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 postmodernism
- 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)