same is true of general rules like "no vehicles are allowed in the park". A more specific rule

would be one that states exactly which vehicles are prohibited. The contextual approach refers to the social, political and economic circumstances that they wanted judges to take into consideration.

The progressives also challenged the formalist view of law by emphasising the *indeterminacy* of the law. Legal indeterminacy, for them, meant that for every rule or principle there was potentially an equally valid, counter-rule or counter-principle. In other words, the answers to legal problems did not automatically follow from the concepts or rules. If the law was indeterminate, other factors had to be looked at in order to determine why the judge decided the case as he did. Such additional factors included those social or psychological factors to which judges responded in deciding cases.

> We will encounter this problem again when we discuss the ideas of the late modern philosopher Ronald Dworkin.

By unmasking the value-judgements and choices which were hidden behind supposedly neutral and logically reasoned judgements, they hoped that judges could be urged to recognise their freedom of choice. This could enable judges to exercise their choices in a way which would better accommodate the social realities and needs of the time. Judges should therefore concentrate on social interests, and rid themselves of the conservatism of positivism. If it was true that judges actually had a number of choices, then there was a large margin for judicial creativity and judges, in the Realist's view, should take advantage of it. In short, according to the progressives, judges should realise that they were making policy, in much the same way as the legislator did. This realisation would enable them to make better policy choices. The function of the law and the court was to bring about specific socio-economic reforms and not to pay lip-service to outdated legal concepts and doctrines.

In conclusion, the progressives tried to base realism in modern social sciences. It was widely accepted and became the "official" version of Realism.

3.4.3.6 The South African context

It is fairly obvious that Realism was and is extremely important in the American context. Until recently, it was mostly ignored in South African jurisprudence. While the Realists were questioning the very foundations of classical American thinking and developing ideas to support the rise of the welfare state, South African jurisprudence was dominated by other debates. South African philosophers were more concerned with "purifying" the Roman-Dutch law to create a science of law that could support the rise of Afrikaner nationalism and defeat British imperialism in law. By the time this nationalism had degenerated into the apartheid state, it was legitimated by the claims that South African law was a formal and logical science.

On the few occasions that the Realist criticism did surface in South Africa, it was as a challenge to the judges of the apartheid era. You will remember that Dugard blamed positivism for the approach of South African courts to interpretation.[18] In the place of this, Dugard advocated the adoption of a "realist-cum-natural-law approach" to the judicial process. The idea was that judges should accept (i) the realist insight that they play a lawmaking role when they decide cases and (ii) as a result adopt a policy of promoting the

[18] Dugard 1971 *SALJ* 181-200. See also the discussion in 3.4.2.4 above.

liberal human rights values inherent in the common law when deciding cases. It is not surprising that Dugard's suggestion was not accepted in apartheid.

That kind of idea does not make sense! How can an approach combine natural law and realism? One is a pre-modern approach to law and the other a modern approach. They are so conflicting that it is impossible to see how they can be combined.

You are right again! If you were to follow Dugard's ideas, you would have to combine metaphysical speculation with rationalism and we do not see how that can be done.

The apartheid judges were also exposed by Hugh Corder in a series of studies that explicitly set out to place the judiciary in its socio-cultural context. Corder showed that a number of important judgements revealed how the individual judge's personal background and education played a role in delivering the judgements in question. The studies made it clear that the judgements could not be justified by using the formal science of law as was often claimed. Instead they expressed the judge's cultural and political bias.[19]

The truth of these realist criticisms of the apartheid judiciary was recently accepted by the *Truth and Reconciliation Commission* in their report on the role of the legal community during apartheid. In fact, the Commission's whole report rests on the Realist insight that judges are almost always able to exercise a choice. This is because of the inherent ambiguity of language and the diversity of factual circumstances in which the law must be applied.

It is, however, in the post-apartheid situation that the Realist critique seems to be most relevant. South Africa seems to be going through the same kind of social change as America did at the time of the Realists. There is also an attempt to establish a kind of social welfare system and to enforce socio-economic rights.

Illustration

This kind of Realist or sociological approach seems to have been adopted in the case of *Kayamandi Town Committee v Mkhwaso*.[20] In this case an order was sought for the eviction of a number of illegal squatters. The court held that a local authority couldn't take a decision to remove squatters unless it has given consideration to what is to become of them. (Remember that this case was heard before the Constitution came into effect!) As no such consideration had been given, the court refused to grant the application. André van der Walt praised the decision "as a new departure for South African jurisprudence".[21]

The new departure has to do with the replacement of formalism with a realist approach – at least in this case. It moves away from conceptualism and formalism towards a contextual investigation of the socio-economic impact and consequences of legal decisions.

19 See Corder H *Crowbars and cobwebs: executive autocracy and the law in South Africa* (Cape Town 1988).

20 *Kayamandi Town Committee v Mkhwaso* 1991 2 SA 630 (C).

21 Van der Walt AJ "Squatting and the right to shelter" 1992 *TSAR* 40-55.

Activity 3.7

Would you agree that Realism can be used in post-apartheid South Africa? Does the Constitution make it possible or even necessary to use this approach? _____

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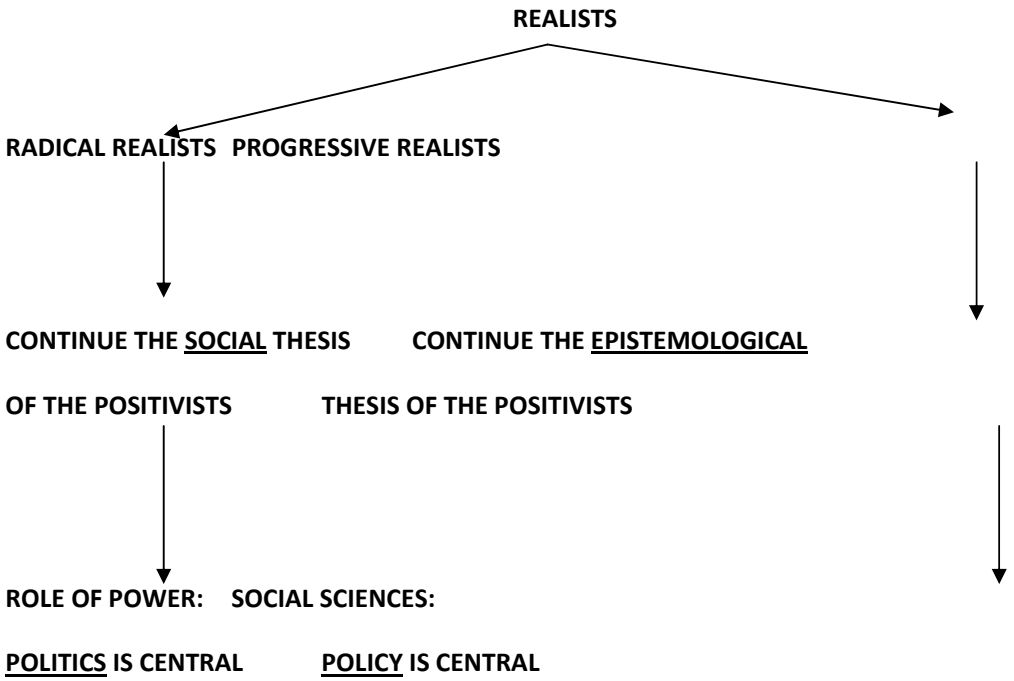
Feedback: For this question you need to first of all discuss the two kinds of realism. On the one hand you have **radical legal realism** with its emphasis on the *political* context and the role of *power*. They wanted to do away with formalism and replace it with a *contextual* approach. On the other hand the **progressive legal realists** used a *pragmatic* approach to replace the formalism with the idea of law as a *social science* based on *indeterminacy*. Now use these separately to look at the SA context. For example if you think of the *Prince* case (dealing with the Rastafarians) could it be argued that they had little or no political power and that is why they lost the case? If your answer to this is "yes" the radical realists might have a very important role to play.

We have seen that the social contractarians were rationalists and that the positivists were empiricists. Where would the Realists fit into this? Well, we think they are also empiricists and that they continue some of the most important work of the positivists. Graphically, their approach looks like this:



3.5 Application

In the *Prince* case[22] the question of freedom of religion was raised. The applicant applied to the Law Society to have his contract for community service registered. In this application he not only disclosed two previous convictions for possession of cannabis (marijuana or dagga), but also indicated his intention to continue using it for religious purposes. The Law Society took the view that his criminal record disqualified him on the grounds that he is not a "fit and proper person" and refused to register the contract.

What the court decided in this case is not the important thing for now. How they decided is much more interesting. In the majority decision the court stated its position:

> The question before us, therefore, is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. *The only question is whether the law is inconsistent with the Constitution.* The appellant contends that it is because it interferes with his right to freedom of religion and his right to practise his religion.[23]

This attitude is the same as the one of the court in *S v Lawrence*. In this case, also dealing with freedom of religion, the court said:

> A Court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are

---

22 *Prince v President of the Law Society of the Cape and others* 2002 2 SA 794 (CC). Hereinafter referred to as the *Prince* case.

23 *Prince* case [109]. Emphasis added.

> overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution, *but what it cannot do is legislate*.[24]

What these quotes indicate is a fairly obvious positivist attitude of the court towards interpretation and adjudication. It seems to show that the court feels that there are right answers to these very difficult questions dealing with religious freedom. Nor are they interested in going outside the text – they are only interested in whether the legislation is in accordance with the constitution. Policy considerations and social circumstances can therefore not play a role in the decisions of judges. But the Realists seem to have shown that judges very definitely do "make law" when they interpret legislation.

The minority judgement of Sachs J in the *Prince* case tries for a different approach. Sachs had the following to say:

> In equal measure, because they are *politically powerless* and unable to secure their position by means of a legislative exemption, the Rastafari are compelled to litigate to invoke their constitutional rights. They experience life as a marginalised group seen to dress and behave strangely, living on the outer reaches rather than in the mainstream of public life. This Court has accepted that: 'to understand the ''other'' one must try, as far as is humanly possible, to place oneself in the position of the ''other''.'[25]
>
> One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Islam, Hinduism and Judaism. These are well- organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections. They are not driven to seek constitutional protection from the Courts. A threat to the freedom of one would be seen as a threat to the freedom of all. The Rastafari, on the other hand, are not only in conflict with the public authorities, they are isolated from mainstream religious groups.[26]
>
> In conclusion I wish to say that this case illustrates why the principle of reasonable accommodation is so important. The appellant has shown himself to be a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs. An inflexible application of the law that compels him to choose between his conscience and his career threatens to impoverish not only himself but all of South Africa and to dilute its burgeoning vision of an open democracy. Given our dictatorial past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order.[27]

It is clear that Sachs follows a different approach. Not only does he take the past into consideration, he also sees that politics might play a part in these decisions. That is why he mentions the fact that the Rastafarians do not have the political power to have their views heard in the political arena. They have to

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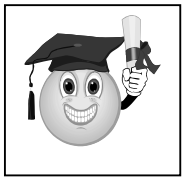
24 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC). Emphasis added.
25 *Prince* case [157].
26 *Prince* case [160].
27 *Prince* case [170].

rely on the courts. Like the Realists, he tries to emphasise that judges should play a part in transforming society.



It's not really that simple, is it? The court in this case tried to find a balance between freedom of religion and the very real need to prohibit drug trafficking and drug abuse. If they had allowed this exemption, it would have opened the floodgates for these evils.

That was of course the majority's opinion in this case, but that was not the point we were trying to make. It's not about what they decided in the end, but how they decided it. But you need to decide for yourself what you think about the case. For example, do you think the court was correct in this case in finding that enforcement of drug legislation is more important than the freedom of religion of the Rastafarians? Do you agree that the majority used a positivist approach? If you were the judge, how would you have decided this case?

Illustration

You will remember that in Study Unit 2 we discussed the attempt of the Transvaal Law Society to have Nelson Mandela Struck off the roll of attorneys due to the Defiance Campaign.

The Law Society argued that respect for the law was required of an attorney and that his political beliefs and actions made him an unfit person to practice as an attorney.

There is a marked similarity between this case and the *Prince* case. Prince's contract for community service was not registered because of his previous convictions and his intention to continue using marijuana for religious purposes (his intention to continue to disobey the law). Prince was considered to be an unfit to practice as an attorney because he did not have the required respect for the law.

However in the Mandela case the court allowed Nelson Mandela to practise as an attorney despite his unlawful convictions. Prince, however, was not.

Following the same criteria (the fit and proper person test) the court arrives at different outcomes. The law is indeterminate and judges don't just apply law they make law!

3.6 A problem

Look at the following problem statement that appeared in the May 2011 exam paper and try to answer the questions set out in that:

Ms X is arrested for prostitution and charged with contravening section 20(1A)(a) of the Sexual Offences Act 23 of 1957. This section reads:

(1A) Any person 18 years or older who –.

(a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward;

shall be guilty of an offence.

Ms X pleads not guilty to the charge as she alleges that this section is unconstitutional as it discriminates unfairly against women.

1. You are a judge who is also a legal positivist. Write a judgement in which you set out your reasons for finding that the section does not discriminate unfairly against women. [10]

2. You are now a judge who is a radical realist. Would your judgement be different?. [10]

Feedback:

1. How would a positivist approach this? If you were approaching this from a legal positivist perspective, we would suggest you concentrate on the words "any person". What does it mean that the act prohibits "any person" from committing prostitution. Would your answer have been different if the act had said "Any <u>woman</u> who ..."?

2. Do you think, as a realist, that you would find the positivist argument convincing? Why not? What would you change? Hint: look at the *Prince* case again – do prostitutes have the political power to enforce their rights? Or are they as marginalised as the Rastafarians?

STUDY UNIT 4

STUDY UNIT 4: LATE MODERN LEGAL PHILOSOPHIES

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4. LATE MODERN LEGAL PHILOSOPHIES

4.1 Introduction

You have already studied the early modern philosophies and you know that it was based on individualism, science and rationalism. The late modern philosophies continue this tradition, but in a slightly different way. To some extent the late modern period in history is still continuing and the two philosophers you will study are still very influential. Against the background of the general purposes of this course, we can now look at the specific outcomes for this section of the work.

After you have studied the late modern philosophies, you should be able to:

1. define and explain the key concepts in italics given at the beginning of each section and elsewhere in the unit;
2. identify how late modern philosophy changed the *individualism*, *scientific method* and *rationalism* of early modern thinking;
3. explain Dworkin's theory of interpretation as a reaction to Hart's positivism;
4. compare Rawls's idea of the social contract with the social contract ideas in early modern thinking;
5. give a practical example of the relevance of late modern thinking for South African law.

4.2 The late modern world[1]

We have seen that early modern philosophy in general is characterised by optimism about science and rationality. This faith in human reason and in science led to faith in progress based on scientific discovery. This was, in turn, based on faith in an objective, knowable universe that operates according to rational principles. But in the late modern philosophy, this faith is increasingly seen as misplaced. The loss of faith is the result of developments in science itself and in the theory of knowledge (or epistemology, if you prefer).

Key concepts:

relativism

existentialism

[1] This discussion is based on Tarnas *Passion of the Western mind* 325-395.

Relativism is the view that knowledge is not universal and absolute, but always particular and provisional. In other words, "the truth" depends on your own perspective.

Without going into too much detail, developments in the theory of knowledge led to a view of knowledge that was startlingly different from the early modern one. Where the early modern thinkers saw scientific knowledge as universal and absolute, late modern thinkers realised that knowledge is always coloured by who and what the scientist is. In other words, the scientist's culture, gender, training and social situation played a role in how he saw reality and what he regarded as truth. What is more, the idea that there are universal truths had been destroyed by this *relativism*. Scientific knowledge was, in the early modern philosophy, regarded as universal and absolute, but it turned out to be limited and provisional.

Discoveries in science exacerbated this problem. In physics in particular new discoveries undermined the idea that reality is structured in such a way that the human mind can objectively understand it. These discoveries include the work on electromagnetic fields and the discovery of radioactivity in the nineteenth century and the isolation of quantum phenomena, Einstein's theories of relativity and quantum mechanics in the twentieth century. All of these discoveries led scientists to question their faith in an ordered universe that is accessible through human reason. The result is that the late modern mind is left free from absolutes, but also without solid ground. As the writer Bill Bryson puts it:

> The upshot of all this is that we live in a universe whose age we can't quite compute, surrounded by stars whose distances from us and each other we don't altogether know, filled with matter we can't identify, operating in conformance with physical laws whose properties we don't truly understand.[2]

But the history of the early twentieth century also served to compound this shift in thinking. Two world wars, totalitarianism, the holocaust and the atomic bomb made belief in an omnipotent, benign God impossible. It also made faith in the progressiveness of science difficult. The unforeseen consequences of the scientific mind-set of early modern thinking (such as pollution, urban overcrowding, mechanical and meaningless labour and the atom bomb) caused thinkers to re-evaluate their trust in science. Where the early modern thinkers lost their faith in religion, the late modern thinkers lost their faith in autonomous human reason.

The nature of late modern thinkers can be seen in the ideas of the *existentialists*. They saw the condition of modern man as one of spiritual emptiness and *ontological* insecurity. Modern man lives in a void where absolute values and universal truths are absent and where he has to deal with a sense of cosmic absurdity and the frailty of human reason. Man has no determining essence, only an existence without an absolute (or God-given) guarantee for a meaningful life or history. As Tarnas said:

> Thus Western man enacted an extraordinary dialectic in the course of the modern era – moving from a near boundless confidence in his own powers, his spiritual potential, his capacity for certain knowledge, his mastery over nature, and his progressive destiny, to what often appeared to be a sharply opposite condition: a

[2] Bryson B *A short history of nearly everything* (London 2003).

> debilitating sense of metaphysical insignificance and personal futility, spiritual loss of faith, uncertainty in knowledge, a mutually destructive relationship with nature, and an intense insecurity concerning the human future.[3]

The result of the changes in the modern world for philosophy was profound. Late modern philosophy can be characterised as the *philosophy of the void*. The problem is that the western mind abhors a void. Consequently late modernists look for something, some eternal value or truth that is beyond the chaos to fill the void. In art theory "art for the sake of art" filled that void. In the philosophy of law the position is slightly different, as you will soon see.

Activity 4.1

You will notice that there are a number of differences between the early and late modern world. Can you give a list of these differences? Can you think of further differences? _____

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Feedback: You will remember that in activity 3.1 we looked at the characteristics of the early modern world. Many of these will still be true of the late modern world. List the early modern ones first and then write the late modern characteristics next to them. Are there big differences? Or are they differences of degree?

4.3 Characteristics of late modern thinking

Above we saw that there are differences between the early and the late modern world. This should not make you think that the late modern thinkers abandoned the ideals of early modernism. On the contrary, they still believe in the ideal of a rational approach to law, rather than a metaphysical one. What they try to do is to refine the early modern approach to law in such a way that the modern dream of the liberation of humankind through human reason can be achieved.

Key concepts:

rational deliberation

collective values

principles of justice

communitarian

[3] Tarnas *Passion of the Western mind* 393.

In a very real sense the late modern thinkers still had the same basic approach as the early modern thinkers – they just added something to the mix. Thus you could say that they still accepted Rationalism, individualism and the scientific world view, but they added something to it.

Late modern thinkers try to refine *Rationalism* by adding that we need to also have *rational values* in our thinking. Late modern thinkers realise that scientific and technological developments and greater economic efficiency in themselves do not bring about greater freedom or meaningfulness to human lives. In fact, the contrary might be the case. The technological capabilities of humankind seem to have outstripped mankind's ethical capabilities. Late modern thinkers realise that, unless we put some *collective values and principles of justice* back into the technological world we have created, it could become a new Frankenstein's monster and destroy its creators. But remember, these values must be rational and arrived at by rational methods.

Communitarianism is an approach that emphasises the community rather than the individual.

Late modern thinking did not reject *individualism* either. They are still at heart individualists. But they temper individualism by including a communitarian aspect in their thinking. This does not mean that they think the group is more important than the individual. They simply think that individuals should together *deliberate rationally and collectively about values*. So, instead of one person deciding for himself what he thinks is right or wrong, he will do this along with other individuals in a collective process.

Late modern legal philosophers have not rejected the *scientific worldview* either. The difference is that they no longer look for this correct method in absolute truths or metaphysical ideas, but in deduction, analogy, precedent, social policy, history and so forth. Late modern thinkers therefore try to develop *conceptual and normative arguments* to explain how subjectivity can be limited in legal decision-making. Therefore they accept that traditional rationalist arguments cannot explain judicial activity.

Let's see if we can show how late modern thinkers adapt early modern thinking:

LATE MODERN THINKING IS:

Rationalism	PLUS	Rational values
Scientific worldview	PLUS	Normative arguments
Individualism	PLUS	Collective rational deliberation about values

There is something strange about all this: you say that they still accept the ideas of early modern thinking and yet they talk about values! Wasn't the whole point of the rejection of pre-modern thinking that law and values (or morality) must be separated?

Well, that is exactly the problem that the late modern thinkers had to deal with. They wanted to re-introduce values into law, but not in the pre-modern way. So where do these values come from?

- They cannot come from a natural or god-given order, because that would be in conflict with the accepted scientific worldview.
- They cannot come from metaphysics, because that would be irrational.
- They cannot be the result of the common good, because that is in conflict with individualism.

To late modern thinkers the answer lies in *human dialogue* and *processes of rational deliberation*. Late modern philosophers still regard reason and rationalism as mankind's only hope. However, they no longer aspire to establish the facts of a value-free legal science. Instead they look to rational debate, dialogue and deliberation about shared values and principles between all members of the community to solve the problems.

Activity 4.2

You can see that there are similarities and differences between early modern and late modern thinking. Can you give a list of these similarities and differences? _____

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Feedback: You need to use the scheme we gave you above to answer this question. Always remember that late modern thinkers are still *modern* thinkers – they just add something to the mix. Also remember not to use the graphic in the exams. You need to convert it to a paragraph or two.

We have said that the biggest problem for late modern thinkers is trying to figure out where the values that they want to incorporate into law comes from, since it cannot come from pre-modern sources. In this section we concentrate on two answers that have been attempted in legal philosophy in the twentieth century, namely Ronald Dworkin and John Rawls.

4.4 Specific philosophers

4.4.1 Ronald Dworkin[4]

Ronald Dworkin
Photo courtesy of
David Shankbone

Key concepts:

conventionalism

pragmatism

law as integrity

constructive interpretation

The discussion of contemporary or late modern liberal thought starts with a look at the important theory of Ronald Dworkin. We assume that you are by now familiar with Hart's positivism and the Realists' criticism of legal formalism. Like all late modern thinkers Dworkin tries to overcome the excesses of individualism and scientific claims in early modern thought. He focuses on the way in which judges decide new cases by constructively interpreting existing legal material.

Dworkin presents a version of the adjudicative process which differs from the ideas of positivists (like Langdell and Hart) and pragmatists (like the American Realists). According to Dworkin, adjudication is not a scientific or functional process, but an *interpretative* process. As a modern thinker, Dworkin insists that this interpretive process can be conducted rationally and that the liberal ideal of a legal order that is neutral towards the individual concept of the ethical good can be achieved.

> The courts are the capitals of law's empire, and judges are its princes.
>
> DWORKIN

4.4.1.1 What is Dworkin reacting against?

We said when we were discussing the Realists that they had an unsettling effect on legal thinking about adjudication in particular. Here's the problem: if it is true that legal decisions are not necessarily based on rational argument, what prevents judges from deciding cases any way they want? To put it more philosophically: what constrains judges? What is it that stops them from deciding a case merely because they don't like the colour of the defendant's shirt? This is the central problem Dworkin has to address first.

Dworkin presents us with three options of how to understand legal institutions in contemporary Western liberal democracies. He calls the options *law as conventionalism*, *law as pragmatism* and *law as integrity* respectively.

Conventionalism is a term Dworkin created to refer to positivism. Hart would therefore, in Dworkin's terms, be a conventionalist. According to Dworkin, the core of conventionalism is the idea that the

[4] This discussion is based on Dworkin R *Law's Empire* (1986 Cambridge Mass).

fundamental purpose of our legal practices is to give people due notice of the circumstances under which coercive power will be used against them. This enables individuals to pursue their own interests in a purposive manner. The law of taxation, for example, allows people to plan and conduct their businesses in a purposive manner, within the framework set by the rules of the law. The same applies to all areas of law. The rule of law and the principle of legality (or legal formalism) are central values in conventional legal thinking. According to a conventionalist the deployment of power by the state (through the courts) is only justified by its compliance with previously announced rules. *Rules* are central to the conventionalist view of law.

> You should try to see if this is in accordance with your own understanding of positivism. Is Dworkin being fair to positivism here? Or is positivism about more than just rules and state power? Go back to activity 3.6 if you are unsure.

Pragmatism is a term created by Dworkin to refer to American Realism. According to Dworkin the core of pragmatism is the idea that the fundamental purpose of our legal practices is to bring about certain social consequences. The rule of law, and legality, are absent from pragmatic thinking except in so far as these ideals are unmasked as smoke screens and ideological myths. According to the pragmatist the deployment of power by the state is justified solely by the good consequences brought about as a result of that deployment. *Policies* are central to the pragmatist view of law.

> Once again you should judge for yourself whether this is a fair reflection of the Realist view. Is Dworkin perhaps concentrating on one kind of Realism? Is there more to Realism than just pragmatism?

Neither of these two approaches is satisfactory to Dworkin. The problem with conventionalism is that it does not leave room for values. The problem with pragmatism is that it concentrates too much on policy, something that Dworkin does not believe is the purpose of adjudication. (I will talk more about this in a minute.) As an alternative Dworkin presents his own theory of *law as integrity*.

4.4.1.2 Law as integrity

We usually say that a person acts with integrity if he acts on the basis of his convictions or principles, even if these principles are against his short-term interests. Dworkin says that a political community acts with integrity if it puts principle above the implementation of policy or party political interest. In the same way in the field of law we act with integrity if we put principle above policy. Therefore courts should act as "forums of principle". In place of the conventionalist view of law as the application of rules, and the pragmatist view of law as the implementation of policy, Dworkin paints a picture of law as the *constructive interpretation of the community's shared principles.* As a late modern thinker he claims that this process of interpretation is a rational process generating uniquely correct answers.

To repeat the point we made earlier, Dworkin is here trying to answer one of the problems that Hart and the Realists pointed out. Hart and the Realists pointed out that rules do not always determine the decisions of judges. Therefore they thought judges should also use other sources in deciding cases. Dworkin rejects both these arguments. At the same time he must admit that judging is more than just applying the rules. This creates a problem for Dworkin: if you admit that the law consists of more than just rules, how do you prevent subjectivity on the part of the judge?

> Hart thought that, in most cases, the answers to legal problems are clear. There might however be "hard cases" – cases that fall in the shadow (or penumbra) of uncertainty. In those cases, and only in those cases, the judge has a discretion to go beyond the rules and consult other legal materials.

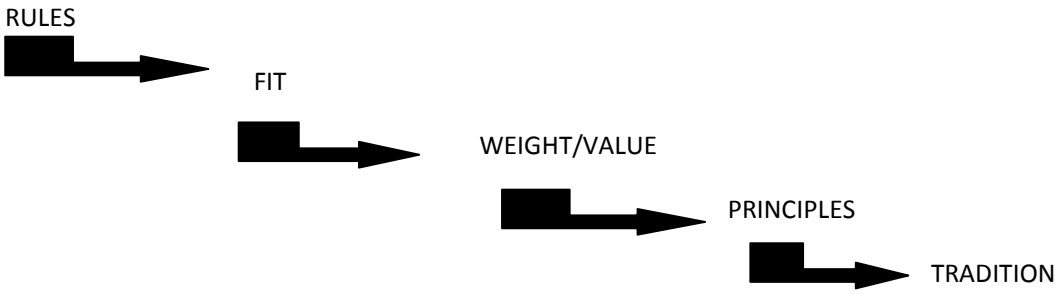
Let us try to put this more simply. Dworkin accepts that the law does not only consist of rules, but that it also includes principles, values and standards. But these are very difficult things to pin down. If a judge can use these intangible things in a specific case, what stops him from just using his own opinions? The central question is therefore: what constrains judges? What is it that makes it possible for Dworkin to still claim that adjudication is objective? The answer lies in his view of constructive interpretation.

4.4.1.3 Constructive interpretation

According to Dworkin judges decide new cases by constructively interpreting existing legal materials. To explain this idea he uses various metaphors, but the one that we think explains it best is his view that legal interpretation is like standing in a river. What happens if you stand in a river? Well, nothing really. The river keeps on flowing between its banks regardless of where you stand or who you are. In this metaphor the person standing in the river is the judge and the river that flows is the law. The law flows between its banks (namely its tradition) and the judge merely "goes with the flow". In other words, judges decide cases according to the flow of the law and one single judge cannot legitimately change the course of the river.

But exactly how does this work? Dworkin says that most cases before courts are easy cases – there is usually only one rule that can be applied and the judge simply applies it. In the rare cases where more than one rule is applicable, the judge decides which rule **fits** the case. How does he decide that? By deciding which rule has more **weight** or **value** than the other. And how is that determined? By looking at the **principles** behind the rules – the rule that is supported by the principle will have the most weight. Once again, how do we know that? Well, the **tradition** of the legal system will indicate the principles of that system. And there you have it: in the end the judge decides the case based on the tradition of the legal system as found (mostly) in case law or precedent.

We can represent this method or theory in the following way:



And with that Dworkin has answered both the question of where values come from and what constrains judges: the answer in both cases is the tradition of a legal system.

To summarise: Dworkin believes that, if a judge has to decide a case, he will first of all apply the rule that *fits* the facts. If more than one rule fits, the judge will look for the *principle* behind the rule that will provide the rule with *weight*. The principle can be found in the history and *tradition* of every legal system (in particular, precedents). The principle will indicate which rule best fits the current situation. It therefore gives *value* or *weight* to one rule or the other.

Therefore, constructive interpretation means reading the authoritative legal sources in a way which makes of them the best that they can be. This reading involves the judge's own understanding of law as a conscientious lawyer who appeals to legal principles when he or she interprets the relevant materials as honestly as he or she can. This can be illustrated in the following way:

Illustration

Dworkin used the following example in a lecture he delivered in South Africa. According to him the constructive interpretation of an apartheid statute like the *Group Areas Act* is the best interpretation possible from a legal principle point of view. The judge will use the Roman-Dutch legal foundations of South African law, which is famous for its principles of fairness and justice. He will then attempt to integrate the provisions of the apartheid law into the non-discriminatory principles of Roman-Dutch law. In order to make the Group Areas Act the best Act it can be, as opposed to inventing another, better Act through interpretation, the judge applies the dimension of *fit*. Where more than one interpretation fits, the best interpretation will be reached when the judge selects the one interpretation that is *in principle* superior to the other. Judges, who interpreted the Group Areas Act constructively, read the requirement of justice and fairness into it and made the application of the act more difficult. (This is the application of the question of *value* that only applies once two or more interpretations fit.) Hence the application of the value (the principle) points to the better interpretation. It is only when this stage is reached that it can be said that the authoritative legal materials have been interpreted constructively and the good judge has given the only right answer.

You can see that Dworkin attempted to create a theory of interpretation that remains true to the ideals of rationality. His principles are not metaphysical speculation, but scientific facts (case law) that can be established through observation (by reading the cases). At the same time, he tries to get away from the rigid formalism by incorporating principles into his theory.

4.4.1.4 Dworkin and the South African Constitutional Court

One of the most interesting things about Dworkin's theory is the popularity it enjoys in the South African Constitutional Court. As you can imagine, judges do not normally explicitly refer to philosophers! And yet, Dworkin's name comes up time and again. Let us look at a few examples.

- In one case Mokgoro J used Dworkin's arguments regarding pornography. Dworkin argues that pornography is a form of political free speech because it influences our shared moral environment. As such it should not be regulated by the legislature but by "disgust, outrage, and ridicule of other people".[5]

- Sachs J is particularly fond of Dworkin. He quoted Dworkin to substantiate his argument that individual rights can sometimes be overridden by "an otherwise desirable social policy". He also uses Dworkin to explain the difference between the right to be treated as equals and the right to receive equal treatment in the same case. (This was not covered in our discussion, but is nevertheless interesting.)[6]

- Sachs J also used Dworkin's views to argue that the idea of a community implies accepting all groups and not just the majority.[7]

- Dworkin's analysis of the abortion issue in America was also referred to by McCreath J[8] and his definition of "policy" was used.[9]

- The court also used Dworkin to substantiate its argument that some invasion of freedom will be compatible with a democratic society.[10] And Sachs J once again uses Dworkin's eloquence to explain the difficulty the court experienced with a case.[11]

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5 *Case and another v Minister of Safety and Security and others* 1996 3 SA 617 (CC) [23] and [46].
6 *Walker v Pretoria City Council* 1998 2 SA 363 (CC) [126] and [128].
7 *National Coalition for Gay and Lesbian Equality v Minister of Justice and other* 1999 1 SA 6 (CC) [133].
8 *Christian Lawyers Association v Minister of Health* 1998 4 SA 1113 (T) 1125.
9 *Pinnacle Point Casino v Auret NO* 1999 4 SA 763 (C) [14].
10 *Bernstein v Bester* 1996 2 SA 751 (CC).
11 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) [55].

Activity 4.3

Although Dworkin is popular with the constitutional court, it is uncertain whether this is a good thing. Do you think Dworkin's theory is a good one to use in South Africa? _____

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Feedback: Do you remember at the beginning of this study guide we said that the activities and problems would get more complicated as we went along? Well, this is one of those more complicated questions. That is why we are going to go into more detail and debate below. But do try to answer the question on your own first!

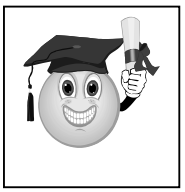
The standard reaction to the use of Dworkin's theory in South Africa is positive. Most writers and lawyers like the idea that we can incorporate values into law without resorting to pre-modern metaphysics. But we are not convinced and these are the reasons why:

- In the first place you need to think about the idea of "tradition". Now this might work very well in a system like the English one, but does it do as well in South Africa? Remember that we do not only have one legal tradition (Roman-Dutch) but many traditions (African, English, religious). Which of these traditions would you choose to use to find principles in and why? And what happens if the principles are in conflict with one another?

- In particular we would argue that the Roman-Dutch tradition in particular is not necessarily as great as Dworkin tries to make us think. This same tradition has been used to oppress black people and women and to justify slavery. Why would you think it's a good idea?

- Finally we think we are at a point in our history where we are deliberately trying to change our tradition. We really do expect our judges to change the course of the river! Why then would we refer back to the old tradition?

But surely there is another side to this argument! Dworkin's theory provides a measure of certainty in the new constitutional dispensation. At least not everything is up for grabs and there is some stability. And we do have values in the Constitution that we need to deal with and Dworkin provides a way of doing so without reverting to politics.



Ah, but that is exactly the point, isn't it? Lawyers do not really like change and they don't like new thoughts and ideas, so they tend to like certainty and stability. But, as we will see in our discussion of Critical Legal Studies it might just be that law IS politics anyway.

The important thing here is that you need to be able to discuss the two sides to this argument and make up your own mind about what you think is the answer.

4.4.2 John Rawls[12]

The legal philosopher John Rawls deals with much the same issues as Dworkin. Like Dworkin he is also a critic of positivism and utilitarianism. And in typical late modern fashion he tries to show that values can have a rational basis and that these rational values are a way of constraining judges in their decision-making. But he does so within the context of the modern *social welfare state*.

Key concepts:
principles of justice
original position
difference principle
welfare liberalism
maximin strategy

What exactly is a social welfare state?

Well the social welfare state is an invention of the twentieth century and is an attempt to combine liberalism and capitalism with socialism. In other words, it tries to soften the harsh effects of capitalism by including aspects of social welfare. Typically these states have a Bill of Rights with individual rights but they also include rights to social services and protection.

For example, according to the preamble of the South African Constitution, the Constitution aims to establish a society based on democratic values, *social justice* and fundamental human rights. These aims are expressed in specific rights like the right to "have access to appropriate social assistance" for people who are unable to support themselves and their dependants (s 27(1)(c)). The purpose of this discussion of Rawls is therefore also to put the constitutional value of social justice into theoretical perspective.

[12] This discussion is based on Rawls J *A theory of justice* (London 1972).

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.

RAWLS

Rawls's welfare liberalism is a specific attempt to reconcile the value of socio-economic equality with the traditional liberal value of liberty. Rawls agrees with the basic liberal conviction that it is politically important that an individual should have the freedom to pursue a personal conception of the good life. Liberals concede that this freedom is not absolute, but subject to limitations, such as the requirement that the rights of other people should not be violated by the pursuit of the good life of one individual.

Welfare liberals claim, in addition, that the undesirable economic impact of that pursuit can be included under these limitations. The free pursuit by an individual of his or her own interests can be tolerated only if does not lead to unjustifiable differences in wealth between people.

4.4.2.1 Basic ideas

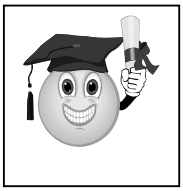
John Rawls defends two ideas essential to welfare liberalism, namely:

(1) A rational person would subject the pursuit of his or her own life project to certain universal principles of justice.
(2) One of those principles of justice would be that his or her pursuit must always be to the economic benefit of the least advantaged person within the political community.

4.4.2.2 The process of rational deliberation

According to Rawls, a rational individual, interested only in advancing his or her own interests, would realise the need to co-operate with other individuals. However, because of a scarcity of resources, the co-operation between a number of people inevitably gives rise to both a group identity and a conflict of interests. Therefore, for such a co-operative venture to be stable, well ordered and inclusive, the members of that venture need to share a common point of view from which claims between them can be judged. In the case of society only a public conception of justice makes a secure political association possible. For this reason it would be rational for a group of individuals, who are forced together by nature, to enter into a *social contract* with each other. This social contract establishes the principles of justice as the basis for their co-operative venture. (This should remind you very strongly of both Hobbes and Locke!)

Rawls asks us to imagine that those who engage in social co-operation choose the principles that determine basic rights and duties and the division of social goods. Just as each person must decide what life he or she wants to lead, so a group of persons must rationally decide, once and for all, what is to count among them as just actions. It is from this idea that Rawls's theory derives the title "justice as fairness". Justice as fairness means that principles of social co-operation are just only if all the members of the co-operative social venture would have agreed to them in circumstances that are fair. The terms of the co-operative agreement (i.e. the principles of justice) are rational and binding only if the agreement was reached in a fair manner. Fairness does not refer to the *content* of the principles of justice but to the *process* by which the principles were established.



But that would be a nearly impossible thing to do! You would have to get the consent of everyone in a society. How would you go about doing that? And what happens if, over time, people change and change their minds?

Yes, that is true and it is exactly why Rawls devised a strategy that he calls the maximin strategy. In order for his idea to succeed, Rawls needs to show that every rational person, on the conclusion of the social contract, would accept these principles as binding. Then they can be regarded as binding on every rational member of the ensuing society. In order to do this he needs to indicate that the principles are dictated by reason alone (a universal human characteristic) and not by self-interest.

In order to achieve this neutrality, Rawls severs the link between the contracting parties and their specific interests. He does this by creating the idea of an *original position*. Imagine, says Rawls, that a group of people would like to form a society. To do that, they must agree on basic principles of justice. But if every person is just interested in his own interests, the most powerful will win and that is not fair. So he asks us to imagine something else – imagine that a *veil of ignorance* covers all these people. This means that everyone is ignorant of his or her position in society. No one knows if, when the veil is lifted, they will be rich or poor, male or female, disabled or not, etc. In these circumstances, in order to make sure you are in a good position when the veil is lifted, rational individuals will agree to three principles of justice. (We will discuss these principles in a minute.)

Having adopted *the maximin strategy* (maximise the minimum you can be certain of), people in the original position would, according to Rawls, reject the principle of utility and adopt his three principles of justice. A person in the original position would not agree to the idea that an individual can be sacrificed for the benefit of the group, because no person could know whether they would be the one to be sacrificed.

4.4.2.3 The three principles of justice

The principles that Rawls claims would be adopted by rational, equal individuals under fair conditions (the original position) are the following:

(a) The principle of *greatest equal liberty*, which means that each person has an equal right to the most complete basic liberties compatible with a similar system of liberty for all. Among these basic liberties are the right to vote, freedom of speech, freedom of association, freedom of the person, the right to hold property and freedom from arbitrary arrest and seizure.

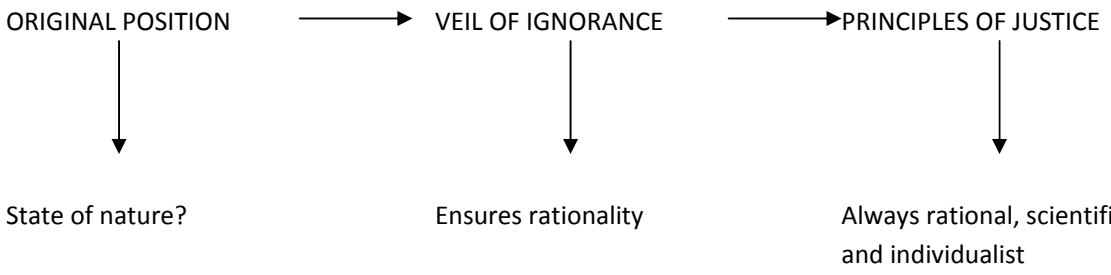
(b) However, it is inevitable that inequalities will arise. The second principle is that socio-economic inequalities between individuals are to be arranged in a reasonable fashion to the advantage of all, or, to the maximum benefit of the least advantaged. This is Rawls' famous *difference principle*.

(c) The third principle is that everyone should have fair equality of opportunity to fill offices and other positions.

Note that, with regard to the first principle, that there can be no inequalities with regard to liberty since the negotiating parties would not tolerate the prospect of poor people who would sell their freedom in exchange for money. But Rawls believes that parties would adopt the *difference principle* in terms of which the distribution of wealth is and has to be completely equal, as long as any inequality in the distribution is to the benefit of all, or at least to the benefit of the poorest. The unequal distribution of wealth is permitted only if the inequality itself serves to improve the position of the poorest.

This theory of Rawls can be represented by the following scheme:

JUSTICE AS FAIRNESS



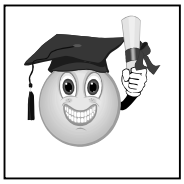
From this you should also see that Rawls is still very much a late modern thinker. He has not abandoned any of the principles of modernist thinking. And, in spite of the collective process he advocates in the original position, he still reserves rights for individuals. It is also interesting to think about the links between Rawls and the early social contractarians. Maybe he is just providing a late modern update of their thinking?

4.4.2.4 Rawls and the South African constitution

Rawls is not nearly as popular with the court as Dworkin and has never been quoted by a court. And yet a surprising number of constitutional provisions can be harmonised with ideas from his theory. For instance, an analogy can be drawn between Rawls' first principle and the provisions relating to the protection of individual rights in our Bill of Rights. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In terms of section 16(1) everyone has the right to freedom of expression, while section 18 provides everyone with a right to freedom of association. In terms of section 19(3) everyone has the right to vote while section 25(1) protects the right of everyone to property. All these and other rights in our Bill of Rights are envisaged in Rawls's first principle of justice. We could say that Rawls demands absolute protection of civil and political (or first generation) rights, from which no derogation can be allowed.

But it is his *difference principle* that is the most interesting. The best way to illustrate this is to refer to the problematic issue of affirmative action. While section 9(1) is typical of his first principle, section 9(2) provides that unequal treatment if justified if it advantages previously disadvantaged people. So there you have Rawls' difference principle enshrined in the South African constitution! It can also be seen in section relating the right to housing and health care – rights that are not typically included in modern constitutions.

The mere fact that this is justified by Rawls' theory does not actually make these rights and their implementation unproblematic. In fact many writers, such as Judge Dennis Davis do not agree with their inclusion and affirmative action continues to be a problem.



For once we agree with you! But we did not mean to suggest that that is the case. It is merely interesting that there exists a philosophical justification for these rights that has never been used by South African courts. We think that is a pity and maybe if they had looked at Rawls the implementation would have been less problematic. The following are examples of the kind of problems courts have had with socio-economic rights:

- In one case the Constitutional Court decided that a patient who suffered from a chronic renal failure was not a case of emergency medical treatment and that refusal by the medical authorities to afford him continued life support machines was not unconstitutional. Although the challenge was directed at section 27(3) of the Constitution, the court also discussed sections 27(1) and (2). This gives us with a good idea of the right to housing and its implementation by the state. The court stressed the need to read section 27 together with other provisions, especially section 26 whose wording and purpose is very similar.[13]

- In another case the constitutional challenge related to section 26. The court found that the government had a good programme for the provision of access to adequate housing. However, its failure to make provision for those who need the service most by reason of the unique crisis situation in which the applicants found themselves was unreasonable, and therefore unconstitutional. The state was accordingly ordered to provide the applicants with access to adequate housing.[14]

- In Constitutional Court has also held that the state's refusal to provide people with Nevirapine, to prevent mother-to-child transmission of HIV/AIDS, was unreasonable and therefore unconstitutional. The court found that the state had only two training and research sites in each province in which doctors were allowed to dispense Nevirapine and provide the recipients with counselling. Although there are many state hospitals and clinics countrywide which have the capacity to dispense Nevirapine and provide counselling, the state had unreasonably, and therefore unconstitutionally refused to allow such hospitals and clinics to provide the service.[15]

13 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).
14 *Government of the RSA and others v Grootboom and others* 2000 1 SA 46 (CC).
15 *The Minister of Health v Treatment Action Campaign and others* Case CCT 8/02.

Activity 4.4

The idea of a social contract is not new to legal philosophy. Does Rawls' theory differ substantially from that of Hobbes and Locke? If so, in what way? _____

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Feedback: Of course the point of this exercise is to think about the differences between social contracts theories in the early and late modern philosophies. You need to ask what Rawls includes in his theory that is absent from earlier theories.

4.5 Application

One of the most important characteristics of late modern legal thinking is the search for objective and rational values. Dworkin tries to find values that can be used to constrain judges in deciding cases. Rawls' purpose is to find values to provide the basis for the liberal welfare state. The South African Constitutional Court has also been involved in this debate. Because the Constitution explicitly mentioned values in various sections, the court could not ignore them. Let's look at the case of *S v Makwanyane*. In this case various judges have the following to say about how values should be understood.

CHASKALSON:

In *S v Zuma and Others* this Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in chap 3 of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution.[16]

Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary'. The weight given to human dignity by Justice Brennan (in the American case of *Gregg v Georgia*) is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.[17]

16 *S v Makwanyane* [9].
17 *S v Makwanyane* [58].

DIDCOTT:

Whether execution ranks also as a cruel, inhuman or degrading punishment is a question that lends itself to no precise measurement. It calls for a value judgment in an area where personal opinions are prone to differ, a value judgment that can easily become entangled with or be influenced by one's own moral attitude and feelings. Judgments of that order must often be made by courts of law, however, whose training and experience warns them against the trap of undue subjectivity. Such a judgment is now required from us, at all events, and would have been inescapable whichever way the question was answered.[18]

KENTRIDGE:

Nonetheless, in our attempt to identify objectively the values of an open and democratic society**,** what I find impressive is that individual Judges of great distinction such as Brennan J in the United States and Bhagwati J in India have held, notwithstanding those constitutional provisions, that the death penalty is impermissible when measured against the standards of humanity and decency which have evolved since the date of their respective Constitutions.[19]

MAHOMED

In my view, the death sentence does indeed constitute cruel, inhuman or degrading punishment within the meaning of those expressions in s 11(2).

Undoubtedly, this conclusion does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated**,** having regard to the ordinary meaning of the words used in s 11(2); its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and the post-amble to the Constitution; its harmony with the national ethos which the Constitution identifies; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life protected by the Constitution; its inherent arbitrariness in application; its impact on human dignity**;** and its consistency with constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community.[20]

18 *S v Makwanyane* [177].
19 *S v Makwanyane* [198].
20 *S v Makwanyane* [277] – [278].

MOKGORO

In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *ubuntu* - a notion now coming to be generally articulated in this country. It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement. It is a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation.

It is common cause, however, that the legal system in South Africa, and the socio-political system within which it operated, has for decades traumatised the human spirit. In many ways it trampled on the basic humanity of citizens. We cannot in all conscience declare, as did a United States Supreme Court Justice in Furman v Georgia 408 US 238 (1972) at 296 with reference to the American context, that respect for and protection of human dignity has been a central value in South African jurisprudence.[21]

SACHS

We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the once powerful common-law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality, and we uphold and develop those many aspects of the common law which feed into and enrich the fundamental rights enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.[22]

21 *S v Makwanyane* [307] & [310].
22 *S v Makwanyane* [383].

It is interesting to note, first of all, that both Mokgoro J and Sachs J refer to the fact that respect for human dignity has not been a feature of South African law in the past. This would seem to be a rejection of Dworkin's constructive interpretation. After all, if you cannot in all honesty say that a principle has been part of our law, how can you apply such a principle? If you go back to the example of the *Group Areas Act* above, you can now see the problem: you cannot make it a better law! Sometimes the best thing to do is simply to reject such a law.

But despite these sentiments, the court still tries to do what late modern thinkers do. A number of them point out that the values have to be determined *objectively*. Didcott J even states that judges are specifically trained not to be subjective. (What would the Realists say about this?) And what is more, these values are seen as *universal*. A number of the judges are at pains to show that the values in our constitution are no different from those in America and India. Just like Rawls, they try to find general principles that all "civilised nations" agree to. And not only that, but these principles are also found in customary law, in the concept of *ubuntu*. The conclusion seems to be that there is virtually no difference between African customary values and American constitutional values! But that does seem to be a bit far-fetched, doesn't it?

4.6 A little (fake) court case

Here's a fictional case and three fictional judgements, just to make thinks more real. Read through this and then try to answer the questions that follow:

Facts:	Afriforum approaches the late modern court with an application to have further affirmative action measures declared unconstitutional as it infringes on the right to equality. There are three judges hearing the application: Dworkin J, Alter-ego Dworkin J and Rawls J. Here are the judgements in brief.
Judgements:	
Dworkin J:	This case involves the conflict between two opposing rules: the right to equality and the right to affirmative action. Both are legitimate rules. Where two rules are in conflict, we need to determine which has the greater weight and that weight is determined by the principles underlying the rules. These principles are determined by the tradition of the legal system as embodied in case law or precedent. South African law has a long tradition of affirmative action. The Industrial Conciliation Act 11 of 1924 established a pattern of privileging certain groups over others in the area of work. Therefore the tradition gives weight to affirmative action and it is therefore not unconstitutional.
Alter-ego Dworkin J:	This case involves the conflict between two opposing rules: the right to equality and the right to affirmative action. Both are legitimate rules. Where two rules are in conflict, we need to determine which has the greater weight and that weight is determined by the principles underlying the rules. These principles are determined by the tradition of the legal system as embodied in case law or precedent.

	South African law has a long history and tradition, rooted in Roman-Dutch law, of emphasising equality. Even during Apartheid, there are judgements upholding equality.[23] Affirmative action is per definition a violation of equality and, sixteen years into the democracy, can no longer be justified in terms of section 36 of the Constitution. It is therefore unconstitutional.
Rawls J:	Legal rules are determined by rational individuals engaged in rational deliberation. In such a situation rational individuals will agree on three principles of justice. One of these is the difference principle and affirmative action is an example of this principle in action. Therefore affirmative action is rational and should be upheld as constitutional.

Here's the real question: Which of these do you find convincing and why? And just to be a little provocative: why do you think that is? Is it about your culture, upbringing, religion and even political affiliation? If so, think about radical realism again and about their critique of judges. Then again – keep reading. CLS is waiting for you!

[23] See McCreath H "The 'purposive approach' to constitutional interpretation" in *Constitution and law II Seminar Report* (Konrad Adenauer Stiftung 1998) 65

STUDY UNIT 5

STUDY UNIT 5: POSTMODERN LEGAL PHILOSOPHIES

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5. POST-MODERN LEGAL PHILOSOPHIES

5.1 Introduction

This section of the work should be the most familiar one to students, because it deals with post-modern culture with which we should all be familiar. The problem is that it is not always easy to understand the present! It is a truism that you can analyse the past, but that the present remains a bit of a mystery. Although we can say that we live in a post-modern culture, that doesn't mean that we understand it or all of it.

This section tries to make some sense of this culture from the perspective of legal theory. To this end we are first of all going to try to give a broad overview of postmodernism. We try to explain what post-modernism is in a general sense, drawing on insights gained from the theories of art, architecture and culture generally. This is meant to make the rest easier to understand. In the second place we will try to explain what we mean by post-modern *legal* philosophies. Then we will discuss two post-modern legal philosophies, namely *Critical Legal Studies* and *Feminism.* Finally we will try to apply all that you have learned to case law. Against the background of the general purposes of this course, we can now look at the specific outcomes for this section of the work.

After you have studied the post-modern philosophies, you should be able to:

1. define and explain the key concepts in italics given at the beginning of each section and elsewhere in the unit;
2. identify the main characteristics of post-modern legal thinking;
3. list and explain the main themes in Critical Legal thinking;
4. place feminist thinking within the modern and post-modern contexts;
5. discuss cases using the insights from the whole of your study material.

5.2 What is postmodernism?

5.2.1 The beginnings in modernism

The word postmodernism necessarily implies a connection of some kind with modernism – whether as a continuation of or reaction against modernism. That means that a proper discussion of postmodernism must begin with a discussion of modernism – and that is not an easy task.

Part of the problem of defining modernism is the variety of terms used. Frederic Jameson shows that the word "modern" has been used at least 14 times to characterise an era from the Classical period to the middle of the twentieth century.[1] For our purposes it is important to distinguish between modernization, modernity and modernism, as each informs and influences the other.

[1] See Jameson F *Postmodernism, or, the cultural logic of late capitalism* (Durham 1991).

- Modernization refers to the changes in technology that made a different way-of-being possible. As such it is linked to the Renaissance and the Enlightenment, but with an emphasis on industrialization, urbanization and capitalism. Whereas the Renaissance represents a return to classical art and literature, and the Enlightenment is primarily an intellectual mood or attitude, modernization specifically speaks to technological and ideological changes.

- Modernity is an epochal term indicating the changes in the social sphere brought about by the process of modernization. Generally, although this is by no means uncontroversial, the period is thought to extend from the 1870's to the early 1970's.

- Modernism is the aesthetic component of modernity and it is to this aspect that we now turn.

Modernism refers to the artistic movement that flourished around the latter part of the nineteenth and for most of the twentieth centuries. Reacting against the Romanticism and Realism of earlier ages, *modernist art* is a rejecting of tradition in the spirit of experimentation. Modern artists experiment with the styles, techniques and functions of art.[2]

Modern architecture is also indicative of the influence of modernization on buildings. Led by the famous Le Corbusier, Mies van der Rohe and Frank Lloyd Wright, architects wanted to break with architectural tradition and design simple, unornamented buildings. The most commonly used materials were glass for the facade, steel for exterior support, and concrete for the floors and interior supports. Floor plans were functional and logical. The style became most evident in the design of skyscrapers, such as the Twin Towers in New York.

These developments in art and architecture were also echoed in *literature* and *music*. Writing by authors like Baudelaire, Rimbaud, James Joyce, Franz Kafka, Virginia Woolf and Gertrude Stein all represent a movement away from traditional literature. The role of metaphor and allegory is strongly emphasised. The same goes for the music of Stravinsky and John Cage which move away from traditional harmony in a spirit of experimentation and newness.

As is the case with modern, the term postmodern can be used in three different ways:

- Postmodernity refers to the present historical period, a period that Charles Jencks mischievously describes as starting at exactly 3.32 pm on 15th of July 1972.[3]

- Postmodernism refers to the style in art, architecture, literature and music that is characteristic of postmodernity.

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2 As such it includes movements as varied as abstractionism, avant-gardism, constructivism, cubism, dadaism, futurism, surrealism and situationalism. It is epitomised in the works of Manet, Cezanne, Munch, Chagall and Picasso.

3 Jencks C "13 propositions of post-modern architecture" in *Theories and manifestoes of contemporary architecture* (Chichester 1997) 131-132. This is the moment at which the Pruitt-Igoe social housing project in St Louis was demolished. This project was designed by the same architect who designed the Twin Towers and its demolition marks the end of the idea that social change can be brought about by architecture.

- Lastly the term postmodern refers to a point of rupture in epistemology, mostly articulated by Jean-François Lyotard.[4]

It is to these last two meanings that we now turn.

5.2.2 Postmodernism

One of the most influential of the postmodern philosophers is Frederic Jameson who identifies postmodernism as the age where capitalism has finally permeated every aspect of life. This process has two drivers, namely (a) the industrialization of Third World agriculture and (b) the refocusing of First World economy on tertiary enterprises (information and technology) rather than on primary and secondary ones (eg mining and manufacturing). According to Jameson, postmodernism has five symptoms or characteristics:

- The "waning of affect" – which is his term for the shallowness of postmodern art;
- Pastiche – the borrowed or mixed style of this kind of art which epitomises parody without purpose;
- The "hysterical sublime" – Jameson's term for technology that exceeds human abilities;
- The "geopolitical aesthetic" which refers to the inter-relationship between states; and
- The mutation in the built space that people occupy.

In *postmodern art*, the movement is away from the traditional methods and media of art (painting, sculpture and so forth) towards alternative media and art forms like installation art, multimedia, bricolage, pop art, performance art and, of course, music videos. In a very real sense these were made possible by the rise of technology that Jameson calls the hysterical sublime. Jameson would argue that much of this is shallowness and pastiche and he would of course be right. But these new kinds of art also exhibit an openness to interpretation – indeed an invitation to interpretation – that is also characteristic of postmodernism.

Postmodern architecture heralds the return of "wit, ornament and reference". "The functional and formalized shapes and spaces of the modernist movement are replaced by unapologetically diverse aesthetics: styles collide, form is adopted for its own sake, and new ways of viewing familiar styles and space abound."[5] Examples include the Guggenheim museum in Bilboa, Spain[6] and the Pompidou Centre in Paris that literally turns the building inside-out.[7]

Perhaps for our purposes the most important example of postmodernism is to be found in *literature*. With the "interpretive turn" and the "death of the author" postmodern literature has paved the way for developments in most of the humanities, including law. The interpretive turn in literature is the

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4 Lyotard JF "Answering the question: what is postmodernism" in Freeman M (ed) *Lloyd's Introduction to Jurisprudence* (London 2001) 1264-1270.

5 See Jencks "13 propositions" 131.

6 Bilboa is a port town and the museum is intended to resemble a ship. The titanium panels resemble fish scales and references the river Nervión upon which the museum sits. Computer Aided Three Dimensional Interactive Application was used heavily in the structure's design.

7 All the functional elements (plumbing, electricity and aircon) are outside the building – leaving large, open spaces inside for the various exhibitions. These outside elements were also colour coded. Indeed a building that exposes what other buildings try desperately to hide.

understanding that a text or discourse is always open to multiple, equally valid and often opposing interpretations. The death of the author refers to the idea that the "intention of the author" is irrelevant in the process of interpreting a text – something that has caused considerable trouble in both theology and law.[8]

5.2.3 Postmodern epistemology

Lyotard argues that society uses two kinds of discourse: narrative discourse and scientific discourse.[9] Narrative discourse includes stories told within cultures which are accepted simply because they are told – they are self-legitimising. An example of this is the story told among the Bashongo of how the god Bumba vomited forth the moon and stars thus creating them. No evidence is offered to "prove" this story. The mere telling of the story is enough.

Scientific discourse is different, because it needs legitimacy from outside. If you claim that a god created the earth, you have to prove it by empirical means. But our scientific discourse (the idea that everything can be explained by science) depends on a political discourse (the idea that history charts the progress of humanity) and a philosophical discourse (the possibility of absolute freedom). These basic ideas are what Lyotard calls "grand narratives". The problem, however, is that post-modern people no longer believe in these "grand narratives". The experiences of the world wars, the holocaust and the atom bomb have shown that science does not necessarily produce freedom or progress.

The result is that, where the modern era believed in one story (narrative), namely that of progress and freedom through science, post-modernists see that there are many, equally valid stories or narratives. Therefore our culture is filled with many micro-narratives that do not depend on grand narratives to legitimise them. On a very simple level one can see this in cultural practices: in the modern period the "grand narrative" for relationships between men and women was the heterosexual, monogamous marriage. But in post-modern culture there are many more acceptable ways in which this relationship (and others) can be understood. There is no longer one single, correct way that is valid for all times, places and people.

Science can therefore no longer rely on the traditional legitimating narratives so familiar from the Enlightenment and modernism. In its place science is forced to rely on "little narratives" and this is a good thing as it undermines hegemonic discourse.

To summarise, modern thinkers looked at Western culture and saw emptiness, a void, where the heart or essence of this culture should be.[10] The death of religion and the death of rationality means that there is no longer a core or centre from which this culture derives its meaning. Modernists try to fill this void with art, with purpose and with design. That is why modernism is known as "the philosophy of the void".

Post-modern thinkers, however, see this effort to fill the void as ultimately futile. Instead they try to live with the void, to play with it, to focus on the process rather than the ultimate object. This sort of attitude can be seen in movies: in the post-modern world of film-making the director no longer tries to teach us lessons – he is simply telling a story and what we make of it is up to us. (*The Matrix* is the perfect example of this!)

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8 This might explain why interpretation is so important in, for example, positivism and realism.

9 Lyotard JF *The postmodern condition: a report on knowledge* (Manchester 1984).

10 Philosophers call this the "God-shaped hole in our consciousness".

Activity 5.1

Try to give your own definition of postmodernism. _____

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Feedback: You will immediately realise that this is not an easy thing to do! Even the philosophers cannot agree on a definition. But think about the typical post-modern things that you get to deal with every day: music videos, films, art, and architecture. And, of course, you can always look up the definition on http://www.wikipedia.org .

5.3 Post-modern legal theories

The same kind of difference of opinion on postmodernism can be found in legal writing. On the one hand there are South African writers like Dennis Davis and Johan van der Walt who complain about "the depressing turn to postmodernism". According to Davis this is the kind of postmodernism practised by lawyers whose souls are bare but whose pockets are full.[11]

Key concepts:

nihilism

contingency

deconstruction

relativism

Van der Walt too has only scorn for the post-modernists, because they are, apparently, resigned to "an eclectic play (and capitalist re-production and consumption) of available styles" which provides an excuse for "capitalist self-satisfaction".[12]

11 Davis D "Duncan Kennedy's A Critique of Adjudication: a challenge to the 'business as usual' approach of South African lawyers" 2000 *SALJ* 697-712.

12 Van der Walt JWG "The quest for the impossible, the beginning of politics: a reply to Dennis Davis" 2001 *SALJ* 463-472.

In a word, Van der Walt's problem is that postmodernism is nihilistic – it is an attitude of "anything goes" and lawyers in particular do not have a conscience any more. All they are interested in is making money. In the light of the discussion above it is clear that this is very close to Jameson's views on postmodernism. Both these writers see postmodernism as closely associated with consumerism and lack of depth. But, of course, that is not the only possible way to see postmodernism. As Joe Singer has said about nihilism:

Nihilism can mean two things, namely (1) the idea that it is impossible to say anything that is true about the world and (2) the idea that there is no meaningful way to decide how to live a good life. The first denies rationality, the second rational morality.

> When we give up the idea that the legal system has a foundation, a "rational basis," we are not left with nothing. We are left with ourselves, and we are not nothing.[13]

The other way of defining legal postmodernism is to see it as a reaction to and rejection of legal modernism. Although the term "postmodernism" was originally used to characterise the rejection of modernist theory, specifically in the field of architecture and art, the term is now also used to indicate a new attitude regarding intellectual thought and theories of knowledge, science and law. In law and legal theory, postmodernism has to do with a movement away from interpretation based on universal truths, essentialism, or "grand narratives". In general, postmodernism in law represents a resistance to formalism and "grand systems" that are characteristic of modern liberal thinking. As such it is an approach that follows from and reacts to modernist theories and practices.

In its simplest form, the deconstructive practice involves the identification of a hierarchy of opposing values and an attempt to reverse the hierarchy.

GARY MINDA

A trend in postmodernism is *deconstruction***.** According to some writers, deconstruction revolves around the analysis of conceptual oppositions and paradoxes. In this sense it is a method of ideological critique. Ideologies often come to dominate (that is, leave the impression that things are the way they are because they have to be that way) because certain features of social life are privileged while others are suppressed or underprivileged. In the context of language use, for example, reference to "he", "him", and "his" in legal writing, privileges a masculine world-view and suppresses the voice of women, who are marginalised in this way.

[13] Singer JW "The player and the cards: nihilism and legal theory" 1984 *Yale LJ* 1-70.

But that is exactly what you have been doing right through this study guide! You consistently use the masculine pronoun (his, he, and him) and not the feminine. What gives?

Well spotted! That was actually deliberate and I'll tell you why. The history of western philosophy (and for that matter most other philosophies) up to the late twentieth century was dominated by men. When someone like John Locke talks about "the rights of man" he means literally that – rights were reserved for men. You already know this was true for Greek and Medieval thinking. So the point was not to mislead you. And did you notice that most, if not all of the philosophers, are white men? But let's get back to the philosophy.

In the legal context, for example, if a field of law pivots on a dominant principle, for instance, ownership, the deconstructivist seeks out marginal counter-principles. They are principles which have hitherto had an unacknowledged significance and which, if privileged over the dominant, might displace the latter. Deconstruction accordingly wants to show that texts have multiple meanings in order to highlight the importance of reading the text in context. Deconstruction also includes an ethical imperative to question both our own beliefs and to open up to others and their perspectives or views.

This is way over my head. Could you give more examples?

Let's try this: take a jacket that you have bought. Any jacket will do. Why did you buy that jacket? Most probably because it was nice and fashionable. Now turn it inside-out. Not so nice now, is it? When you look at the "wrong" side you can see where the seams were not stitched quite as well or where they had to improvise a bit to make it look good. Deconstruction does the same in law – it turns it upside-down and inside-out to show that the law is flawed, ugly and imperfect. It's like our discussion on Roman-Dutch law: the dark side of that legal tradition is its justification of oppression, slavery and apartheid. That is what deconstruction tries to do.

Finally, we can look at Balkin's ideas on how the postmodern condition affects not only legal philosophy, but also legal practice.[14] Because law is a social artefact, changes in the culture and material conditions of life will also affect law. We can therefore approach the question of postmodernism and law by asking the right question: How can changes in technology, communication, and the organisation of living and working change our understanding and practice of law?

Balkin identifies the following ways in which the postmodern condition can affect law:

1. The fact that media industries are increasingly owned by multinational corporations and this has an effect on our understanding of free speech and public debate.

[14] Balkin JM "What is a postmodern constitutionalism?" 1992 *Michigan LR* 1966-1990 1977.

2. Mass broadcasts of police and law shows have altered the public's perception of the administration and integrity of the justice system. This is particularly acute when the shows portray a very American view of the law that is, in most instances, completely inappropriate in the South African context.
3. The public sphere of legal discourse that used to include practitioners and academics has disappeared. Instead it has become fractured and fractional.
4. Technological advances regarding privacy and surveillance affect these rights in a fundamental way.

In conclusion, it is virtually impossible to define legal postmodernism once-and-for-all. Although post-modern writers share a number of themes, such as disbelief in grand narratives, it is simplistic to lump them all together. But it is possible to indicate the themes common to post-modern legal writing. As Alan Hutchinson says:

> Postmodernism simply dares people to walk the high wire of life without a metaphysical safety net for the occasional loss of balance or nerve.[15]

Activity 5.2

We have said that it is difficult to define post-modern legal thinking. However, we have mentioned a number of characteristics. Can you list these characteristics? _____

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Feedback: You will have noticed that we mentioned both positive and negative aspects of post-modern legal thinking. List both of these – they will give you a better overview. We know that the terms used in this discussion can be confusing. Try to master them anyway; they will help you to understand the very difficult work that follows.

[15] Hutchinson AC "Inessentially speaking – is there politics after postmodernism?" 1991 *Michigan LR* 1552.

5.4 Specific philosophies

5.4.1 Critical legal studies

The Critical legal studies movement is a widely diverse group of legal thinkers. From the outset they decided to be a political and social movement that tried to link their intellectual activities to political goals. While their views are very diverse, they share the same background. CLS scholars (Crits) rediscovered the work of the radical Realists and used this to show that traditional legal thinking justified abstract reasoning that ignored the politics of power.

Key concepts:

false consciousness

fundamental contradiction

trashing

deconstruction

indeterminacy

law is politics

CLS is presented as a form of post-modern legal philosophy because the Crits say that it is impossible to establish a fully rational society or legal system. The task of the legal scholar is accordingly to resist the lure of the modern project and rather to attend to the power plays involved where claims to rationality and justice are made.

CLS was formally founded in 1977 by a group of American scholars who shared a common commitment to leftist politics and disappointment with "orthodox"/"mainstream" legal scholarship. From this splinter group the Movement mushroomed until by the 1980's the *Conference on Critical Legal Studies* boasted several hundred dues-paying members, many of whom were professors at leading American law schools. The most prominent members included scholars such as Roberto Unger, Peter Gabel, Duncan Kennedy, Karl Klare and Mark Tushnet. The movement lost its coherence in the late 1980's and disintegrated into a number of smaller groups. Though CLS started as an American phenomenon, versions of the CLS critique can now also found in England and South Africa (see below). Although there are many subjects and approaches used by Crits, we will here discuss three main themes.

5.4.1.1 False consciousness

> Law, like religion and television images, is one of these clusters of belief … that convince people that all of the many hierarchical relations in which they live and work are natural and necessary.
>
> GORDON

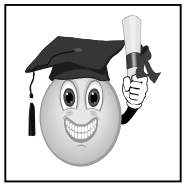
Critical Legal Studies scholars begin with the idea that there is a false consciousness at work in law and in society. By this they mean that political and legal ideologies construct a certain way of thinking about life and society. This leads to the common belief that things are the way they are because they *have* to be that way. Crits regard this as an illusion that must be dispelled so that individuals can consider alternative legal and social orderings. They use deconstruction to show how ideologies underlying legal doctrines side-lined alternatives in law and in society.

What do you mean by "ideologies underlying legal doctrines"? And how is this related to the ideologies that Crits say underlie our thinking about life and society? Can you give examples?

We can certainly try. Let's take the apartheid years in South Africa for example. Many people (particularly white people) never questioned the way society was structured. That is of course partly because they were advantaged by the system, but it was also because many of them though this kind of society is natural or inevitable. This idea was strengthened by some churches who claimed that apartheid was biblical and ordained. Can you see how this is an ideology that presented social arrangements as being the way they are because they have to be that way. And this attitude was also found in law so that criticism of the laws was met by harsh punishment.

The CLS starting point is the conviction that society is characterised by exclusion, hierarchies, violence and arbitrary exercises of power for which no legal justification can be found. To present a picture of society as one big happy democratic family or to suggest that every exercise of power is regulated, legally controlled and justified (the claims made of the liberal rule-of-law) is to confuse reality with fiction. The Crits believed that there were good reasons to get rid of the fiction that the social and economic power of the dominant class in society has a rational and legal basis (a fiction called liberal legalism). They claimed that the established socio-economic hierarchies could be destabilised if the so-called legal basis of these hierarchies were exposed as fictional.

The Crits therefore see law as an ideology that legitimises a fundamentally unjust social order (the liberal welfare state) by creating the illusion that this system is natural or necessary. People who continue to believe in the justice, rationality and necessity of the socio-economic hierarchies suffered from false consciousness. The Crits set out to expose this false consciousness in order to transform society.



I can see and I even agree with the example above dealing with the apartheid state, but surely that is not true of the modern, democratic states? The whole idea of democracy and accountability is that government actions must be sanctioned by legal rules and regulations.

That is one of the most comfortable fictions in our modern society! But think back to the example about the *Prince* case. If the applicant had been a member of an established, orthodox and powerful church, do you really think the decision would have been the same? The Crits try to show that not only the application of the rules but the rules themselves represents the interests of the rich and powerful and not those of ordinary people. As such it is an ideology.

To this end, the Crits started analysing specific areas of law, like property and contract, to expose the arbitrary nature of the claims to social wealth and power which these fields of law were supposed to provide. A close analysis revealed a series of contradictions at the bottom of nearly every field of law. By highlighting these contradictions, a style of legal scholarship called "trashing", the Crits tried to convince their students and colleagues that every field of law was indeterminate. The law could therefore not determine in any rational or logical manner how a legal dispute had to be decided. No judge could determine rationally whether a claim to a specific socio-economic privilege was legally justified. Decisions to this effect, and thus the whole basis of the social order, were not grounded in reason and law but rested on arbitrary and legitimating exercises of pure judicial power.

5.4.1.2 Indeterminacy

You will remember that the Realists argued that legal concepts are basically indeterminate. This indeterminacy was based on the observation that for every rule or principle there is another, equally valid counter-rule or principle. The Crits argued that the indeterminacy is more fundamental than that – it is inherent in society as a whole. These contradictions are then reflected in law and legal doctrine. (You will remember that it is exactly this contradiction that Dworkin tried to solve with his theory!)

> The claim that a legal doctrine is indeterminate means that the doctrine allows choice rather than constraining or compelling it.
>
> JOE SINGER

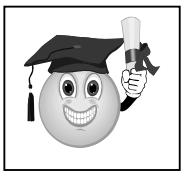
According to the Crits the origin of the indeterminacy of the law lay in the nature of human existence itself. Inspired by the existentialist philosophies of the 1960's, the Crits claimed that human existence was torn between the self and the other, isolation and community. What is more, the relationship between the self and the other was never harmonious but had to be expressed as a form of conflict or contradiction. Duncan Kennedy called this the "fundamental contradiction".

Are we now back at the conflict between individualism and the common good? If the pre-moderns believed in the common good and the moderns in individualism, where do the post-moderns fit in? Are they communitarians as well? You did say they rejected modernist thinking.

Yes, you are right. The conflict between individual and community is one of the enduring problems and debates in legal philosophy. But the Crits did not fall for any of the simple solutions. Instead the Crits believed that it was impossible to rationally solve this conflict or contradiction. Because of this, any attempt to develop a rational set of legal rules and principles to regulate interaction between human beings, is doomed to failure. The law might hide the fundamental contradiction, but cannot overcome it. The fundamental contradiction will again and again re-appear in the form of conflicting rules or principles. It even underlies the conflict between rules and principles. Crits stated that rules define the boundaries of action with precision, but they are born out of fear and mistrust of others and thus lock human beings into individuality and egoism. Standards and principles, on the other hand, are vaguer and more open-ended, they stem from trust and love of others and therefore lock human beings into community and altruism.

From this you will realise that the Crits were not interested in refining and developing legal doctrines so that remaining exceptions, contradictions and gaps in the law were smoothed out as mainstream lawyers and legal academics tried to do. Nor were they interested in providing a rational foundation for the basic legal principles on which liberal societies rest, like Rawls and Dworkin tried to do. The Crits were content with "trashing" legal material and debunking the legal claims made by the powerful in support of their social and economic privileges. The task of the post-modern legal scholar, as the Crits understood it, was to disrupt and destabilise hierarchies in society.

But that means that Crits show where all the problems are without trying to solve them or to provide alternatives. Isn't that a very selfish way of doing things? Isn't it the job of the philosopher to tell us how to solve these problems?



No, we don't believe it is. It is rather like the old joke: you don't have to be a chicken to know if an egg has gone bad! Crits see their task as exposing the problems and mistakes and then leaving it up to the genuine democratic process to solve that problem in a unique way. But this is a never-ending task as every attempt to refashion society in a more rational fashion will fall foul to the disruption of the fundamental contradiction and generate its own arbitrary exercises of power, exclusions and hierarchies. The task of the post-modern or critical legal scholar is to constantly challenge every claim that a new law or case or doctrinal development or constitutional amendment has finally found the working solution to the fundamental contradiction.

5.4.1.3 Law is politics

> We have proposed instead that legal reasoning is a way of simultaneously articulating and masking political and moral commitment.
>
> JOE SINGER

From the Critical Legal Studies viewpoint, therefore, the use of formalism and conceptualism conceals the contradictions and tensions underlying not only a specific legal theory, but also society and the legal order. When deciding a case, the judge has to choose between conflicting interests of society, and his *political* choice is reflected in the decision he makes. Politics in this sense means the pursuit of justice, or the allocation of resources in society, or the choice between various interests in society. Therefore, law is essentially a political enterprise.

The liberal emphasis on absolute individual liberty and freedom is also criticised by Critical Legal Studies scholars. Instead, they stress the economic and social interdependence of people which results from these liberal beliefs. Rights and entitlements give individuals power over others. Therefore, the liberal ideal of freedom to act without harming others cannot be realised. For example, because some people have more power than others, contractual consent is coerced through superior bargaining power. Think of hire purchase agreements with one of the big furniture stores – the client is in a very weak position and has no real choice as to the terms of the contract. This is the rule rather than the exception. As a result, freedom of contract is a myth.

5.4.1.4 Criticism of CLS

Because of the subversive nature of their work the Crits have often found themselves at the receiving end of a number of scathing personal attacks. For example, it has been suggested that the CLS movement might amount to "a pathological phenomenon, a Peter Pan syndrome", or a "lonely hearts club for left-wing law professors". Adherents of CLS have been denounced as "guerrillas with tenure" and as scholars with "an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy". A prominent Crit described the movement as "a ragtag band of leftover 1960s people and young people with nostalgia for the great events of years ago".

Critical Legal Studies scholars are also criticised that they are merely intent on undermining mainstream legal liberalism without substituting any positive alternative. Their answer is that the unsettling effect of their work has jolted mainstream complacency, which in itself is an important contribution.

That is why one of the most important contributions of the Crits has been it demystifying of the legal process. Joe Singer has the following to say about how judges decide cases:

> When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do. There is nothing mysterious about any of this.[16]

5.4.1.5 The South African context

Some writers argue that Critical Legal Studies insights are perhaps irrelevant to South Africa for two reasons. On the one hand they argue that the need to overhaul the social and legal order was already realised or recognised under the old political order and that the new Constitution will in any event increasingly effect the needed change. On the other hand, some argue that the most important insights of the Critical Legal Studies Movement must be of the utmost relevance to the South African context. For example the insight that equally valid but conflicting principles are contained in every legal system and that therefore there are alternatives to the way in which society is presently structured. By exploiting these choices to allow the entrance of other cultural ideas, the previously under-privileged or excluded potential inherent in the law can be released. In terms of this view, then, every aspect of social life is within the reach of internal transformation. This view seems particularly pertinent to the South African context.

The critique of Critical Legal Studies scholars of the liberal view that rights are pre-social or pre-political and therefore inviolable is also worthy of comment. For example, if in the area of the law of property, communal rather than private property is privileged, a communal property regime may come to be seen as more efficient in fact than the liberal concept of private property. This coincides with African legal ideas about property law and property theory.

What sense should we make of the CLS stress on the contradictions of law? What can CLS contribute to a post-apartheid jurisprudence that builds on the postscript to the Interim Constitution, where it was stated that the new constitutional dispensation provides the secure foundation for a just and rational South African society? Does the CLS critique mean that this must be exposed as yet another myth or legitimating ideology?

To date there have been a few attempts by South African legal academics expressly to adopt a CLS methodology in their writings. John van Doren is one American Crit who has actively encouraged the incorporation of CLS into South African legal scholarship.[17] Writing at the end of the 1980's, he argued that South African legal education provided a form of passive legitimation for the apartheid regime (a point more recently confirmed by the *Truth and Reconciliation Commission* report into the legal community). Van Doren claimed that CLS can be valuable to subvert the Roman-Dutch private-law bias which was taught to students, and which enshrined the supposed neutral formal equality of South African law. CLS methodology could expose the inherently contradictory nature of this system.

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16 Singer 1984 *Yale Law Journal* 1-70 65.

17 Van Doren JW "Critical legal studies and South Africa" 1989 *SALJ* 648.

When you were discussing Dworkin's idea of principles you also spoke about the future of Roman-Dutch law. You then said that it is not necessarily the best or the only choice for the source of principles. Does this mean your argument was in line with that of the Crits?

Yes, in essence it was. To a very large extent we all think that Roman-Dutch law is the best or only alternative and that is the result of the way in which we are taught at university. But that might just be false consciousness and our training may just be keeping that false consciousness in place. Van Doren's point was that apartheid law contained an incoherent mix of rules and policies which rendered it wholly incoherent and indeterminate. He believed that the exposure of this incoherence would remove the veneer of legality on which the racist state relied, and contribute directly to its de-legitimation.

A further example of the possible application of the CLS critique to sustain political transformation in South Africa is provided by the early work of Dennis Davis. At the beginning of the 1990's, Davis argued, on the basis of the CLS critique about the indeterminacy of rights, against the inclusion of socio-economic rights in the South African Constitution (other than as directive principles). Davis was sceptical of constitutional adjudication in general, because "problems of competing ideology, textual indeterminacy and contradictory or competing rights claims" rendered the process indeterminate.[18]

This meant that there was no guarantee that socio-economic rights would be interpreted in a progressive, social-democratic fashion. A restrictive liberal interpretation was equally possible. (Does this remind you of the Realist critique of how judges decide cases?) Because the judiciary could not be trusted, and because rights discourse itself was inherently incoherent, the socio-economic transformation of South Africa was best left to parliament and popular politics.

Another Crit, Henk Botha, has insisted that constitutional review is a sign of social dissent which should be approached in such a way that it constantly shows the lack of consensus in contemporary societies.[19] The moment that constitutional review is seen as coherent discourse or community, transformative critique becomes severely restricted. Constitutional review or the complete justification of political power is impossible because no unified political community exists which could provide the neutral and objective standards of justification. The idea of a coherent rights discourse and the idea of active democratic politics are deeply contradictory. Botha's understanding of the task of critical legal scholarship is derived from the CLS critique, namely to actively pursue this contradiction and to keep it alive.

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18 Davis D "The case against the inclusion of socio-economic demands in the Bill of Rights except as directive principles" 1992 *SA Journal on Human Rights* 475.

19 Botha H "Freedom and constraint in constitutional adjudication" 2004 *SA Journal on Human Rights* 249.

Activity 5.3

We have here given three themes or ideas in CLS thinking. Can you give a list of these themes and briefly explain what they mean? _____

_____

_____

_____

_____

_____

_____

_____

_____

Feedback: It should be fairly easy to list the characteristics, but explaining what they mean in difficult. The important thing is to use your own words and not repeat our version.

5.4.1.6 Application

It is, of course, difficult to give an example of CLS thinking as it pertains to case law. Because the Crits are so critical of traditional adjudication, it is highly unlikely that courts will ever use this approach when deciding a case. CLS is primarily a critical tool used to analyse and criticise decisions. But we can give you an example of how this works.

Go back to the application in 4.5 above. There we gave you a number of quotes from judges in the *Makwanyane* case. We then indicated that the judges are still involved in the modern project – trying to find a rational and objective basis for values. Crits point out that the whole project of late modern thinking is flawed. Searching for objective and universal values hides the real conflicts and disagreements in societies. Not all South Africans agree on what "human dignity" means or should mean. In fact, that may be the reason why there is a renewed call for the re-introduction of the death penalty. We can summarise the problem with the court's reasoning in the following way:

It seems clear that the expectation of a move away from textualism and intentionalism has not been realised. Textualism is alive and well and living in the Constitutional Court. Any court that can speak of the "clear language" of a text with any measure of sincerity has obviously not parted ways with textualism. The reason for this is the formalist assumptions and routines that underlie legal thinking. As long as values are used as "binding, debate-stopping, culture-transcendent, and preference-systematizing" devices, the formalist pretension can be maintained.

But using values in this way has the effect of a sort of collective denial, a way of not taking the social, cultural and political situation into consideration. The point is that, regardless of the characteristics of values, their value depends on how they are used and in what context. That is why the court's approach to values can be regarded as an illustration of the radical indeterminacy of interpretation. In that respect the constitutional court is in no different a position than any post-modern interpreter of a text such as the constitution.[20]

In this instance, therefore, the Crits use the Court's attitude towards interpretation to illustrate indeterminacy. They point out that values can not be determined objectively. Therefore, any attempt by the court to pretend it is objective only serves to hide its own assumptions about values. They pretend that we all agree about values to hide the deep divisions about values in our society. In the words of an American Crit, Pierre Schlag:

> Values are like little divinities. Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence and self-abnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and human existence. In short, "values" are the secular equivalent of God – they are the continuation of theology by other means.[21]

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20 Kroeze IJ "Doing things with values" 2001 *Stell LR* 265-276.

21 Schlag P "Values" in *Laying down the law – mysticism, fetishism and the American legal mind* (New York University Press New York 1996) 42-59 50.

5.4.2 Feminist Legal theories

Before we can start the discussion on feminist legal theories, two things must be cleared up first. In the first place it is important to distinguish between *feminism* and *feminist legal theories*. The term *feminism* refers to a movement or theory that has as its goal the liberation/emancipation and empowerment of women. It is a social and political idea or movement.

Key concepts:
essentialism
sameness feminism
difference feminism
relational feminism
gender

There is no such thing as being individually free in the face of a collective bias, just as with racism, or anti-Semitism.
GLORIA STEINEM

Feminist legal theories of course have their roots in this broad movement but cannot be completely associated with it. Feminist legal theories are *theories of law*. They deal with all the aspects other theories deal with, such as adjudication, interpretation, property law, ethics, etc. It is therefore not enough if, for example, you discuss Carol Gilligan's ideas without explaining what this has to do with the law. You need to make sure that you are dealing with legal philosophical issues.

In the second place feminist jurisprudence appears here as part of the *post-modern* theories. That is, of course, not entirely correct. It is impossible to speak of one feminist theory, just as it is impossible to speak of one positivist theory. Feminists differ about a large number of issues, as will become obvious later. But, broadly speaking, you can distinguish between modern feminist legal theories and post-modern feminist legal theories. The difference between the two has to do with *essentialism*.

5.4.2.1 Essentialist feminist jurisprudence

In the section on pre-modern philosophy, we stated that "*essentialism* is the viewpoint that objects or ideas have an innate, unchanging core of meaning." In the context of feminism essentialism means that people think that all men and all women have characteristics that are innate, unchanging and universal. In other words, they think that all women, for instance, are emotional, irrational, they talk too much and they like pink frilly things. Men, on the other hand, are all aggressive, like beer and sports and are afraid of commitment. This is the basic point of departure of popular books like "Men are from Mars, women are from Venus" and "Why men won't talk and women can't read maps". They share the idea that women and men have essential characteristics that never can or will change.

In modern legal theory this idea has led to two schools of though that, at first glance seem to be opposites. But they are not. *Sameness feminism* (also sometimes called liberal feminism) starts from the viewpoint that, although men and women look different, they are *essentially* the same. Men and women may therefore differ physically, but in their thoughts, actions and motivations they are the same. This is therefore a kind of essentialism that sees men and women as basically the *same*.

> Its guiding impulse is: we're as good as you. Anything you can do, we can do.
>
> CATHARINE MACKINNON

This kind of feminism was needed at the time when feminists were fighting for the right to vote, equal pay for equal work and equal opportunities. Because men were the standard against which everything was measured, women had to claim to be essentially the same in order to be able to claim the same rights and privileges. In the process, of course, the position of men as the "measure of all things" was established.

Sameness feminism was a very effective tool at the time and was responsible for many of the advances made by women. But it was in the area where men and women differed physically that its limitations became apparent. When women first started to claim maternity leave, for example, they were denied this because men were not entitled to it. The argument was that, if women were the same as men and had the same rights and privileges, they could not claim more rights than men had. Since men clearly did not have a right to maternity leave, women couldn't have it either!

Carol Gilligan
Photo Courtesy of Deror Avi

It was against this background that *difference feminism* was born. It was based on a small study by Carol Gilligan and it emphasised what it perceived of as characteristics women have simply by virtue of being women.[22] In law this had two important consequences. On the one hand the drafting and adoption of international documents featuring "women's rights" is the direct result of this kind of thinking. The *Convention on the Elimination of Discrimination Against Women* (CEDAW) and the *Draft Women's Protocol to the African Charter* are both documents that are based on the idea that women need "special rights" because they are different from men and therefore need different kinds of rights.

The second consequence of this approach can be seen in the theories of the so-called relational feminists in law. The *relational feminists*, of whom Carol Gilligan is the most prominent, claim that women are different from men because of their psychological make-up. Gilligan claims, that, because of their psychological development, women are essentially different from men. Boys develop by separating themselves from their mothers and identifying with their fathers. Girls develop by identifying with their mothers and do not experience the same need to distance themselves from their mothers in order to assume an independent adult identity. The resultant male attitude towards others is oppositional (i.e. males set themselves in opposition to others) whereas the female attitude is relational (i.e. females reach out or relate to others). Based on this, Gilligan states that there is a different female voice, which leads to the contrast between the

22 Gilligan C *In a different voice: psychological theory and women's development* (Cambridge Mass 1982).

female *ethic of care* and the male *ethic of justice*. The male ethic is much more individualistic than the female ethic and focuses on autonomy, abstract rules, principles and rights. The female ethic is much more concerned with relationships and communal ties and focuses on the taking care of others.

Relational feminists therefore criticise the traditional (male) liberal theories for focusing too much on rights and not enough on relationships. For them the law deals with the relationships between people (parents and children; husbands and wives; clients and companies; etc.). Therefore legal thinking should not be based on analyses of rights, but should be concerned with maintaining and supporting relationships. Therefore the traditional (male) ethic of justice should be replaced with a (female) ethic of care.

This all sounds good and they might have a point about the law being very masculine. In fact, even legal philosophy seems very masculine. But how would the ethic of care change anything in an actual court case? Aren't court cases about competing rights and obligations?

Well, the relational feminists would say that that is exactly the problem. They would like to see court cases be about relationships instead of rights. In that sense, they are very close to the African approach to law with its emphasis on reconciliation instead of winning. We're just not convinced that it would work in our marginalised society.

It should be clear that, from the perspective of the relational feminists, the liberal feminists contributed to female oppression because they adopted a male voice with which to challenge the oppression of women. In the process no room was left for the liberation of the female voice (the ethic of care) and its challenge of individualism and formalism. From the above it should be clear that there are close similarities between relational feminism and some strands of communitarianism: both see relationships, communal ties and the context of the subject as central. At the same time both are extremely critical of the atomistic or individualistic (male) view of the world.

Catharine MacKinnon

However, Catharine MacKinnon's criticism of Carol Gilligan is interesting.[23] MacKinnon says that celebrating caring as the essential female trait has two dangers. In the first place, it celebrates the same difference (from men) that was used previously against the liberation of women and to restrict women to the role of rearing children (in other words denying them participation in politics and business).

In the second place, it neglects the possibility that the very values which relational feminists celebrate as the essence of femininity and womanhood could themselves be the result of stereotypes which developed during years of male domination. The problem is that relational feminism is still essentialist feminism. The essence of women and the essence of men are compared and found to be different.

[23] MacKinnon C "Difference and dominance: on sex discrimination" in Feinberg J and Coleman J (eds) *Philosophy of Law* (Belmont 2008) 180-191.

Instead of the relational feminism, MacKinnon develops what is called the dominance theory. She agrees that men and women are essentially different from one another. The difference is that men have power and women do not. Men are the dominators and women are the dominated. The difference is a difference of power. Women will achieve equality if they have as much power as men.

> An equality question is a question of the distribution of power. Gender is also a question of power.
>
> CATHARINE MACKINNON

5.4.2.2 Non-essentialist feminist jurisprudence

Simone de Beauvoir, the French feminist and existentialist, once said: "One is not born a woman, one becomes a woman." This sums up the non-essentialist position perfectly. Post-modern feminists start by making a distinction between sex and gender. *Sex* is determined by biological and physical factors. In other words, whether you are male or female is determined by chromosomes, physical attributes and so on. *Gender*, on the other hand, is determined by cultural and societal factors. Gender refers to the cultural roles accorded to men and women. Therefore your culture and upbringing determines what you see as the appropriate role for men and women. (This is why the Constitution prohibits discrimination on the basis of both sex and gender!)

That is why post-modern feminists regard statements like "all men are like this or that" and "all women are like this or that" as nonsense. Essentialist claims about the nature of masculinity and femininity are regarded as more "grand narratives" that are no longer accepted. Men and women act the way they do because they are conditioned by society to regard that as appropriate behaviour. Masculinity and femininity is therefore not a product of biology, but of social conditioning.

What is more, these social constructions of gender are neither universal nor eternal. The view of what is feminine differs from society to society and from time to time. If you has a time machine and could travel to the Victorian age (late nineteenth and early twentieth century) you would be amazed at the differences. Most Victorians would regard modern women as hopelessly unfeminine! But today we realise that there are as many ways of being feminine as there are women on the planet. That is why it is impossible to maintain an essentialist understanding of gender in post-modern feminism. You cannot speak of a single "women's experience", because inevitably that turns out to be the experiences of white, straight and socio-economically privileged women. This kind of feminism therefore relies on many experiences of women instead of a single "different voice".

But what does this mean for legal theory? One of the unforeseen consequences of this new way of understanding gender has been the fragmentation of feminist theory. Legal theorists insist that, for example, a white middle-class Afrikaans woman's experience cannot be the same as that of a poor, black, rural woman. And, since feminism insists that all women's experiences are equally valid and valuable, the white woman cannot speak on behalf of all women.

> bein alive & bein a woman & bein colored is a metaphysical dilemma
>
> NTOZAKE SHANGE

In legal theory this has led to the rise of various schools of feminist legal theory, such as the Global Critical Race Feminists, the Cultural Feminists and Radical Feminists. All of these approaches can and do provide important insights into and criticism of legal rules and institutions.[24]

[24] See, for example, Morgan R (ed) *Sisterhood is global* (New York 1996); Bartlett KT and Kennedy R

A good example of post-modern feminist legal thinking can be found in the work of Mary Joe Frug.[25] She uses a post-modern analysis to highlight problems with rape and prostitution. Frug argues that law "encodes" the female body with meaning. By that she means that the law attaches certain meanings to women's bodies for the purpose of legal analysis. This happens in three ways:

- In the first place legal rules mandate the *terrorization* of the female body. This is done by inadequately protecting women and, at the same time, encouraging women to seek refuge against this terror. That means women's bodies are "bodies in terror" – bodies that have been taught to submit.
- In the second place legal rules mandate the *maternalization* of the female body. This is done through rules that force women to become mothers (by making abortions difficult or impossible for women) and by rewarding them for motherhood and punishing those who choose not to be mothers. An example of this is social grants given to poor mothers, but not to other poor women.
- Legal rules also mandate the *sexualisation* of the female body. This happens when certain kinds of sexual conduct is prohibited (like prostitution) and through the rules pertaining to rape and sexual assault. In the last two cases it works by not focusing on the crime but on the sexual conduct of the woman in question.

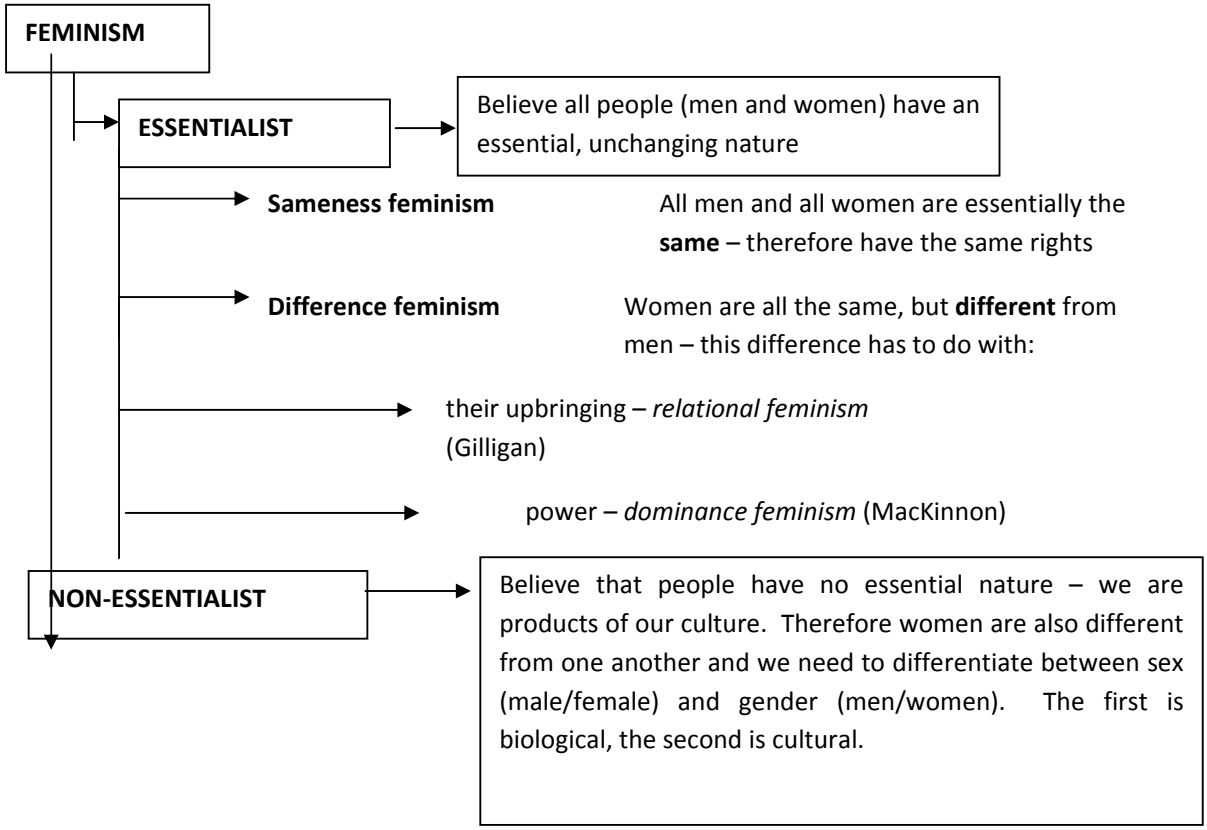
Those are very unusual words and ideas. Could you perhaps explain them more by giving examples?

The best kind of example is to look at the case of prostitution. The prostitute's body is *terrorised* in the following way: because her actions are illegal, she is not protected by the law. Consequently she has a choice between the risk of assault by her clients and the dubious protection of her pimp. Her body is *sexualised* in an obvious way – she is to be used and has to submit to that. But it also sexualises other women's bodies in that they are constantly reminded to "not dress like a slut". Finally their bodies are *maternalised*. Prostitution is frowned upon because it removes sex from marriage. Here sex is not for the purpose of procreation and therefore not approved. Remember that all these things are not about what society thinks – it is about how the law encourages us to think in certain ways about women and their bodies. This is just one example of post-modern feminist legal theory. We will see how it is applied in case law in the next section.

(eds) *Feminist legal theory: readings in law and gender* (Boulder Col 1991); Wing AK (ed) *Global critical race feminism: an international reader* (New York 2000).

[25] Frug MJ "A postmodern feminist legal manifesto" 1992 *Harvard Law Review* 1045-1075.

But first, let us give a brief summary of the various feminist theories by means of a scheme:



[Please remember that this scheme is a **study aid.** You cannot use it in the examination!]

5.4.2.3 Application

The first South African case dealing with gender discrimination was *President of the Republic of South Africa v Hugo*[26] and the case was instituted by a man! The applicant was serving a jail sentence at the time when President Mandela was inaugurated as the first democratic president. As part of the celebration, the president freed a number of prisoners, amongst others all women who were the sole caretakers of children younger than twelve. The applicant was the sole caretaker of a child younger than twelve, but because he was a man, he could not be released. He claimed that this was discrimination based on gender. The court did not find for the applicant, but did not base its argument solely on gender discrimination. For our purposes, however, the arguments regarding that are of interest.

[26] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

In the majority judgement, delivered by Goldstone J, the following was said:

> The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon the evidence that mothers are, generally speaking, primarily responsible for the care of small children in our society. Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement, of course, is a generalisation. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be fair to discriminate between women and men on that basis.
>
> For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The generalisation upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.[27]

The majority judgement therefore accepts the gender roles prescribed by society (namely that women look after children) even though it accepts that these gender roles lead to inequality. We would therefore argue that the majority decision used a relational feminist approach to the question of gender equality. Do you agree with us?

[27] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) [37] and [38].

The minority judgement took a different view. Kriegler J states:

> I illustrate what I mean by examining how these criteria are to be applied in the instant case. In terms of the first criterion, the benefits in this case are to a small group of women - the 440 released from prison - and the detriment is to all South African women who must continue to labour under the social view that their place is in the home. In addition, men must continue to accept that they can have only a secondary/surrogate role in the care of their children. The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women *qua* women in the President's conduct, merely a favour to perceived child minders. On the other hand, there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the workplace and other sources of opportunity. There is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts. I cannot agree that, because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major societal disadvantages.[28]

It should be clear that the minority uses a very different approach. For them the traditional and accepted view of women as child-minders is not acceptable without criticism. They seem to echo some of Catharine MacKinnon's ideas and even include some post-modern ideas.

Activity 5.4

From these excerpts it should be clear that the two judgements use different feminist theories. Which theories do you think they used? Which one do you think is the correct one? _____

_____

_____

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Feedback: It is important here to start by listing the kinds of feminist legal theories and briefly explain each one. Then go back to the quotes and see which one fits into which theory. It is not simple or straightforward and sometimes you have to read between the lines a bit. We see at least two theories at work here. Do you agree?

[28] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) [83].

5.5 A final exercise

In sections 2.8, 3.6 and 4.6 we gave you a fictional problem that you had to write an essay or answer on. You now need to go back to your answers, read them carefully and write a critical essay on your own answer from the perspective of postmodern legal theories. This will show if you have mastered the material.

STUDY UNIT 6

STUDY UNIT 6: THEMES IN LEGAL PHILOSOPHY

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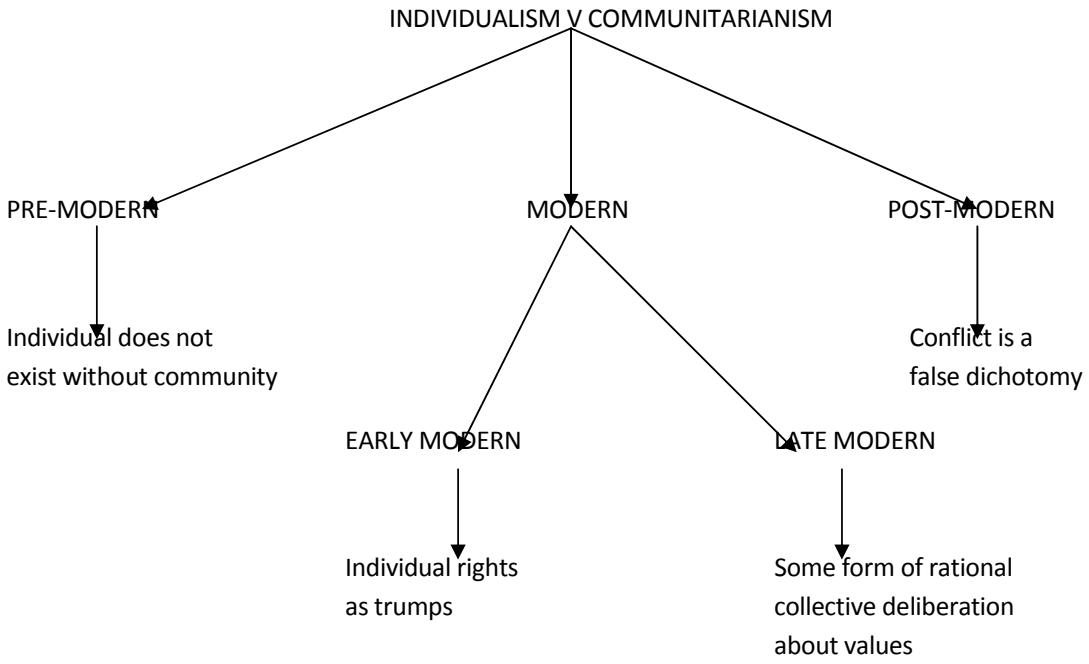
STUDY UNIT 6: THEMES IN LEGAL PHILOSOPHY

6.1 Introduction

By now you will have realised that certain themes keep on recurring in legal philosophy. These are the continuing problems that legal philosophers struggle with and will probably struggle with for some time to come! What we want to do in this last short study unit is to introduce you to some of these continuing themes and to give you some idea of how they are answered. We have no intention of repeating all the information contained in the rest of the study guide – the idea is merely to show you how the various schools of thought are connected and related to one another. So, there will be a brief discussion of every continuing theme and then a graphic illustration of the problem. Your job is to use the graphic as a starting point and to expand it to include other ideas. Obviously these kinds of questions are ideal for exam purposes.

6.2 Individual v community

One of the most enduring conflicts in law is the one between the individual and the community. The basic question here is whether the individual's rights and interests should always be regarded as more important than that of the community. Or should the community's interest be considered paramount? To this question the various philosophical schools give different answers. Most, if not all, **pre-modern philosophers** regard the community as more important than the individual. For them the community is an expression of the common good and, as such, part of the natural order. In fact the idea of an individual separated from the community seems impossible to them – as we see in the idea of *ubuntu*. In general, **modern philosophers** reject this idea and instead accept that individuals and individual rights should supersede that of the community. However, **late modern** thinkers tend to temper this absolute individualism with some version of rational collective deliberation about values. In the **post-modern philosophies** the conflict between individual and community is seen as a false problem – a problem created by modernism. Post-modernists see people as both individuals and part of a community. The problem then becomes how that relationship (rather than a conflict) should be seen. We can therefore show the problem in the following way:

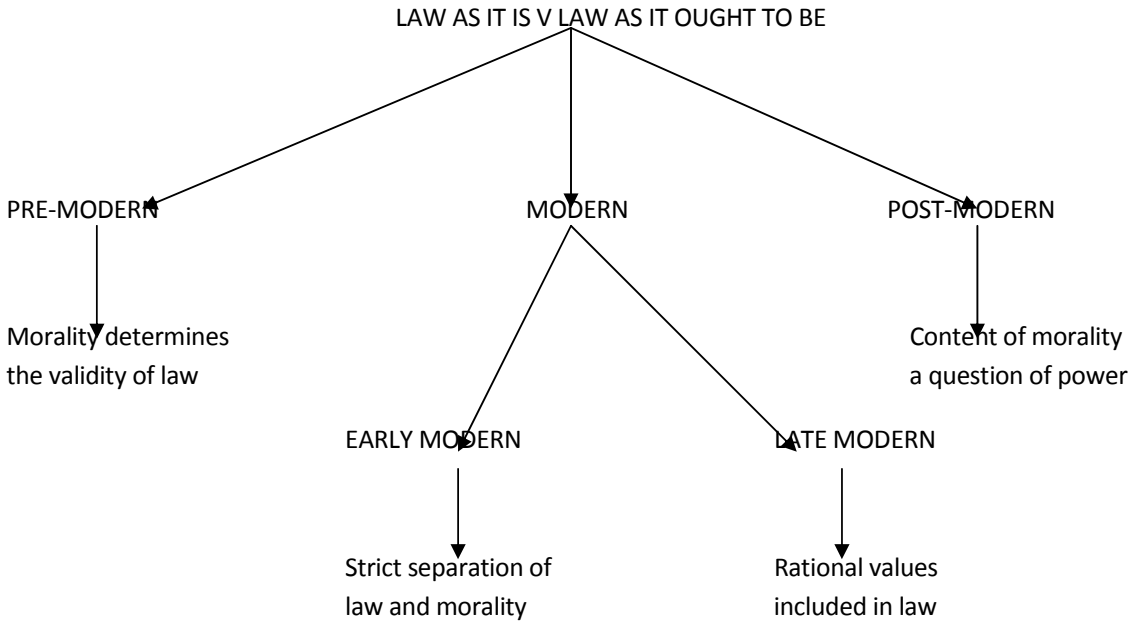


It would be a great idea if you could expand this scheme to include the specific philosophers' views on this issue!

6.3 Law and morality

The other big problem in legal philosophy is the relationship between law and morality. This is even a problem that continues to plague society at large. There are continuing calls for the inclusion of moral ideals in law to better protect society and individuals. In the **pre-modern philosophy** this question was first raised but the answers were fairly simplistic. It was merely assumed, based on the idea of natural law and a natural order that morality determines both the content and the validity of law. In other words, if a law was in conflict with the natural order (Ideals, Forms or God) it was regarded as invalid. In the **modern philosophy** this idea was completely rejected. Because of the scientific world view the old ideas were rejected and law as it was (positive law) and the law as it ought to be (morality) was strictly separated. In **post-modern theory** this issue does not get nearly as much attention. These thinkers are more concerned with the following question: what exactly do we mean when we speak of morality? Whose morality? And do we decide that question on the basis of rationality or on the basis of power?

We can represent this debate in the following way:



6.4 The source of values

This question is closely related to the previous one. We are not even going to draw you a picture – by now you realise how this works! The point is that **pre-modern** thinkers find the source of values in something metaphysical, while **modern** thinkers find it in rationality. So you shouldn't think that modern thinkers don't deal with values at all. They simply deal with it in a rational and scientific way. **Post-modern** thinkers typically see values as a smokescreen for politics. For them values are used by courts to hide their political decisions and to appeal to a political consensus that doesn't exist.

6.5 Other problems

Without going into too much detail, a number of other enduring problems can also be identified. For examples, thinkers also disagree about the nature of the state. The ideas change from a view of the state as part of the natural order to the idea of the state as the result of a social contract. Post-modern thinkers even question the idea that we need states at all. And finally there is the perennial problem of the nature of justice. Is it an ideal that all laws should aspire to (pre-modern) or a non-existent idea designed to distract us from what is really going on (post-modern)? It would be well worth your time to consider these and other problems you might encounter.

6.6 Conclusion

We have come to the end of the study material for this course. At the beginning we said we would come back to the definition of legal philosophpy. You can go back and see if you still think your definition is valid. We hope that you have learned at least one thing: that nothing is ever as simple as it originally seemed! We also hope that you have enjoyed studying it as much as we have enjoyed preparing it. We leave you with the last word from Francis Bacon:

> If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.

ADDENDUM A

ADDENDUM A: SELF-EVALUATION QUESTIONS AND EXEMPLAR ANSWERS

As we said earlier, these questions come from the assignments set for students in this module. What follow is firstly the questions and then two exemplar answers for each question. The purpose of this is twofold: on the one hand we want you to see how the questions could have been answered and on the other hand we want you to see that there is **never** just one correct answer to these kinds of problems. They are therefore not intended as "model" answers – there is no such thing in philosophy. Please first try to answer the question on your own, then read through the exemplar answers and then go back to your own answer to compare them.

In particular, please note that a good answer is not necessarily a long answer. When answering a philosophical question, make sure you understand the question and then answer the question and only the question. There is no point in writing a lot of things that are not relevant to your answer. The rule of thumb is: **think a lot, don't write a lot**.

SELF-EVALUATION QUESTION 1

Read the following article and answer the question below.

Fifa probes Suarez handball

Fifa confirms investigation into 'Hand of God'

Last updated: 3rd July 2010

Suarez: Maybe banned for longer

Fifa has confirmed it is investigating Luis Suarez's deliberate handball and could extend his one-match ban.

The Uruguay striker stopped Ghana substitute Dominic Adiyiah's last-gasp header on the line which would have sent the Africans through to the last four.

While Suarez was given a straight red card for his actions, his 'Hand of God' intervention ultimately paid-off as Ghana missed the resulting penalty and Uruguay went through to the semi-final after winning a shoot-out.

Suarez is now being hailed as a hero in his home country, who view his actions as being on behalf of the team, but the incident has provoked condemnation in other parts of the world, with the handball seen as cheating.

The striker will now serve an automatic one-match ban, ruling him out of the semi-final with Holland, but this punishment may be increased as Fifa has confirmed it is looking into the case.

The ruling body may decide he should also be suspended for Uruguay's last match of the tournament - which will be either the final or the third-place play-off.

Opens case

Fifa spokesman Pekka Odriozola said: "For automatic red cards there is an automatic one-match suspension.

"The disciplinary committee also opens a case and they will be looking at that incident and taking a decision."

Fifa's disciplinary code gives the committee the option of a longer ban for "unsportsmanlike conduct".

It may find his action was contrary to the fair play code which states: "Winning is without value if victory has been achieved unfairly or dishonestly. Cheating is easy, but brings no pleasure."

'Fifa Probes Suarez Handball' http://www.skysports.com/football/world-cup-2010/story/0,27032,17368_6243302,00.html (Date of use: 10 August 2010).

Uruguay's handball denied Ghana a place in the World Cup semi finals. Uruguay do not view that handball as unfair or dishonest play but rather as an act for the higher purpose of winning the game. Ghana, however, see the handball as unfair play which is contrary to the fair play code.

Discuss the different philosophical approaches being used here. In your substantiated opinion, which view is the correct one?

Students must treat this assignment as a professional legal opinion. Correct referencing is essential. (10)

EXEMPLAR ANSWER 1

The handball incident in the match of Uruguay versus Ghana represents the dilemma of the law as it is and the law as it ought to be.

On the one hand we have Uruguay applying the law 'as it is' or rather the law as set out by the ruling body FIFA. After the handball incident Suarez was given a red card which resulted in him leaving the field of play and a one match ban.

This would appear to be a strict application of the rules an example of legal positivism. The handball rule exists to adjudicate handball incidents - 'once you have identified the rules, you could make accurate predictions regarding future events'.[1]

In line with the epistemological thesis it is not relevant whether the handball was the 'hand of God' or whether it was immoral or unfair play because morality or natural law should not and cannot be the basis of law.[2] And therefore issues of morality or fair play should not be the basis of the rules of football as set out by FIFA, nor should they be the basis for adjudicating incidents such as the handball. Therefore the handball incident can only be interpreted in terms of the law which resulted in the red card and the one match suspension.

The social thesis of legal positivism also recognises that law is a social system. Thus as the nations which participate in the Soccer world cup have accepted and agreed to play according to the rules set out by FIFA those are the rules to which they should be bound.[3] As Ghana and Uruguay had agreed to play according to the FIFA rules which contain the handball rule, the treatment of the handball incident in this match was the correct approach.

It also follows from the command thesis that FIFA is the sovereign power of the soccer world cup. And as the sovereign it is FIFA who stipulates what the rules of soccer are and therefore that these are the rules which must be obeyed by the citizens (the participating nations).[4]

In light of the above Uruguay should use a positivist approach to the rules to support their argument that a strict application of the handball rule as it is was the correct approach to have taken in the circumstances.

On the other hand Ghana would prefer an interpretation of the law 'as it ought to be'. Whilst Ghana could agree that there is an existing handball rule they could argue that the law is indeterminate. Whilst the teams, players and referees are bound by the rules they are also bound by the fair play code. A strict application of the handball rule in this circumstance amounted to unfair play. The handball incident allowed Uruguay to win the match by cheating, which is contrary to the fair play code. Uruguay won

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1 Kroeze IJ Study guide for Legal Philosophy LJU406K (Unisa Pretoria 2007) 60.
2 Kroeze *Study guide* 61.
3 Kroeze *Study guide* 62.
4 Kroeze *Study guide* 63.

because Suarez cheated. Essentially, the positivist application of the rule resulted in Uruguay 'winning...without value'.

It would have been fairer play to allow the judge (the referee) to recognise his freedom of choice in the situation and allow the goal. Had Suarez not cheated the goal would have been awarded and Ghana would have won the match in the last few minutes of the game. This would have resulted in a fairer outcome for the match, an outcome which is not contrary to the fair play code.

This argument follows the approach of the progressive realists. Rather than rules being applied conservatively and formally the judges need to realise that rules are indeterminate and that they therefore have a choice in the adjudication process. This means that judges have to consider other factors when making judgements. Rather than merely applying the rules as they exist judges need to make policy choices which will enable them to bring about socio-economic reform.[5] Judges need to bring about the law as it ought to be.

Thus, as the judge in the handball incident, the referee should have considered that a strict application of the handball rule would amount to unfair play, and considering factors such as the time left in the game and the fair play code he could have allowed the goal which would have amounted to a more just outcome.

In our opinion what is at stake in this case is not merely the outcome of the game (and the result for the two nations) but the 'spirit of the game' of football. When considering the 'spirit of the game' fair play becomes very important and therefore the fairer outcome, the more just outcome, would have been for the referee to allow the goal and for Ghana to have won. This would have been a far more 'scientific' result than the strict application of the law.

[5] Kroeze *Study guide* 76 – 77.

EXEMPLAR ANSWER 2

The scenario under discussion is an excellent example of the problems associated with natural law thinking. The reasons for this statement will become clear in the course of the discussion.

Natural law is an aspect of premodern thinking and is based on the idea that exists a set of rules or laws that are not made by humans. Natural law can be defined as follows:

> *Natural law* is the idea that there is a real, pre-political set of rules that provide the yardstick against which human laws can be measured.[1]

The idea is that this set of laws (called natural law) comes from god/gods/nature and provides a way of measuring human laws. These laws are not found in books or legislation or court cases, but they are unchanging, universal and unquestionable. But that also means that it is difficult to determine their content.

Both parties in this dispute rely on the idea of "fair play". The Uruguayans argue that it is "fair" to bend the rules for a "higher purpose". Presumably that higher purpose is sanctioned by some higher power. The Ghanaians, on the other hand, argue this is against the fair play code, which is obviously very vague. So, both sides base their arguments on fairness, but that concept is nowhere defined or explained.

This is typical of natural law arguments that rely on metaphysical assumptions.[2] Like Plato's Ideals of Justice, the precise meaning of "fair play" is never exposed. And fairness can, as in this case, mean very different things to different people depending on a variety of factors. Thus, both sides can claim that they argue from a superior, moral position. But in fact, neither can be rationally evaluated and are therefore irrelevant to science.

For the perspective of Realism and CLS this is an excellent illustration of indeterminacy in law and in society.[3]

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1 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 18. Italics in original.

2 See Kroeze *Study guide* 17 – 18 for a discussion and explanation of metaphysics.

3 For a discussion on indeterminacy in Realism and CLS, see Kroeze *Study guide* 73 – 74 and 125 – 126.

SELF-EVALUATION QUESTION 2

Read the following paragraph and then answer the question at the end:

> Ritual circumcision is practised across many cultures in the world and is one of the *"most resilient of all traditional African practices within [the] urban industrialised environment"*. In South Africa, every year, young abakwetha (Xhosa: male initiates) are hospitalised or die from circumcision wounds undergone during traditional initiation rites. Ritual circumcision[1] under some circumstances can put young men at risk of contracting STDs, HIV/AIDS and other blood-borne infections. (Stinson K "Male circumcision in South Africa: how does it relate to public health" http://www.africanvoices.co.za/culture/circumcision.htm (Date of use: 12 August 2010))

Write a critical essay in which you comment on this cultural practice from the perspective of Critical Legal Studies. (10)

EXEMPLAR ANSWER 1

The practice of ritual circumcision is often defended as a cultural practice and thus protected by the right to practice and enjoy one's culture as guaranteed by sections 30 and 31 of the Constitution.[1]

It is possible though to interpret the practice as more than an aspect of Xhosa culture. The practice also serves to maintain the dominant position of men in society.

It is commonly understood that black Xhosa males need to go through the ritual in order to be considered as men. The ritual serves as the passage through which a boy becomes a man. If males do not participate in the practice they are never deemed to be 'men' in Xhosa society and never attain the respect and responsibilities that are associated with manhood.

Men who have undergone the ritual are associated with traditional male stereotypes. They are seen as strong, brave, courageous, unemotional and as being able to withstand violence. The practice thus maintains the idea that only males who have these qualities are 'real' men and those 'real' men should portray these stereotypes. Thus men who do not have these characteristics are not 'real' men. It also means that as women do not (and cannot) undergo the ritual they are not (and cannot be) associated with these characteristics.

Thus the practice maintains the false consciousness of this male stereotype. It perpetrates the idea that men should have such characteristics and that as the men who have performed the practice have these characteristics that they are the dominant people in Xhosa society. This maintains the hierarchy in which men are treated as the standard against everyone else is judged. The false consciousness perpetuates this hierarchy by creating the belief that as this is the way society has always been structured this is the way is should continue to be structured.[2]

The practice of ritual circumcision also highlights the fact that law is politics. Despite the fact that traditional circumcision can result in death and also puts the initiates at risk of contracting HIV, STD's and other blood borne infections[3] there is very little legislative or executive intervention.

Two of our post 1994 presidents have been Xhosa men (Nelson Mandela and Thabo Mbeki) and many members of the African National Congress are Xhosa men. The ruling party has considerable interest in remaining silent on the issue and in perpetuating the false consciousness as it allows Xhosa men to hold these positions of power.[4]

It is important to question this false consciousness not merely because of the health risks involved in ritual circumcision but also so that we break down the stereotypes of what makes a man a man, what makes a woman a woman and what makes a child a child. And thus we can break down the arbitrary hierarchies that exist in society.

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1 Constitution of the Republic of South Africa, 1996 s 30, s 31(1).
2 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 122.
3 Stinson K "Male circumcision in South Africa: how does it relate to public health" http://www.africanvoices.co.za/culture/circumcision.htm (Date of use: 12 August 2010).
4 Kroeze IJ *Study guide* 126.

EXEMPLAR ANSWER 2

The first thing to remember about Critical Legal Studies[1] is that their analyses are not limited to the law and legal rules. Their goal was to be "a political and social movement that tried to link their intellectual activities to political goals".[2] This means that they not only looked at the law, but also at other social institutions and practices as the object of their study.

The basis of CLS analysis is the idea of false consciousness. By this they mean that people in society have a certain way of looking at their own cultural practices. In essence they think that the things they do are "natural" – that things are the way they are because they have to be that way. They then try to unmask the underlying ideology[3] by using deconstruction.

In this case the ritual or practice of male circumcision is regarded as an important part of Xhosa culture.[4] For most members of the Xhosa people, it would be unthinkable to question this ritual. It is regarded as required by metaphysical assumptions about the role of men and about the forefathers.

But from a CLS perspective the practice should be questioned. They argue that "society is characterised by exclusion, hierarchies, violence ... for which no legal justifications can be found".[5] In this case you have a practice that would normally be regarded as assault, but which is justified as a "cultural practice". And, in effect, it excludes women and reinforces the hierarchical position of men within that culture.

In a nutshell the practice of male circumcision is a remnant of premodern thinking within a postmodern society. In light of the constitutional safeguarding of the right to human dignity and freedom and security of the person,[6] the practice should not be allowed to continue.

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1 Hereinafter referred to as CLS.

2 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 122.

3 "Ideology" can be defined as: "A set of doctrines or beliefs that form the basis of a political, economic, or other system". See http://www.thefreedictionary.com/ideology (accessed on 31 March 2011).

4 See http://www.southafricalogue.com/features/the-xhosa-circumcision-ritual.html (accessed on 31 March 2011).

5 Kroeze *Study guide* 123.

6 S 10 and s 12(1)(c) and 12(2)(b) of the Constitution of the Republic of South Africa, 1996.

SELF-EVALUATION QUESTION 3

Read the following article and answer the question.

The birth of Lead SA

Article By: Stephen Grootes
Wed, 04 Aug 2010 10:10

A new initiative was launched on Wednesday morning calling on South Africans to respect the country's laws and lead by example.

The Lead SA call to action is the brainchild of Primedia Broadcasting and is supported by Independent Newspapers. It aims to encourage action with immediate effect and reminds every South African to challenge negative perceptions, follow the rule of law and help change the country.

The call to action comes as South Africa has been plagued by violent crime and corruption for several years.

"Our country has come through some of the toughest challenges, both in its history and in the recent past. Some of these trials may have produced miracles beyond our imaginings, but they have also robbed us of some our basic moral values. We see it in the abuse, the disrespect, the indifference, corruption and all sorts of evils around us," said Primedia Broadcasting CEO Terry Volkwyn.

"We can blame the government, community leaders or teachers for the state of our nation — but what have we as individuals done to make a difference?"

Lead SA is following former president Nelson Mandela's call to the citizens of the country to be proactive about improving their lives.

"It is in your hands to create a better world for all who live in it," said Mandela.

"Lead South Africa is a Primedia Broadcasting initiative that seeks to get individuals to look within, and be the change they want to see in our country," said Volkwyn.

"Start by greeting the car guard. Don't give bribes to government officials. Don't break the law. Don't litter. Don't speed. Volunteer at your local charity. Get to know your neighbour. Help your children with their homework. Recycle. All these little things add up to make our world better. This is what makes each one of us 'leaders'."

Reaction to the initiative is already coming in.

"I encourage every South African to become a leader and contribute to making South Africa a better place," said the J&J Group's Jay Naidoo.

Former cricket boss Ali Bacher is also behind it.

"It is a great initiative, it is about enhancing in my opinion the further changes that are needed in this country," said Bacher.

Religious groups are also backing the initiative.

"Despite our diversity we can have united goals and share those goal," said Muslim leader Moulana Ebrahim Bham.

"The real power of Lead SA is that it taps into the essential goodness of every human being," said Chief Rabbi Warren Goldstein.

For more information on Lead SA go to the website.

Eyewitness News

Grootes S "The birth of Lead SA" http://news.iafrica.com/sa/2566641.htm (Date of use: 12 August 2010).

The article encourages South Africans to *inter alia*; follow the law, get to know your neighbour and stop littering. Lead SA envisages South Africa as it ought to be. Is Lead SA following a natural law philosophy or a positivist philosophy or a combination of the two?

Students must treat this assignment as a professional legal opinion. Correct referencing is essential.

(10)

EXEMPLAR ANSWER 1

In its most basic form, the difference between natural law and legal positivism pertains to the difference between "the law as it is" and "the law as it ought to be". While adherents of natural insist that the validity of law depends on its moral content, legal positivists deny this link. In their opinion morality might influence the content of law, but is irrelevant to its validity. In other words, the metaphysical assumptions behind natural thinking leads to the assumption that law is not a simple human activity but one that is implicitly linked to the natural order.[1] On the other hand, legal positivists think that morality plays no role in the scientific application of legal rules.[2]

From a Critical Legal Studies perspective, however, the debate between the law as it is and the law as it ought to be is yet another example of the false consciousness at work in law and in society. While the specific legal rules might be different from the specific moral rules, they both serve to maintain the same power relationships and the same outdated ideas.[3] In respect of the idea of the "rule of law" specifically, Crits have shown that there is very seldom any agreement over the content of this idea.[4] If this indeterminacy is true, then the concept can be manipulated to substantiate any political agenda.

But it is the call to a return to common "moral values", "essential goodness" and "united goals" that is most troubling. These seem to presuppose that South Africans all share a set of moral values that is generally accepted and practiced by all. But that is not necessarily true. Volunteering at charities and getting to know one's neighbour might sound good, but it is not necessarily things that all people regard as good in and of itself. As Kroeze points out, this kind of assumption serves to hide the deep divisions and distrust in society rather than to highlight it so that it can be addressed.[5]

In the end this initiative is not about a choice between the law as it is and the law as it ought to be, but about how the law hides and privileges certain moral views over others.

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1 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 16-17.
2 Kroeze *Study guide* 60.
3 Kroeze *Study guide* 121ff.
4 Radin MJ "Reconsidering the rule of law" 1989 *Boston University LR* 781-819
5 See Kroeze IJ "Doing things with values" 2001 *Stell LR* 265-276 as quoted in Kroeze *Study guide* 130.

EXEMPLAR ANSWER 2

LeadSA is promoting a vision of South Africa 'as it ought to be'. This essay will argue that this vision promotes a natural law approach and that this natural law approach is even apparent in positive law.

The quote by Chief Rabbi Warren Goldstein, "The real power of Lead SA is that it taps into the essential goodness of every human being," and Terry Volkwyn, 'Some of these trials may have produced miracles beyond our imaginings, but they have also robbed us of some our basic moral values' suggest that there is a higher order against which human conduct can be measured.[1]

These moral values and the essential goodness of human beings follow Plato's essentialist view of the nature of reality. From the article there appears to be a set of moral values, an Ideal of goodness which is unchanging and absolute.[2] The moral values and goodness are the Ideal for human behaviour. We can measure the rightness of human conduct against this Ideal.

LeadSA suggests that South African citizens should conduct themselves in a manner which is consistent with these Ideals. And thus LeadSA is promoting a natural law approach.

However the argument may be raised that ordinary citizens cannot access these Ideals. From Plato's philosophy we know that only philosophers can access the Ideals.[3] How are ordinary citizens supposed to conduct themselves in a manner which is consistent with these Ideals if they cannot access them?

I argue that these Ideals have been enunciated in the Preamble and the Bill of Rights of the South African Constitution.[4] The Preamble of the Constitution requires South Africans to;

> 'Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and

---

1 Grootes S "The birth of Lead SA" http://news.iafrica.com/sa/2566641.htm (Date of Use: 12 August 2010).

2 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 21.

3 Kroeze *Study guide* 23.

4 Constitution of the Republic of South Africa, 1996.

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'[5]

The Bill or rights also includes rights such as Dignity.[6] Case law has emphasised the principle of ubuntu and our responsibility for the well being of all citizens.[7]

This legislation and case law recognises that there is a higher, universal, unchanging Ideal of behaviour in South Africa. Thus the South African approach to the conduct of South African citizens is based on a higher, unchanging, eternal Ideal. And this is the approach advocated by LeadSA.

5 See Preamble of Constitution of the Republic of South Africa, 1996.
6 S 10 of Constitution of the Republic of South Africa, 1996.
7 *S v Makwanyane and another* 1995 3 SA 391 (CC) at par 308.

SELF-EVALUATION QUESTION 4

Read the following extract and then answer the question that follows:

> Society organises its members into certain hierarchies and groups with defined, distinctive roles. These organisational factors may be political, religious or economically determined and in turn, become guidelines that shape the practices and modes of living, ultimately contributing to a common cultural identity. Expanding on this, culture therefore directs and determines (all) aspects of human behaviour, interaction and belief systems, and is passed from one generation to the next, through articulated ritual, language and symbol.
>
> Rituals are a means for society members to communicate values and ways of living, through psychological, social and symbolic interactions and teaching. Anthropologists categorise ritual in three specific ways:- those which are calendrical, those which address misfortune, and rites of passage . Male initiation rites fall into the latter, and illustrate the transition from boyhood **(ubukhwenkwe)** to manhood **(ubudoda)**. (Stinson K "Male circumcision in South Africa: how does it relate to public health" http://www.africanvoices.co.za/culture/circumcision.htm (Date of use: 12 August 2010))

Write a critical essay in which you discuss this extract from the perspective of postmodern feminism. (10)

EXEMPLAR ANSWER 1

Postmodern legal feminism departs from a non-essentialist perspective. By this is meant that it uses an approach that assumes that men and women do not have "essential" characteristics or behaviours. This is in contrast with modern feminists who assume that women are essentially either the same as or different from men.[1] But postmodern feminists unmask this as fiction – women may be the same biologically, but they are as different from one another as they are from men. There is therefore no such thing as a "typical" woman. All women differ because of their backgrounds, upbringing, culture, politics and economic circumstances.[2]

What this means is that what we regard as "masculinity" and "femininity" is culturally conditioned. This means that we learn how to be men and women from our families, culture, religion and society. While the question of whether we are male or female can be easily resolved by using simple blood tests, the question of whether we are acting "like a woman" or "like a man" is not as easy to resolve.[3]

But it should not be forgotten that postmodern feminism is also a *postmodern* movement. Like the Crits, they are concerned with the power relations inherent in the gender roles prescribed by society. These power relations may be presented as cultural practices, but in reality they serve to strengthen the superior position of men and the subordinate position of women. The rite of male circumcision is an illustration of such a cultural practice.

While the ritual in itself might not seem to be harmful to women, the net result is a reinforcement of the hierarchies inherent in that society. It reinforces stereotypical ideas about appropriate behaviour for men and women and this makes it impossible to women to break out of these stereotypes. As Kriegler said in the Hugo case, the small benefit cannot justify the negative impact this has on maintaining stereotypes and hierarchies.[4]

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1 For essentialist feminism see Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 131- 134.

2 Kroeze *Study guide* 134-136.

3 This is another way of articulating the sex/gender division that postmodern feminists use – see Kroeze *Study guide* 134.

4 President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC) at [83].

EXEMPLAR ANSWER 2

Cultural circumcision advocates a relational feminist approach to the question, 'what is the nature of reality'.[1]

Relational feminism developed from the essentialist feminist philosophy. Essentialist feminism proposes that all men and women have innate, unchanging and universal characteristics.[2] Essentialist feminism would regard men as strong and women as weak, men as adventurous and women as timid and men as violent and women as peaceful, amongst others. They recognise these characteristics as being essential to men and women.

Essentialist feminism has divided into sameness feminism and difference feminism (from which we get relational feminism). Sameness feminism says that whilst men and women are physically different they have the same essential characteristics. These essential characteristics are inherent in all human beings such as life, the ability of rational thought and the ability to work. Therefore essentialist feminists argue that since we all have the same essential qualities we should receive equal treatment.[3]

Difference feminism however recognises that although women and men are essentially the same (for example both sexes are human) we also have essential differences. These differences mean that we should have equal but different treatment because we have different needs. Maternity leave is an example of this.[4]

Relational feminism develops from this branch of feminism. Relational feminism recognises that men and women are psychologically different. As girls and boys develop psychologically they become different. As boys mature they identify with their fathers or the older men in their lives. Whereas, as girls mature they identify with their mothers and other older females.[5]
This identification with different genders provides the 'guidelines that shape the practices and modes of living, ultimately contributing to a common cultural identity' and ensures the organisation of society, 'into certain hierarchies and groups with defined, distinctive roles'.[6]

Male initiation rites perpetuate and enforce these psychological differences as they provide a space in which boys can identify with, and begin to identify themselves as, elder males. This in turn enforces the hierarchies that exist in society. It enforces the belief that men and women are different and therefore have different roles to play.

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1 Kroeze IJ *Study guide Legal Philosophy LJU406K* (Unisa Pretoria 2007) 2.
2 Kroeze *Study guide* 132.
3 Kroeze *Study guide* 132.
4 Kroeze *Study guide* 132.
5 Kroeze *Study guide* 134.
6 Stinson K "Male circumcision in South Africa: how does it relate to public health" http://www.africanvoices.co.za/culture/circumcision.htm (Date of use: 12 August 2010).

ADDENDUM B

ADDENDUM B: INFORMATION ON MIND MAPS

Definition

A **mind map** (or **mind-map**) is a diagram used for linking words and ideas to a central key word or idea. It is used to visualize, classify, structure, and generate ideas, as well as an aid in study, problem solving, and decision making as well as to condense or reduce large chunks of information into much shorter manageable chunks of learning.

Concept Map - Similar to a mind map, a concept map is a visual representation of a group of related topics. It differs from mind maps in that there can be more than one key idea with multiple links in any direction, whereas mind maps typically have one central idea from which associated ideas spring from.

If you teach a Grade 7 pupil how to do their **personal** mind maps, you will help turn them into active self-directed students who can study learning materials and also use it for brainstorming, problem solving, essay planning and revision etc.. The learning that takes place while one is creating such a map occurs **while** you are designing it and allowing your mind to radiate these thoughts outward through associations and linkages – the same way your neuro-cells are linked to one another and the way the brain is designed. Such learning – once mastered through lots of practice – actually stimulates the brain while the traditional linear method of writing summaries tends to bore the mind. The brain is designed to "wire" what it "fires" more often. The more you "recall" your mind maps during the year – say once every fortnight – the easier and quicker it becomes. By reducing the masses of content you need to learn to acquire the necessary knowledge to a few pages instead of hundreds, you are making learning a far more enjoyable experience.

Mind maps were originally developed by Tony Buzan, who has carried out considerable work relating to brain function. What follows is a very brief "starter" and can be followed up by reference to the BBC book ***Use Your Head*** by Tony Buzan. Learning to create and use mind maps can take some practice, so it can be a good idea to start by changing the shape of your notes. For example, most people write notes in a linear fashion, like this:

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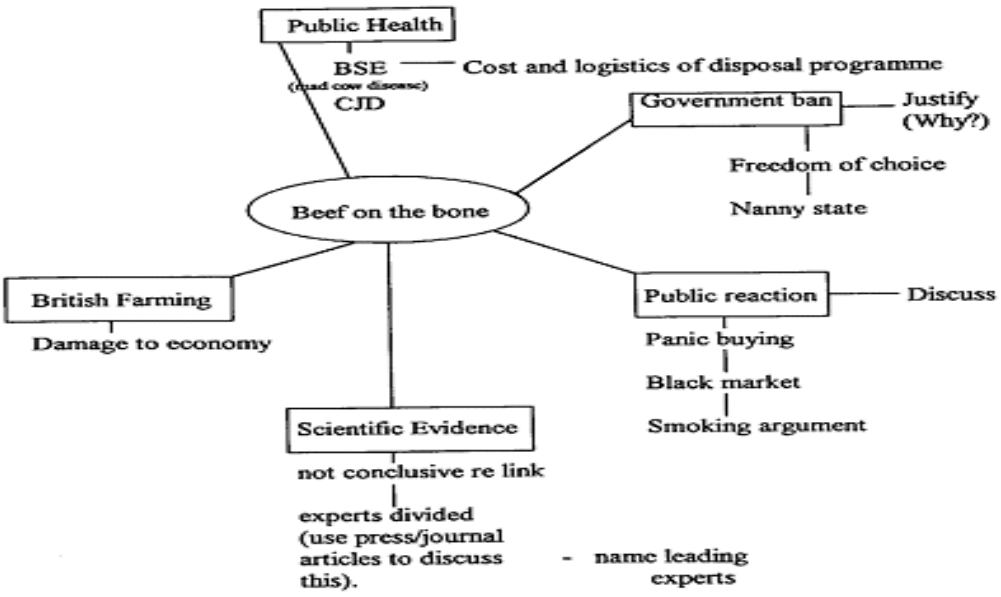
_____

Some people also use colour, underlining and/or highlighting to enhance important points: this is one step towards changing. Others like to use tables with summaries. Search on the internet using Tony Buzan/mind maps and you will be amazed at how much detail is to be found on the net.

The next step is to try a "spider gram". Your linear notes become a diagram, like this:



The main advantage of this change is that you can easily see if there are any links between themes and ideas. From this, it is a relatively short step to making a mind map. The following example is taken from Buzan's book:

STEPS ONE CAN FOLLOW WHEN DOING A MIND MAP AND USING IT

1. Study the unit and read through it quickly to acquaint yourself with the main points the writer is trying to express. After this you can read the unit slowly underlining the key thoughts in each paragraph, making sure you know the meaning of each new concept you come across. In the back of your mind keep asking those questions like: What is the writer trying to tell me? Do I agree if I think of my experiences in relation to what is written? What is the main point this paragraph/ section is making etc. Where you find it difficult you may have to take more time, even ask someone and discuss the issues if possible. Write down in the margin your questions and thoughts. Remember your mind map will consist of **main headings**, **sub-headings** and their **key ideas** plus **relationships** and **NB questions** etc.

2. Once you have worked through the unit carefully, spending about an hour on 5 pages if you are a slow reader which is about 250 words per minute, you can see if you can draw a mind map of the unit in your workbook you use for your studies. If the unit is lengthy (over 20pp) you may want to make two maps. There is no hard and fast rule so experiment and be creative and use color as the mind loves this. The main thing is you are reducing the amount of reading you have to do in a way which is less tiresome.

3. Finally you will remember we included a concept map of the first part of the first unit (Activity 1.2). I used a program called "mind-manager" but it is better to do it by hand. Using A3 pages for a unit instead of the usual A4 pages in a notebook will leave you with lots of space to put in extra notes, questions and relationships as time progresses and you work through the other units. If you prefer you can chunk the material into smaller parts as I have done to make the map more readable for you.

4. Spending two hours on a mind map for each unit will be time well spent. Our memories have three types i.e. **sensory memory** which acts as a filter via attention so that only information that's of interest is passed onto the **short-term memory or working memory**. With memorization techniques i.e. mnemonics we use mainly chunking, visualization, repetition, rehearsal, etc. over time to encode incoming information for storage **into** the **long term memory.** The weakest link in this "memory chain" is said to be **recalling** or retrieving the information necessary for application to solve or answer questions repeatedly without our study guides open and in front of us – as in a exam. That's why cramming a week before the exams is seldom successful. If you do pass the test, that knowledge is soon forgotten because the "wiring" is too weak. Many students only recall when they do tests or when writing exams which is far too little. Remember the learning cycle becomes more and more effective as "head" knowledge runs the full circle via the "heart" and the "hand". Using concept maps is a great tool as it helps the brain perform effectively. The more we use this knowledge to apply to new problems the more "knowledgeable" we become.