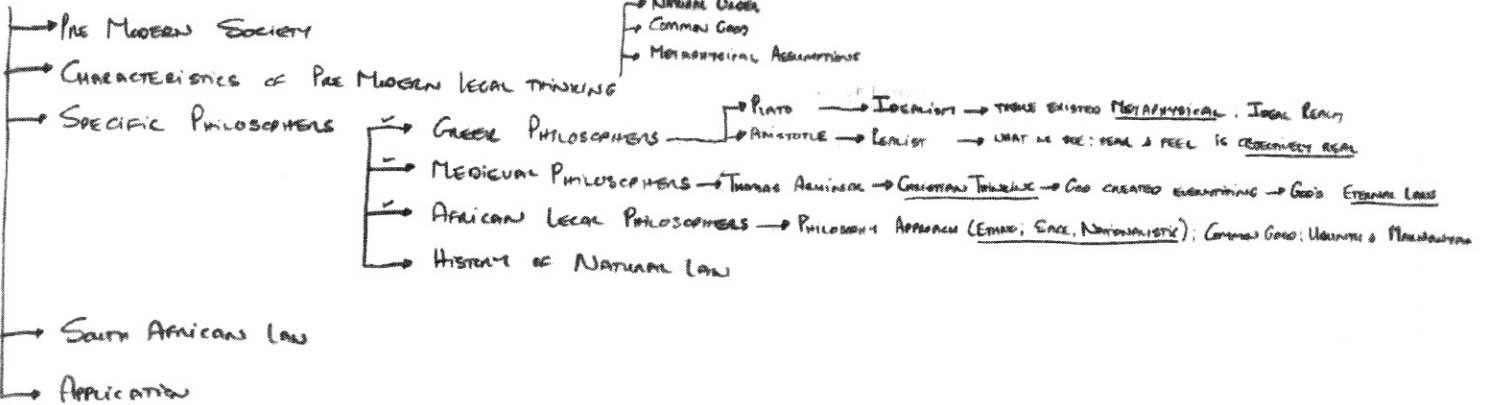


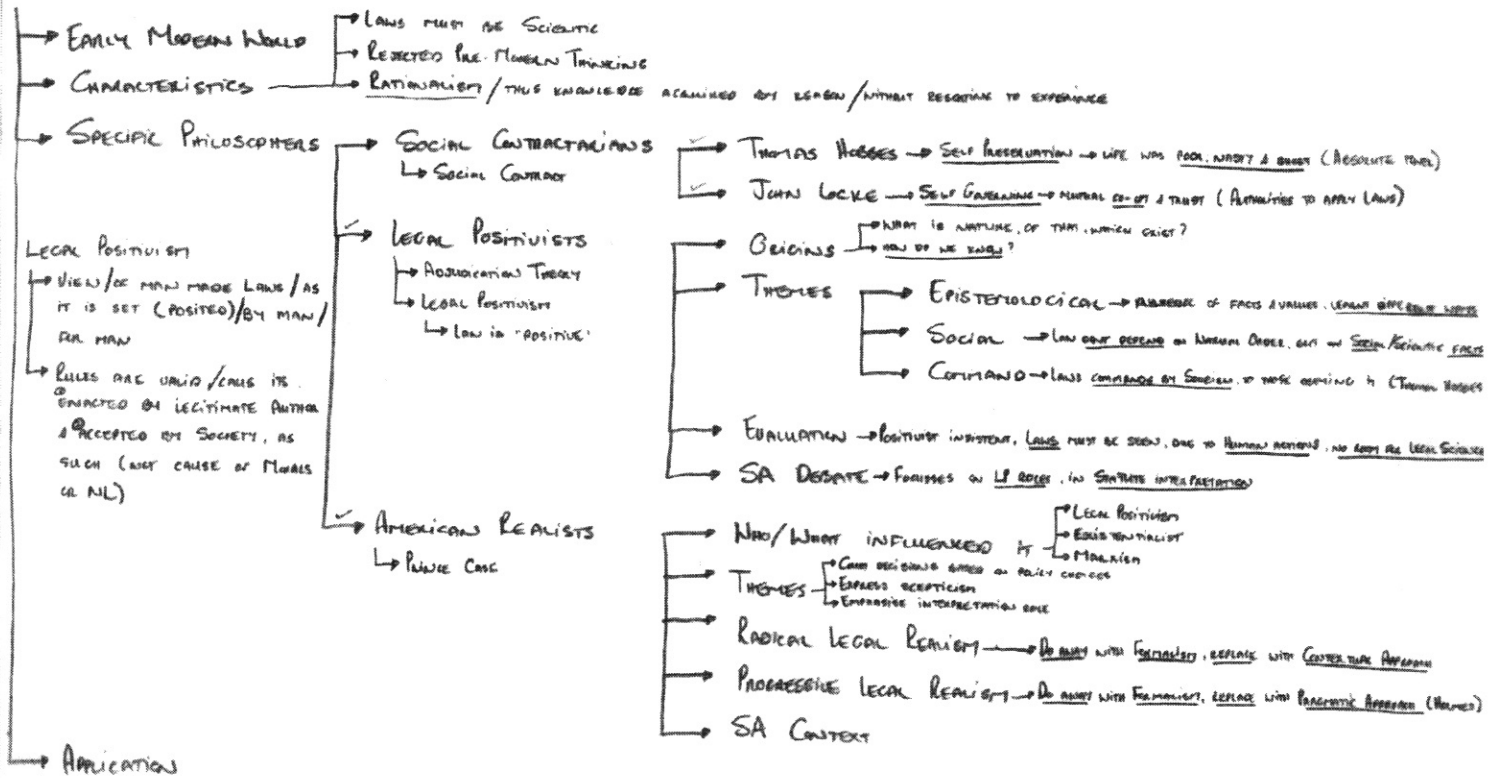
# PRE-MODERN LEGAL PHILOSOPHY

- WHAT IS LEGAL PHILOSOPHY
- CLASSIFYING LEGAL PHILOSOPHIES

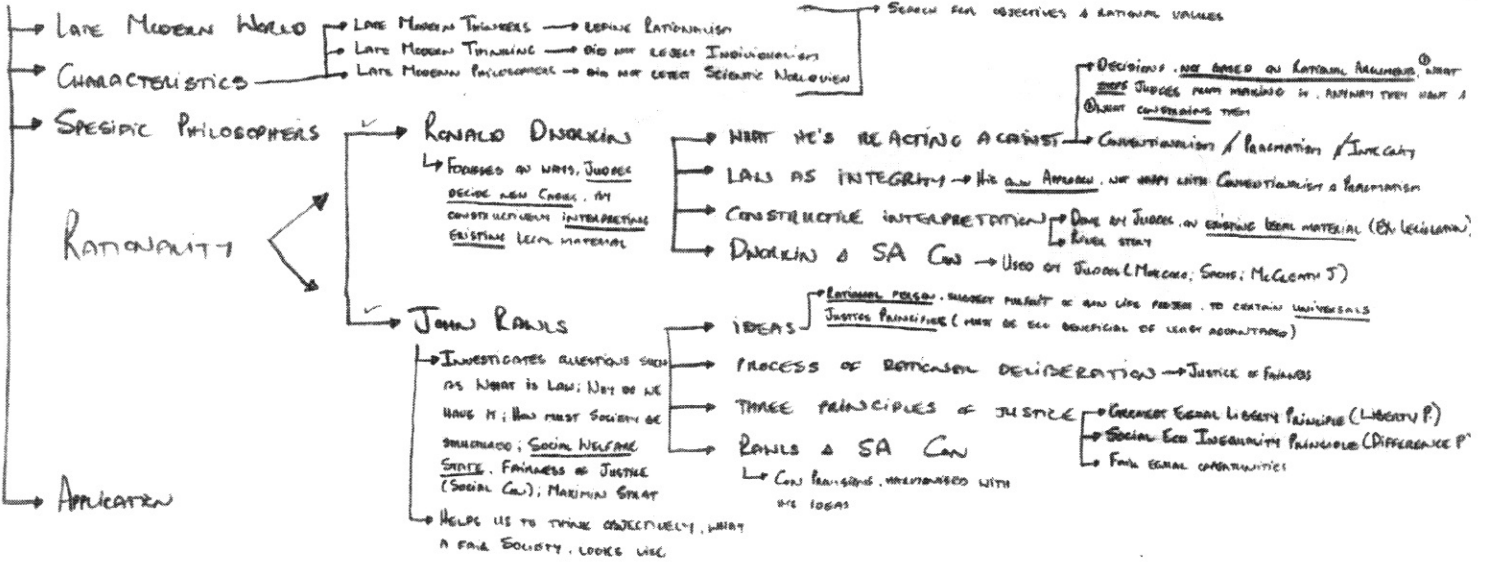
## PRE-MODERN LEGAL PHILOSOPHIES (25 MIN)



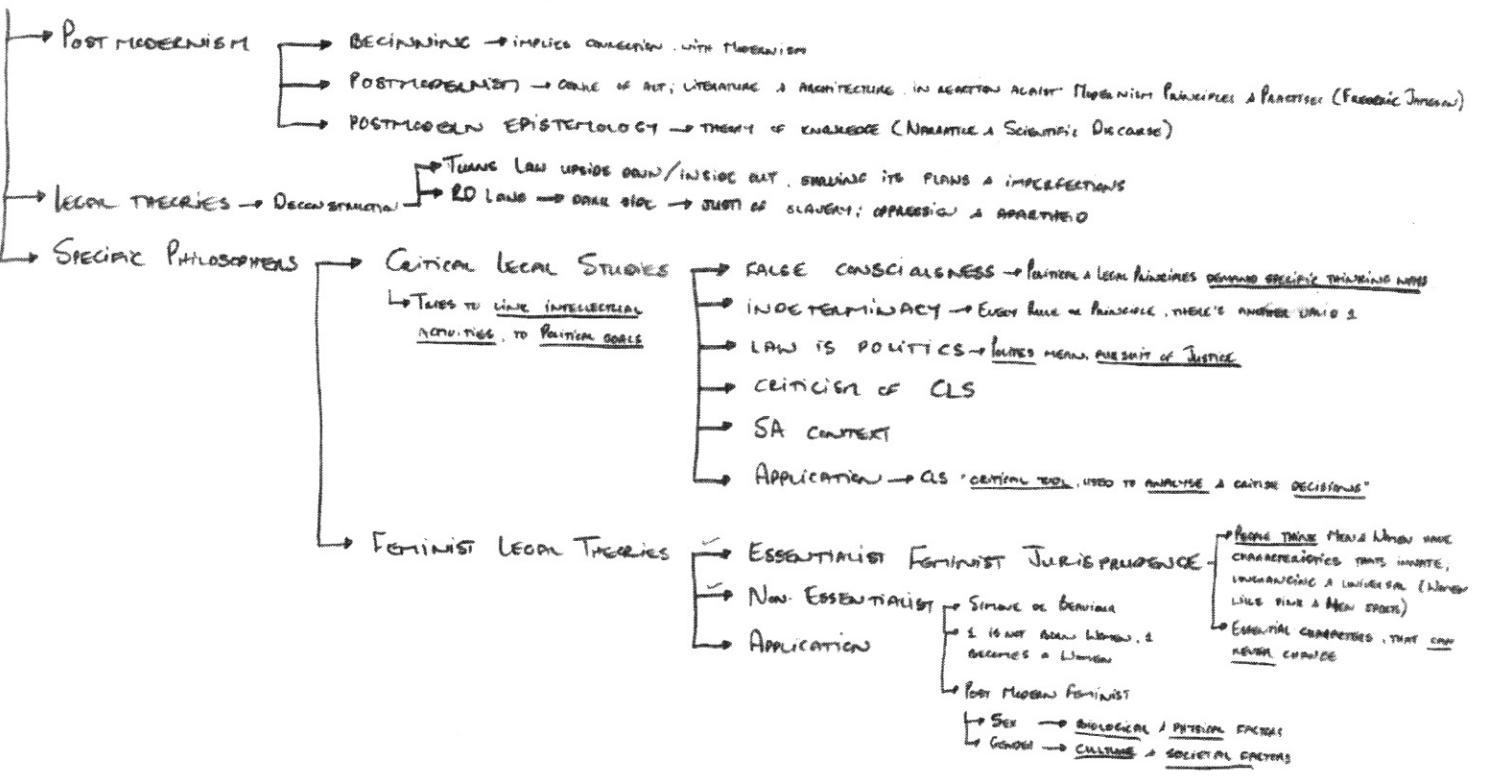
## EARLY MODERN LEGAL PHILOSOPHIES (40 MIN)



# LATE MODERN LEGAL PHILOSOPHIES (12min)



# POST MODERN LEGAL PHILOSOPHIES (33min)



Pre Modern

- Emphasis is on Community's Good (Common Good), as opposed to Individual Interest
- Relies on Religious Beliefs of the World
- Its Thinking is committed to Communities & Religious Worldviews, thus cause of this, it believes in NL

Characteristics

- Natural Order → Applying to Social Life & Laws (Hierarchy Structures, were never questioned)
- Common Good → Community's importance
- Metaphysical Ass → LED to theory of NL

PLATO

- NL for him = Ideals
- In Real World, things "ideal" which we can measure human conduct (Ideal Justice)
- Hierarchy (to access these Ideals) = Ideal State

ARISTOTLE

- NL for him = Forms = everything has its Purpose
- Forms are the "ideals" against which we can measure human conduct
- For him Education is important & its education to be a Political Animal = Ideal State

AGUINAS

- NL for him = God (Bible)
- Hierarchy → God
  - ↳ King
  - ↳ Man
  - ↳ Women
  - ↳ Animals

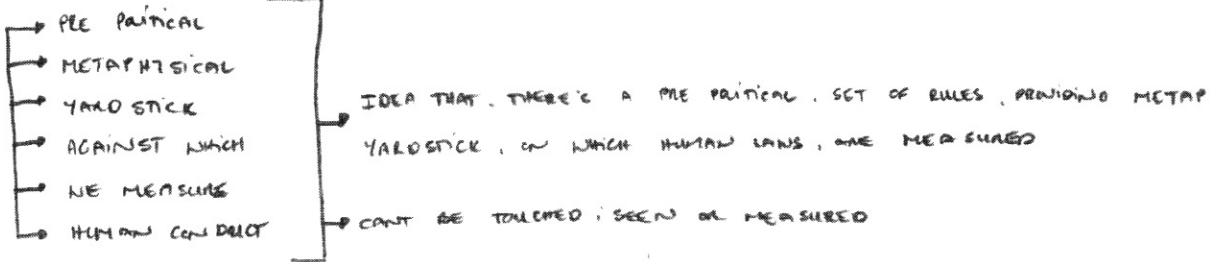
AMERICAN PHILOSOPHY

- NL for it = Utilitarian
  - ↳ Metaphysical
  - ↳ Yardstick, against which measure human conduct
  - ↳ S vs. MacIntyre
- Hierarchy → As per SA Gov. we're a "equal society"
- ↳ S vs. MacIntyre
- ↳

→ INTERPRET THESE PHILOSOPHIES INTO MODERN SITUATIONS

- S vs. MacIntyre (interpret according to its NL)
  - PLATO → Judges acted as Philosophical Kings, set down a thought about, on whether death penalty, was justice, thus accessed that "Ideal of Justice" & according to NL, the death p. isn't justice
  - ARISTOTLE → As per his Forms
    - ↳ Perhaps the death p. is moving towards its form & perhaps the ideal form of Justice, is to not have the death p.
    - ↳ So, Justice is evolving, has it reached, its form?
  - AGUINAS → "Thou shalt not kill" (Bible)
  - ↳ Utilitarian → As per Judges, the death p. was not Utilitarian

NATURAL LAW



CASE LAW (APPLICATIONS) → Christian Education SA vs. Min of Education

## EARLY MODERN

- TRIES REPLACING 'BLIND RELIGIOUS FAITH' WITH SCIENTIFIC & RATIONAL INVESTIGATIONS OF LAWS
- TRIES TO DISTINGUISH BETWEEN
  - FACTS
  - VALUES
- TRIES TO TURN LAWS INTO A 'VALUE FREE SOCIAL SCIENCE'

## THOMAS HOBBES

- IMMENSE STATE OF NATURE = WAR
- LAWSLESS SOCIETY, SO WANT TO TAKE IN 2<sup>ND</sup> PARTY TO STOP KILLING
- SOVEREIGN POWER
  - HANDOVER ALL RIGHTS
  - CITIZENS HAVE NOTHING
  - NO RIGHT TO REBELT

## JOHN LOCKE

- IMPROVED STATE OF NATURE = HARMONY / PEACE
- SOCIETY LIVING IN HARMONY, BUT PROBLEMS THAT ARISE & NEED 2<sup>ND</sup> PARTY TO RESOLVE IT
- SOVEREIGN POWER
  - INALIENABLE RIGHTS (LIFE, LIBERTY)
  - RIGHT TO REBELT

## LEGAL POSITIVISM (POSITIVISM) = COMES FROM NEAR CONCEPTION

- THEORY OF AUTHORITY (JUDGE DECIDES CASES)
  - THE LAW IS, AS IT IS (WHICH WE DECIDE ON A WHITE FROWN)
  - IF WANT TO DECIDE A CASE, YOU GO TO THE LAW AS IT IS & THAT'S WHAT JUDGES MUST BE DECIDING ON
  - IT'S 3 CHARACTERISTICS
    - EPISTEMOLOGICAL → LAW IS KNOWLEDGE, NOT TRUTH (KNOWLEDGE OF FACTS & VALUES, ARE LEARNED DIFFERENTLY)
    - SOCIAL → LAWS DON'T DEPEND ON NATURAL ORDER, BUT ON SOCIAL & SCIENTIFIC FACTS (LAWS DETERMINED BY POLITICAL & SOCIAL FACTS)
    - CONVENTIONAL → LAWS ARE CONFINED, OF A SOVEREIGN, TO THOSE WHO HAVE HABIT, OF OBTAINING IT (POWERS ARE WRITTEN, & WHAT'S SOCIALLY ACCEPTABLE)
- CURRENT SA LEGAL POSITION

## AMERICAN REALIST

- "IS THE LAW, AS IT IS" WORKING OUT FOR US?
  - ACCORDING TO THEM, HE WAS A GOOD IDEA & SAY THAT
    - MUST TAKE A PERSON'S CIRCUMSTANCES INTO ACC
    - SO, LAWS MUST BE MORE SUBJECTIVE
      - OSCAR CASE → OSCAR BARKER NEED NOT TO RESOLVE EVERY CRIME HE EXPERIENCED, SO TRYING TO GET COURT TO SEE & ACCEPT A REALIST ARGUMENT THAT HIS LIFE IN UNLAWFUL SOCIETY & OSCAR'S REACTION TO THAT SITUATION, WAS NORMAL, CAUSE APPLYING LAW AS IT IS, MEANS HE GOES TO PRISON, THUS APPLYING THE REALIST, HE MUST NOT BE GUILTY
  - JUDGES MAKE POLITICAL DECISIONS
    - WE MUST CONSIDER THE POLITICAL CIRCUMSTANCES IN A CASE CASE (ALSO COMES UP IN CLS & THEN BRING FROM THE REALIST)
- Radical
    - DO AWAY WITH FORMALIST
    - REPLACE IT WITH A CONTEXTUAL APPROACH
      - JUDGES TO TAKE SOCIAL, ECO & POLITICAL CIRCUMSTANCES INTO ACC
  - Progressive
    - DO AWAY WITH FORMALIST
    - REPLACE IT WITH PRAGMATIC APPROACH
      - BEING ABOUT, CERTAIN SOCIAL CONSEQUENCES

CASE LAW (APPLICATION) → PRINCE CASE

## CHARACTERISTICS

- RISE OF NATURAL SCIENCES, LED TO BELIEF, LAWS MUST BECOME MORE SCIENTIFIC
- REJECTED
  - NATURAL ORDER & REPLACED WITH SCIENTIFIC HOLLOWNESS
  - COMMON GOOD & REPLACED WITH INDIVIDUALISM
  - METAPHYSICS & REPLACED WITH SCIENTIFIC METHODS

- ↳ USE DECONSTRUCTION TO CRITICISE TRADITIONAL LEGAL THINKING
- ↳ REPRESENTS AN "MTV APPROACH" TO PHILOSOPHY
- ↳ EXPECTS YOU TO PARTICIPATE, BY GIVING YOU OPTIONS, IN FINDING A BETTER SOLUTION

## POST MODERN

- ↳ NOT FOCUSED ON THE "BIG QUESTIONS"

## CRITICAL LEGAL STUDIES

- ↳ HARVARD OLIVIS, MERT & DECONSTRUCTED LAWS & REFERRED TO THEIR DECONSTRUCTION PART AS "TRASHING", THIS TOOK LAWS APART & FOUND 3 CHARACTERISTICS

- ↳ LAWS CREATE FALSE CONSCIOUSNESSES → LAWS CREATE ILLUSIONS
- ↳ LAWS ARE INDETERMINATE → FOR EVERY 2, THERE'S AN ALTERNATIVE
- ↳ LAWS ARE POLITICS → DECISIONS MADE ARE BASED ON POLITICS

→ TOOK IN ANALYSING & CRITICISING LAWS

## FALSE CONSCIOUSNESS

- ↳ CAUSE THERE'S LAWS & WE'VE ALWAYS DONE THINGS THIS WAY, WE'RE COME TO BELIEVE THAT WE MUST CONTINUE TO DO THINGS THIS WAY

↳ AGE OF MAJORITY - 18 → WHY?

- ↳ HAVING THIS, ITS AUTO ASSUMED, YOU CAN DEAL WITH EVERYTHING, THIS CREATING A SENSE OF FC

## INDETERMINATE (CONTRADICTION)

- ↳ SOMETIMES LAW SAYS 1 THING & SOMEWHERE ELSE, ITS SAYS THE OPPOSITE OR ANOTHER THING

- ↳ PROSTITUTION IS ILLEGAL, BUT
- ↳ LAW SAYS, ALL HAVE RIGHT TO PRACTISE THEIR PROFESSION & TRADE
- ↳ SO, YOU HAVE THIS RIGHT, PROVIDED YOU'RE NOT A PRO

## LAW IS POLITICS

- ↳ BEHIND ALL OF THE LAWS, RULES & COURT DECISION IS POLITICALLY BASED/MOTIVATED

- ↳ AGE OF MAJORITY, CAME DOWN BEFORE '74 ELECTIONS, SO MORE COULD VOTE
- ↳ SECRETARY ACT
- ↳ NICHOLSON JUDGMENT (ANX & SA PRESIDENT)

## FEMINIST LEGAL THEORIES

- ↳ TRYING TO SHOW, HOW THE LAW, IS A MALE CONSTRUCTION & HOW IT PREFERENCES MEN (MARY JO FENG)

### SAMENESS F

- ↳ MEN & WOMEN ARE THE SAME, THIS HAVE SAME RIGHTS
- ↳ MEN & WOMEN HAVE ESSENTIAL CHARACTERISTICS, THAT NEVER CHANGES

### DIFFERENCE F

- ↳ MEN & WOMEN ARE DIFFERENT, THIS HAVE THEIR OWN RIGHTS

- ↳ SEX → BIOLOGICAL → MEN ARE DIFFERENT TO WOMEN & PHYSICAL CAPABILITIES

- ↳ GENDER → CULTURE → MEN & WOMEN HAVE DIFFERENT CHARACTERISTICS (VOICE, BODY BUILT)

### HUGO CASE

- ↳ WHY CAN'T HE BE RELEASED?

- ↳ WHEN ARE CAREERS (MATERIALIZING WOMEN)
- ↳ WOMEN WHO WERE RAPED, MUST TRY IN COURT WITH THEIR ABRACTION & DESCRIBE WHAT HAPPENED (TERRORIZING)
- ↳ WOMEN ARE ONLY GOOD FOR SEX & IN ORDER TO BE RELEASED FROM PRISON, MUST SHEDD OF HAD SEX, TO BE HAD A CHILD (SEXUALISATION)

→ MARY JO FENG