

# John Rawls

• welfare liberalism

→ Process. rational deliberation.

- co-op.
- reason alone
- link, original position
- veil of ignorance
- max min certain of.

→ Greatest equal liberty

→ Difference principle

→ Fair equal opportunity.

• relativism → knowledge particular

• refine rationalism

• temper individualism

• void

• metaphysical

# Late-Modern

# Ronald Dworkin

• Constructive interpretation

→ Conventionalism

- rule law & princ. legality
- Positivism
- due notice
- compliance.

→ Pragmatism

- realism
- consequences
- policies

→ Integrity

→ Constructive interpretation

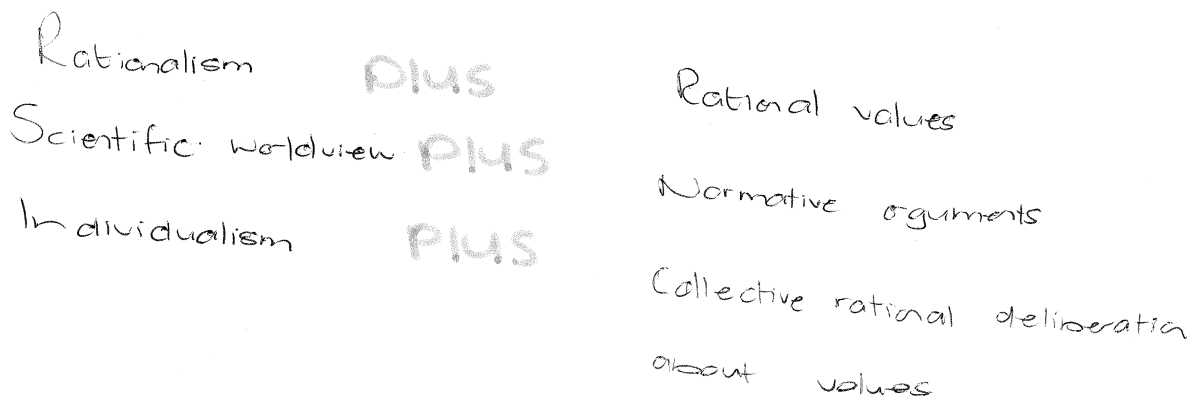
- five
- best rule
- reading → best can be.

# Late modern legal philosophies

- Relativism = knowledge isn't universal & absolute, but always particular and provincial, i.e. truth depends on your own perspective.
- refine Rationalism by adding that we need to have rational values in our thinking, lost faith in autonomous human reason.
- unless we put some collective values & principles of justice back into the technological world it could destroy its creators.
- didn't reject individualism
- temper individualism by including a communatorium aspect in thinking.
- individuals should together deliberate rationally & collectively about values.
- try to develop conceptual & normative arguments to explain how subjectivity can be limited in legal decision making
- saw EM faith in science & rationality as misplaced.
- like existentialism = man lives in a void where absolute & universal truths absent.
- philosophy of the void.
- seek eternal value or truth beyond the chaos to fill void.
- rational approach to law rather than metaphysical one.

## Character.

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



# Ronald Dworkin

- Focuses on way judges decide new cases by constructively interpreting existing legal material.
- adjudication is an interpretative process.
- interpretive process can be conducted rationally; the liberal ideal of a legal order that's neutral towards the indivi. concept of the ethical good can be achieved.
- Courts are custodians of law's empire, and judges are its princes.
- 3 options of understanding legal institutions in contemp. Western liberal democracies.

## 1. Conventionalism - Rule of law; principle of legality = central values.

- refers to positivism

core of convent: idea that the fundamental purpose of our legal practices is to give people due notice of circumstances under which coercive power will be used against them.

- enables indivi. to pursue own interests in a purposive manner.
- the deployment of power by the state is only justified by its compliance with previously announced rules.
- Rules are central to the conventionalist view of law.
- ~~no room for values~~

## 2. Pragmatism - Rule of law; legality = absent.

- refers to American realism.

- core: idea that the fundamental purpose of our legal practices is to bring about certain social consequences.
- deployment of power by the state is justified solely by the good consequence brought about as a result of that deployment.
- policies are central
- ~~no room for values~~

\* Neither one of above acceptable to Dworkin.

Convent = no room for values

Prag = great emphasis on policy.

} made own theory: integrity.

### 3. Law as integrity.

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

• Hart & realists pointed out that rules don't always determine the decisions of judges: Dworkin rejected this.

- Hart
- answers to legal problems is a clear
  - in hard cases, judge has discretion to go beyond the rules & consult other legal materials.

Constructive interpretation: 8.6.10. - 30.6.09

- judges decide new cases by constructively interpreting existing legal materials.
  - river metaphor: = river flows wherever you stand = judges decide according to the flow of the law. 1 judge can't change the course of the river.
  - if judge has to decide case, 1<sup>st</sup> apply the rule that fits the fact.
    - if 2+ fits, look @ principle behind rule that will give rule weight
    - principle found in history & tradition of every legal system.
  - indicate which rule fits best
  - .. construct. inter means reading the authoritative legal sources in way which makes of them the best they can be.
  - reading involves judges own understanding of law as a conscientious lawyer who appeals to legal principles when he interprets relevant materials as honestly as he can.
- distinction btw rules & principles.

# John Rawls 30-6-11

- principles of justice
- difference principle
- welfare liberalism
- maximum strategy.

- his welfare liberalism is an attempt to reconcile the value of social-economic equality with the traditional liberal value of liberty.
- politically NB that individual should have freedom to pursue a personal conception of the good life.  
↓  
Not Absolute, not lead to unjustifiable difference in wealth.
- he defends 2 ideas essential to welfare liberalism:
  - a rational I would subject the pursuit of own life project to certain universal principles of justice.
  - 1 of those principles of justice would be that his pursuit must always be to the economic benefit of the least advantaged I within political community.

## Process of rational deliberation

- a rational indiv., interested only in advancing own interests, would realise the need to co-op. with others.
  - co-op btw a nr of I gives rise to group conflict of interests, resources.  
due to scarcity of
  - for such co-op to be stable members should share a common point of view from which claims btw them can be judged.
  - they should enter into a social contract with each other, based on principles of justice = principles chosen rationally and must be just & fair.
  - justice as fairness: principles of social co-op are just only if all the members would have agreed to them in circumstances that are fair.
- the 3 principles of justice:

### 1. the principle of greatest equal liberty

- each I has an equal right to most complete basic liberties compatible with a similar system of liberty for all.
- basic liberties incl:
  - right 2 vote
  - freedom of speech & association
  - freedom of the I
  - right 2 hold property
  - freedom from arbitrary arrest & seizure.

2. Socio-economic inequalities btw individuals must be arranged in a reasonable fashion to advantage of all or the maximum benefit of the least advantaged.
- difference principle.

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

### - Rawls & SA Constitution

- a nr of const. provisions can be harmonised with ideas from his theory.
- an analogy can be drawn btw Rawls 1<sup>st</sup> principle & the provisions relating to the protection of individual rights in B.O.R.
- e.g. S 9(1), 16(1), 19(3), 25(1)
- his difference principle is enshrined in S 9(2) AA