

# Legal Theory

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# 1. Tamanaha on Three themes

## 1. Tamanaha's three ideas/themes/meanings as to rule of law:

1.1 The broadest understanding of the rule of law is that sovereign and the states are limited by the law – behind this idea is the restriction of government tyranny.

- a. Government limited by the law – two distinct sense
  - One is officials abide by the current valid positive law;
  - The other one is even they want to change the law they are not free to change in their desire.
- b. The modern day equivalents to legal limits on law-makers in liberal societies are bills of rights or human rights declarations.

1.2 The rule of law can be seen as formal legality; formal legality emphasises a rule-bound order established and maintained by government.

- Certainty and predictability – in capitalism, certainty and predictability allow merchants to calculate the likely costs and benefits from anticipated transactions

1.3 The rule of law can be seen by way of contrast to the rule of man

- a. Law is non-discretionary while man is arbitrary; law is objective while man is subjective
- b. Two-fold construction – first identify the judiciary as the special guardians of the law; second deny the presence of the individual who is the judge
  - [Some links with Lesson 4](#)
- c. Ultimate risk of this theme is that law might become rule by judges – judges must be selected with utmost care.

## 11. Devlin v Hart Debate:

### 1. Devlin: public morality is essential to the 'fabric' of society therefore society is justified in criminalising conduct that poses a threat to public morality.

- Conduct may threaten public morality even if no 'harm' to another.
- Society entitled to use law to protect its morality
- Argues against Mill that society should be able to enforce whatever moral standards are held by the majority, and thus that there is no 'public/private divide based on harm, but rather where the law can extend to is based on where the majority of the community thinks that law should extend to

2. **Hart: no principled basis for Devlin's regulation of 'immorality'. Empirically, there is no evidence that (sexual) immorality destabilizes society.**

- Even if behaviour is morally objectionable that is not of itself sufficient reason for the state to interfere. Devlin identifies society with its morality but morality changes (and society continues) so its relation to the social fabric is questionable
- Hart also attacks Devlin's basis of popular morality because for one, it is not possible to say that an entire society shares one morality, and secondly, Devlin bases this on 'gut instinct'.
- Hart thinks that if we are going to base decisions on morality they should at least be rational, examinable and arguable

## 15. Sen on Inequality and Critique to Rawls

1. **Redressing manifest injustice is more urgent (and feasible)**

- Sen argues that an important advantage of the realisation-focused approach is that it enables us to speak of 'global justice'

2. **Criticism of transcendental institutionalism**

- **For Sen, this tradition 'concentrates primarily on getting the institutions right' and ignores the actual societies or social arrangements they produce**

3. Contractarian mode of thinking: a hypothetical social contract that is assumed to be chosen is clearly concerned with an ideal alternative to the chaos that might characterize a society.

- **Small point of Sen**

4. May be no reasoned agreement on principles of justice in the original position

- **Critique to Rawls:** If a theory of justice is to guide reasoned choice of policies, strategies or institutions, the identification of fully just social arrangement is neither necessary nor sufficient.

5. If a diagnosis of perfectly just social arrangements is incurably problematic then the entire strategy of transcendental institutionalism is deeply impaired.

- **Easily postulate into essays**

6. **The subject of justice is not merely about trying to achieve some perfectly just society or social arrangements, but also about preventing manifestly severe injuries.**

- **For example, Abolition of slavery:** it was the diagnosis of an intolerable injustice in slavery that made abolition an overwhelming priority, and this did not require the search for a consensus on what a perfectly just society would

look like.

7. **Global justice:** Not a question of perfect institutions. The question we have to ask here is: what international reforms do we need to make the world a bit less unjust?

- Use in essay

## 18. Lafont on Global Human Right

### 1. Gap in State-centric

1.1 This state-centric interpretation of responsibilities for human rights protections leaves a gap with respect to any responsibility that states might have in their treatment of members of other states either through direct action (for example, through their foreign policy) or indirectly through their actions as participants in global governance institutions.

- It suggests that states must protect the human rights of their own people, but are off the hook with regard to their treatment of those who are outside their jurisdiction.

1.2 The current situation of the prisoners at Guantanamo is perhaps an obvious example of how a state can exploit the existence of this gap in the state-centric interpretation of human rights obligations for its own (often questionable) goals.

1.3 But perhaps a better illustration of the morally unacceptable consequences of the state-centric distribution of responsibilities is former President Clinton's recent apology for pushing for dramatic tariff cuts on US rice imports to Haiti at the expense of Haitian farmers

- As made crystal clear by this example, in defending the economic interests of farmers in Arkansas, President Clinton took himself to be discharging his obligation to protect and promote the rights of citizens in his own country.
  - But in light of the humanitarian catastrophe following the collapse of rice production in Haiti, he came to recognize his direct responsibility in hampering the human right to food of Haitian citizens.