

DESCRIBE THE MAIN ELEMENTS OF CLASSICAL COMMON LAW THEORY

Fundamental principles

- Developed in the late 16th-17th C
- Law is accumulated social & political **customs** that have been in practice since time immemorial
- **lex non scripta** (unwritten law) – origin of law could not be in writing
- **Declaratory theory** – law is the expression of a deeper, pre-existing reality that is discovered & declared by judges (never created by judges)
- **Artificial reason** – law requires artificial reason to be discovered – it cannot be deduced from natural/ordinary notions of reason – it requires extensive study & ongoing dedication to law
- The 3 fathers of the common law are Coke, Hale & Blackstone

The 3 Fathers

Edward Coke

- Origin - dates back **before Norman Conquest** & continues unchanged
- It is superior to any other form of rules/legislation etc because it represents a **collective wisdom of the ages**
- Change is only an **illusion OR fixing problems** created by human error (de-generative & regenerative)
 - De-generative – deviation from law is
 - Regenerative – restoration of law as it ought to be in response to degenerative change
- Coke deconstructs law & through distinguishing cases & legal principles, the law is broken down & built anew – in this way the age of common law is deconstructed & rebuilt, evolving into law that is modern & applicable

The 3 Fathers

Matthew Hale

- There is **no origin** of the common law – **it never begins or ends**
- **Timelessness** gives it superiority since it has **endured the passage of time**
- Artificial reason **guarantees its stability**
- **Change is an illusion** (ship of the Argonauts)....

Describe the Critical Legal Studies movement

Historical & political context

- ...*"the beginning of a dissolution"*
- Started in the US in the 1970s & builds upon legal realism

Main characteristics

- A postmodern movement that all claims to knowledge are questionable
 - It is a collection of different arguments & writers & authors
 - It marks the beginning of the fragmentation of legal theory into multiple perspectives
- Law is naturally uncertain & unstable
- Law is not neutral or objective (it cannot be either)
- Law IS politics & economic power (influenced by Marxist)

Critiques

- CLS connects law & power but they don't explore the nature of power any further – purely abstract
- Written by privileged academics who aren't concerned about rights or critiquing rights
- CLS critique for the sake of critiquing – it does not propose anything else – it only suggests that the law is politics but it doesn't explore it any further (very limited compared to other approaches like feminism, critical race theory, post-modernity)
 - BUT all these theories are possible because of the impact that CLS movement has had on legal theory & it is only with this explosion that then the law can be seen from a plurality of perspectives often to be re-combined & reconciled together
- The normative nature of law is excluded from the realist & CLS movement critiques (probably the greatest shortcoming of both movements)

What are the concerns of critical race theory?

Background

- Began in 1970s – 1980s
- Law professors & activists became disillusioned with the results of the civil rights movement because it was evident that whites still had disproportionate power & superior standards of living
- CRT uses postmodernism theory to uncover what they define as imbedded racism
- Focuses on discrimination & 'otherness'

Arguments

- Law is the reflection of a **privileged elite** (historically white male)
- 3 concepts that were used & fundamental to uncovering the work of privileged elite:-
 1. **Race** & racism are used to explain the social & cultural roots of discrimination – race (as a construct) justifies & normalises the position of power
 - These natural explanations of differences btw races have been used to historically allow oppressive & discriminatory political actions (eg. White Australia Policy in Oz)
 2. **Colonialism & post-colonialism**

The concept of **colonialism** is directly derived from the...

Outline the main feminist legal theories

Background

- FLT emerged & flourished (mainly) in the 1960s onwards from the ongoing debate of equality & political equality
- Social & personal positioning count – 'the personal IS the political' – it is inherently & necessarily a political position

Arguments

- A feminist or women's **standpoint epistemology** propose to make women's experiences (instead of men's) analysed because they are better equipped at understanding certain aspects of the world – men & women lead different lives with different kinds of knowledge
 1. Feminists argue that social science is not objective & value free because it was conducted mainly from male perspectives & interests
 2. In order to make the meaning of women's lives more visible, it was necessary to analyse it from their point of view
- The significance of standpoint epistemology lies in its challenge to descriptions and classifications of social life that are based on universalistic male assumptions

Main types of Feminism

- **Liberal feminism** – women deserve the same rights as men

Equality can be achieved within the institutional framework of the existing legal & political system which they recognise...

BRIEFLY DESCRIBE THE MAIN FEATURES & LIMITATIONS OF LIBERALISM

What is liberalism?

- Dominant philosophy in Western democracy from late 17th C
- Founded on the ideas of liberty & equality
- It is a product of Enlightenment & the rise of scientific method
- It marked the shift from 'faith in divine relation' to the 'faith in human reason'
- 3 varieties of liberalism – laissez-faire, utilitarianism & welfare liberalism
- Hobbes & Locke mark the foundation of western liberalism (esp in law & nature of law)

Origins of Liberalism

Thomas Hobbes – "society is at war with itself"

- The "**state of nature**" has no security, peace or safety = society is at war with itself
- Uses the concept of 'natural law' to justify the necessity of **Leviathan** (absolute ruler) - an overwhelming political power that protects ppl against themselves

John Locke – "We are all equal & have natural rights"

- 1st to express that we have certain fundamental **individual rights** which the govt should not violate
- Govts exist to protect the natural rights of citizens which exist in **the 'state of nature'** (which is ordained by God)
- All people were equal & have natural **rights to life, liberty & property**

Citizens surrender responsibility...

IDENTIFY, DESCRIBE & EVALUATE THE MAIN CLASSICAL & CONTEMPORARY NATURAL LAW THEORIES

NLT assumptions

- Most ancient pillar of traditional jurisprudence
- Plato – only laws that pursue the idea of justice could be considered right (Justice is linked to law)
- It "is" what it "ought" to be

The most significant NLTs

Aristotle (300-400BC)

- First to systematically theorise this theory
- **Man is a political animal** - his **telos** is to live in a political society
- Aristotle has 2 types of laws:-
 - **Natural** (universal type of law) – need to reflect that *telos* & for that to flourish it needs to reflect those community political values (eg. Don't kill your parents)
 - **Human** (particular to any human group but once laid down is decisive) – but they are of a diff quality & order (eg. Don't drive on LH side of road)
 - Both go to very different senses of the law – natural laws should allow us to express the things that are natural within us (& that is our *telos* of being a political animal)
- Nature is the end & goal of all things ('*telos*') – did not agree with Plato
- Law is something that naturally exists permanently within human political relations

Cicero & Roman Legal Tradition (100BC?)

- Any unjust law isn't law (b/c God is the source of all natural law) – cant be changed by human intervention
- Identified 3 elements of natural law:-
 - It is **higher** (superior to human posited law)
 - It is **universal** (either eternal (lasts forever) or historical (doesn't change)) – eg. Classical common law
 - It is **discoverable** by natural reason

Romans introduced the distinction...

What are the main concerns & perspectives of postmodern jurisprudence?

There are 4 main things you need to be able to articulate here

- Modernism & its rejection
- Postmodernism
- Structuralism as a form of postmodernity
- Its evolution of poststructuralism

Modernism & Postmodernism

Modernism and modernity

- Dominated as a theoretical approach in the 19th C & a good part of the 20th C
- Attempted to identify an absolute foundation of knowledge (led to the development of positivism)
- Modernity is a blanket that covers positivism, natural law & common law theorists up until post-modernism
- The way in which theory was structured was v.similar & largely concerned with uncovering universal truths that exist outside of the person, just waiting for us to discover them

Postmodernism – "my reality is not your reality"

- Post-modernism is contrast to modernism – rejects all universal values, principles & rationality
- The truth is within each person – it is subjective & relates to each person differently (object & subject are abstract fantasies)
- It represents the strongest rejection of the quest for reality & truth as universal values that have formed the basis of western epistemology for centuries
- Postmodernism is a rejection of any absolute truth

CRITIQUE - it risks being nihilistic & may lead to absolute moral relativism

Structuralism & Poststructuralism

Structuralism – "language constitutes & shapes our reality"

- **Saussure & Language** - structuralism emerged from postmodernism & was initially applied to the work of **Saussure** (Swiss linguist) who was interested in the structure of **language** & the way it is spoken
- Language is a system of sophistication which is comprised of a few basic elements:-
 - **A referent** – always remains outside the system of sophistication
 - **A concept or signified** – that refers to this referent that is always inherently external
 - **A sound image or signifier** – that which refers to a signified/concept
- There are words, the meaning of words & the construction of words. The construction of words (*referent*) is the external element of the system, whereas the word & its meaning (*concept/signified*) are internal & relative.
- The different ways we communicate are external systems of construction whereas words & what they mean are internal and relative (Eg. You say something & I receive the words & construct my own meaning to them)...