CRITICAL LEGAL STUDIES

CLS started to emerge in the 1960s, but was formalised through a now famous Conference on Critical Legal Studies, first convened in 1977 in Madison, Wisconsin. Indebted to the social theories of Marx, later Marxist critique, including critical theory and hegemony, the 'crits' took on a range of critiques of law, but in particular bored in on the underlying notions of what was known as liberal legalism.

The strands of CLS thought:

- Neutral, abstract principles, uninfected by politics, society and personal viewpoint are impossible to keep out of legal reasoning and decision-making.
- Law claims to be a complete system of rules, norms and doctrines, but CLS says that law is indeterminate/uncertain. Legal decision-makers will 'pick and choose' doctrine to fit the desired result.
- Legal principles and categories such as contracts are used to organise social relations to not favour the sectors of society who can use law to their advantage. CLS do not deny the 'realty' of these principles and categories
- **Law alienates people**. Every time you assert a right against someone else, you are alienating yourself from society, which hardens existing social structures, disadvantage or advantage, into a permanent form.
- **Rights are a furphy (rumour)**. Rights are abstract and able to be manipulated. One person's right to free speech will be destroyed if it clashes with a more acceptable right to liberal society, e.g. protection of property. Rights will be empty of meaning if they cannot be given effect.
- **Law dismisses subjectivity and individual circumstances**. Law thinks that objectivity and reason are value free rather than recognising that these notions deeply embed political or social choices.

An example: **why is contract law wrong**

- it represents the type of legal action needed in an alienated society, where individuals must assert formal rights against each other
- through its formal structures**, it masks inequality that became embedded in contract doctrines during the 19th century's laissez-faire period**.
- It assumes that parties are formally equal and disregards individual circumstances as subjective and unstable
- It favours of objective tests, but can choose the 'right' rule to get the 'best' outcome in the case
- We cannot imagine a world w/o contract law
- **It is liberal legalism in action**

Where did the crits get their ideas?

- **Law has a political dimension: blunt instrument approaches of MLT, fact skeptic strands of American Legal Realism, and sociology**
- **Indeterminacy of law: critical theory, American Legal Realism, postmodernism and poststructuralism**
- When we assume legal principles are real, we reify them (To regard or treat (an abstraction) as if it had concrete or material existence). We forget that they're made up in the 1st place and cannot imagine functioning w/o them. Crits are concerned with sourcing the origin of 'facts'
- **Alienating society: Marx's original concept of alienation**

- **Critique of rights**: commodity-form theory, hegemony, the psychoanalytic concept of 'denial' from critical theory. We engage in denial because we want to believe that we have rights, but our own experience belies the promise of those rights.

Contemporary Social Theory and Law:
- Looks at assumptions made by individuals in society, including questions of identity.
- Social theory examines the composition, structure, and development of social phenomena and knowledge – incl culture, economics, law and politics – in both contemporary and historical contexts
- Examines function of public institutions, the nature of power in society

POSTMODERNISM

Not originally and not primarily a theory of law. It has developed from theories about language.
- **Postmodernism rejects Enlightenment values and the belief in absolute values**.
- **Suspicious of authority, received wisdom and values**
- **Does not accept that rationalism represents an unbiased, neutral and independent tool for seeking truth**.
- **Sceptical of metanarratives – universal theories which claim to provide an overarching explanation for things** – and focus on local and particular explanations which are accepted as being true only in that they represent the best explanation in the particular context.
- **"truth" is always contingent, and conceals and suppresses other truths**.
- Regards everything as fair game: who wins and who loses?

Other Theories and Postmodernism
Modernism
- **Modernism says there is an overarching truth**
- **Postmodernism: "truth" is always contingent, and conceals and suppresses other truths**.

Natural Law
- Accepted universal truths are simply expressions of dominant values in a particular time and place

Positivism
- To attempt to analyse law as a discrete subject matter disconnected from e.g. politics is contrived and flawed because law exerts a coercive force on individuals. It is inherently political

Outsiders: breaking down what insiders see law as containing a degree of conformity, and providing new insights into how law actually operates.

Basic Concepts

Text
- Not just written, but any form of representation
- E.g. painting, sculpture, architecture
- Everything in the world could be taken as representation, subject to interpretation. E.g. judge's robe
- There is no single or determinate meaning discoverable in the text
- Author supplies the text, reader creates meaning, incorporating their experience and understanding of the world
- Texts are a 'fabric' women out of ideas and sources from within the culture creating an 'interplay' of signs which generate a multitude of layered meaning, which are resolved, if at all, by the process of *reading*, not writing → HCT JJs can produce 7 diff sets of reasons for their decision

The modern legal subject
- see the legal subject in light of positivism – stable and determinate individual; disregarding the specific characteristics the individual already has, but tested against the hypothetical 'reasonable man'
  - Even when law appears insufficient (Hart's judicial discretion or Dworkin's hard case), legal decision making will be guided by judges who have been trained to think like legal insiders
  - Hart's 'critical reflective attitude' is not talking about looking critically at law; it is talking about non-conforming conduct, not the law itself

The postmodern legal subject
- No hard boundary between the subject and the surrounding world.
- Legal subject is embedded in its social and historical context, and is uniquely created by experiences

Modern Legal Subject	Postmodern Legal Subject
• Atomistic • Disconnected from context • Assumed to be the same as each other	• Not disconnected from their context • Unique and highly individualised products of the experience which have gone into their formation
Modern legal subject forming rltnships	**Postmodern legal subject forming rltnships**
• Forms temporary connections w/ others in pursuit of their objectives …but retains its atomistic nature	• Form relationships (both w/ other individuals and w/ their context)…i.e. behaviour and language change with context …which alter their nature
Modern legal subjects over time	**Postmodern legal subjects over time**
• Does not change as a result of its rltnships • Is an idealisation used to explain law from a conventional viewpoint	• Constantly redefine themselves by reference to these rltnships • Have a view of the world, including law, which is a product of their interaction w/ it …and the view changes as their interconnections change

HOWEVER there is <mark>no single postmodern approach to the legal subject</mark>. Lloyd says that the instability of the subject takes two forms – 1) focusing on the failure of traditional groupings (based on gender, sexuality, race etc) to capture the subject sufficiently and 2) focusing on the fragmented nature of the individual within themselves as they absorb and respond to their social contexts.

Postmodernism and language – binary opposition
- Binary opposition: pairs of terms (e.g. man and woman) which are constructed in such a way that they represent opposites. Such pairs of terms are not simply a neutral way of dividing up the world, but carry with them a marked preference for one of the terms – usually the first term of the pair (the superior term). E.g. good/evil; light/dark; express/implied; guilty/innocent; admissible/inadmissible
- Note the story of the injured boy and the mother who was a doctor meant to operate on HER son

Deconstruction- **analysing concepts to uncover what is lost or pushed into the background**.
- Remember Bentham's preference for codification – no need for an intermediary to interpret the words of the code
- Also remember later that Hart recognised that language was not always a precise mechanism for communicating ideas – penumbra of uncertainty within the meaning of the word

- THEREFORE, there is a fixed meaning built into words
- HOWEVER, POSTMODERNIST says completely opposite: all texts are mediated by language, the cultures, assumptions of author and reader and the process of reading itself
    - To deconstruct is to strip away the layers of meaning which are associated with words, to arrive at a new understanding of the word and the assumptions embedded within them; and this new meaning is also subject to further deconstruction

Deconstruction as legal method
- Used to critique legal doctrine, showing how arguments which are used to support the doctrine may also support the opposite rule
- Used to expose the ideological basis and the underlying assumptions in a legal doctrine
- Provides a way of critiquing mainstream interpretations of the law
- Constant re-assessment of law
- No formula, only commonly used techniques that forms part of the deconstruction method.

Genealogy
- Tracing historical origins of a doctrine, looking for clues as to HOW it arose – conditions at the time
- Closely associated with Friedrich Nietzsche – who sought to uncover the origins of ideas like 'good' and 'evil'

Differance
- A French pun – difference and deferral
- Implies that there is a difference between the two terms of a binary opposition;
    - that meaning is never entirely complete within the text, but is in some way deferred;
    - the meaning of each of the terms in the opposition defers to the other because although they're opposites, each requires the other in order to have any meaning at all.

Trace
- refers to the marks left by the half of the binary opposition that is not explicitly present
- Traces of alternative views are brought out by deconstruction

Deconstruction of a legal doctrine
- Rape as an example: a man could not be sued for raping his wife – historical ideas that when women is married she became property of her husband; exposes inequalities and hierarchies which were present at that time (1988 CC)

Power/Knowledge
- **Conventional theorists**: Bentham and Austin's sovereigns hold power because of their position within a political or legal structure
- **Postmodernist:** Michel Foucault - **power is intertwined with knowledge**, and constructed within a network of constantly shifting social relations.
    - **Truth and power are mutually dependent** –
        - truth: both science and law; law – doctrine of precedent
        - power: small scale rltnships which cumulatively create ideas of what is acceptable or true within the particular system
    - Law is NOT describe by ref to institutional forces, but by myriad local and particular interactions which constitute society – rather than top-down analysis, takes a no central authority, bottom-up analysis
    - E.g. We are accustomed to think that legal doctrines are formed in authoritative leading judgments. This may be where they are articulated, but doctrines really come from everyday decisions made by individuals like solicitors. Solicitors determine what issues to argue before the court.

CRITICISMS of POSTMODERNISM

- **Postmodern approaches to meaning are not appropriate to law, which relies on a secure and stable meaning**.
- Important concepts for law, like objectivity and neutrality are broken down by postmodern analysis. Instead, **it seems to offer indeterminacy, uncertainty and confusion**
- Notion of responsibility – harder to grasp in postmodern analysis than modernism
- Rejection of modernism should be based on a rational argument – internal contradiction
- **<u>Inherently negative</u> – provides no secure benchmark against which legal ideas or concepts can be measured**. Deconstruction may pull ideas apart but provides no guidance as to how to put them back together.