

# Legal Theory Notes

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## Summary

- Common Law Constitutionalism: judges are keepers of the common law, and common law is higher.
- Natural Law: insists that what law is depends some way on what law should be.
- Positivism: understands law primarily in terms of rules and adjudication primarily in terms of the impartial application of rules to facts. Austin: (Positivist) Laws are orders backed by threats of sovereign, which are habitually obeyed, it is believed that the threats are implemented, ruling body is supreme and external.
- Marx: Rules are a tool for the ruling class, part of the super structure.
- Waldron: Liberal theory of rights, (liberalism accommodating communitarianism concerns) and rejects judicial review on democratic grounds.
- Dworkin: (Natural Rights) Judges should decide case on the best justification they can. The chain novel analogy, best fit and best light
- Fuller: (Anti-positivist, similar to Dworkin) Context and purpose of the law, as judges search for the best purpose of the law, this will lead to inclusion of the inner morality of law, must follow the criteria for making law (vehicles in the park analogy) + has criteria for legality.
- Hart: (Positivist) Does not agree with Austin, because he does not account for all laws (e.g. marriage where there are no threats). Law is convergence of a behaviour, accompanied by serious social pressure to conform, or rational acceptance, good overall may be negative for the individual. Distinguished from game and etiquette rules by seriousness and secondary rules. Rules of recognition: these enable efficiency and change. Interpretation of law: penumbra and core, indeterminacy of language, efficiency of law.
- Kymlicka: Minority rights, only to national minorities, distinction between internal and External rights are problems.
- Okin: Feminist
- Dyzenhaus: Wicked legal systems + the ROL and whether judges have an obligations. Can strictly apply the law, refuse jurisdiction, or interpret in best way possible to avoid an awful outcome, through principles of fairness derived from the common law. Hard Cases in a Good Legal System: Majority governments pick on minorities, shouldn't approval otherwise give stamp of approval,
- Habermas: Communicatory rights because we want laws which are accepted by the population by free and rational acceptance. This requires communication, which requires rights. Two types of making laws legitimate. Content, or method of manufacture. (Assumes humans are fundamentally rational) + Judicial review.
- Illewellyn: legal realism, rules are rationally indeterminate
- Eisgruber: Judicial review is not undemocratic and can be better at representing the minority rights, based on rights, because they are not pandering to the majority.
- Tamanaha: The ROL is a cumulative, continuous spectrum, which goes from thin to thickest (from how the law should be made to what the law should be) + Rule by Substantive rights.
- Critical Legal Studies: Double think. Is never neutral, and never advantages anyone except the ruling elite. One time players and Repeating players.
- Legal Realists: Take a realistic/scientific view of what judges do not of law but what judges will likely do. Law is Rationally indeterminate. Judges do not apply the law, rather the particulars of the case. Precedent is not binding, because no to cases are ever alike.
- Sandel: communitarian
- Eisenberg: Legislature cannot legislate for everything. Indeterminate cases should be decided with reference to social propositions that enjoy widespread support.
- Young: Impossible to be impartial, and we shouldn't pretend to be impartial

# Exam Topics

## • The nature of law

### • Law, power, morality and politics

- Tamanaha: at its most basic, your conduct will be judged by a measurable, objective legal standard
- Hart: Rules of recognition, wide spread compliance by officials
- Austin: Sovereign Commands v Habermas-democracy
- Differences in understanding of the rule of law, work in Cheema and the rule of law in the global south.

## • Indeterminacy

### • Critical theory perspectives on law

- Hart: Language is inherently indeterminate
- Theorists on indeterminacy
- How to decide tricky cases: morality, social propositions
- Legal realism
- Dworkin's political morality: best fit and best light
- Fuller: Text and context
- Dyzenhaus + Young: wicked legal system

## • Rule of law

### • Adjudication and the role of judges

## • Rights and democracy

### • Law and cultural difference

- Hart: Rules of recognition (Habermas: rule of recognition are democratic)
- Role of judges: Waldron, Habermas, Eisgruber
- Minority rights in a democracy: Kymlicka, Okin
- Liberalism and rights: Waldron, Kymlicka
- Entrenching rights, and should they be constitutionalised?
- Minority rights
- Waldron's rights as a fall back
- Do we have rights?
  - Naturalism (Dworkin), liberalism (Individual freedoms, freedom to choose to the good life, individual rights is universal rights), communitarianism (what the local community believes)
- What are rights
- How do we protect them?
- Bill of rights