QUESTIONS ON THE NATURE OF LAW

Law is made ***for and by the people.***

It is not cast in stone and it isn't elevated above criticism. It is also being constantly created.

"It is thus not a completed monument from which you must only lift a veil, but rather an unfinished statue which you must help complete."

WHY DO WE HAVE THE LAW

Much has been written philosophically about why we have laws and what *'the law'* is.

In general, there is no single or correct answer to this question.

We do know that the law presupposes a SOCIETY.

E.G. ***one person:*** no need for rules or laws.

two persons: certain rules will have to be laid down to facilitate peaceful and productive interaction between the two people - more than one person will have a claim to existing resources.

group of people: cannot necessarily agree on rules among themselves on a continuous basis. A need then arises for some kind of *structure of authority or government that will make rules for the whole society.*

N.B. adherence to these rules has come be known as ***'the RULE OF LAW'***

WHY DO WE HAVE THE LAW (cont)

How do we justify the RULE OF LAW? - philosophers sometimes find the justification for these rules and authority ***(the rule of law)*** in the idea of a **SOCIAL CONTRACT** into which people have entered.

THE SOCIAL CONTRACT: HOBBES

THOMAS HOBBES (1588-1679) was an English philosopher.

- best known for his *1651* book ***Leviathan***, in which he expounds on the influential formulation of the ***social contract*** theory. In addition to political philosophy, Hobbes contributed to a diverse array of other fields, including **history, jurisprudence, geometry, theology, and ethics**, as well as **philosophy** in general. He is considered to be one of the founders of modern **political philosophy**

What would a society without law look like?

According to ***Hobbes,*** it would be a *state of nature*. In such a state, humans act in ***self-interest*** and are ruled by ***instinct and freedom***.

Chaos will reign until reason leads people to realise that such a state is **unsustainable** - groups of people realise that if they do not order society, they would exist in a state of uncertainty.

THE SOCIAL CONTRACT: HOBBES (cont)

Therefore: people decide to enter into a ***SOCIAL CONTRACT*** - each person gives up their unlimited freedom in order to have a *peaceful co-existence.*

In exchange for *sacrificing unlimited freedom* in a state of nature, they receive the **guarantee of protection and order** from their leaders.

Fear of their own destruction makes it possible for individuals to accept the authority of their ruler *(government/state).* The ruler lays down the *legal rules* that people must follow and they've agreed to.

According to some thinkers, it is only once such a society comes into being that we can start talking about the concepts of **civilisation and the law.**

THE SOCIAL CONTRACT: LOCKE

JOHN LOCKE (1632-1704) was an English philosopher and physician, widely regarded as one of the most *influential of* ***Enlightenment*** *thinkers* and commonly known as the ***'father of liberialism'***.

He is equally important to **SOCIAL CONTRACT THEORY**. *His work greatly affected the development of* **epistemology and political philosophy.**

His writings influenced ***Volataire and Jean-Jacques Rousseau,*** and many **Scottish Enlightenment thinkers**, as well as the *American revolutionaries.

THE SOCIAL CONTRACT: LOCKE (cont)

His contributions to *classical republicanism and liberal theory* are reflected in the United States' ***Declaration of Independence**.

Internationally, Locke's political-legal principles continue to have a profound influence on the theory and practice of limited representative government and the *protection of basic rights and freedoms* under the ***RULE OF LAW.***

Locke took a more optimistic view of the human nature than *Hobbes'* ***state of nature***.

According to ***Locke***, the *original condition* is NOT one of a state of nature ***(that is chaotic and ruled by self-interest)***, as humans are governed from the beginning by ***reason and the aim to live peaceful and stable lives.***

In a *natural state*, all people are equal and independent, and everyone has a *natural right* to defend his ***"life, health, liberty, or possessions."***

HOWEVER - without *fixed and ascertainable rules* that can be applied ***impartially***, conflicts cannot be resolved. As such, people enter into a social contract whereby they submit to the authority of the state. The state is allowed to **make and enforce rules.**

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THE SOCIAL CONTRACT: LOCKE (cont)

Like *Hobbes*, Locke thus assumed that the sole right to defend in the state of nature or the natural state was not enough, and people therefore established a *civil society* to resolve conflicts in a civil way with help from a government.

THE SOCIAL CONTRACT: RAWLS

JOHN RAWLS (1921-2002) was an American political philosopher in the liberal tradition.**

His theory of *justice as fairness* describes a society of free citizens holding basic rights and cooperating within an ***egalitarian economic system.*** His theory of **political liberalism** explores the legitimate use if political power in a democracy and envisions how *civic unity* might endure despite the diversity of worldviews that free institutions allow.

His writings on the law of people sets out a *liberal foreign policy* that aims to create a permanently ***peaceful and tolerant international.***

Rawls built on **SOCIAL CONTRACT THEORY** but deviated from it.

- He used a hypothetical position of people **(the parties to the social contract)** behind a ***'veil of ignorance'*** to explain the acceptance of a just theory.

THE SOCIAL CONTRACT: RAWLS (cont)

Behind the veil, everyone is *ignorant of their specific position in society*, not knowing their ***talents, gender, language, or economic position.***

Because they are in this **'original position'**, people would agree to terms in the social contract that are MOST JUST to all in society.

AFRICAN PHILOSOPHICAL CRITIQUE OF SOCIAL CONTRACT

THE SOCIAL CONTRACT THEORY originated in *Western philosophical conceptions*.

Different societies have *different justifications* for the law's existence.

The **African philosophical** conception of the law emphasises that the social contract requires 2 things:

(1) Separated individuals in the original position, and

(2) An imagined agreement between those individuals

An *African* understanding of the law deviates from both of these requirements.

Rather, human beings are born into a world of ***ethical relations and obligations***, where we owe duties to other people, and they owe duties to us.

Individuals are important; but they cannot escape the fact that they are born into a community from which *they can never be truly separated.*

AFRICAN PHILOSOPHICAL CRITIQUE OF SOCIAL CONTRACT (cont)

It involves a ***recognition*** *(not of an agreement with a rule or state) that all of us must respect one another's* dignity* by virtue of our common humanity.

UBUNTU *- I am because you are/ a person is a person because of other persons.*

CHARACTERISTICS OF THE LAW

We can discern that the following appears the characteristics of the law:

- Body of **Rules and Principles** facilitating and regulating human interaction.

- It **orders society** and gives some **degree of certainty.**

- The rules are often applied or interpreted by **institutions of state (authority).**

- The **contents of the law** depends on the history of the specific country or people concerned.

Law is an integral part of our lives: We have become used to living with the law and being subject to legal regulation that we barely even notice it.

Law functions to ensure order in the *relationships and interactions* between people and things in society.

CHARACTERISTICS OF THE LAW (cont)

A lawless country would be marked by ***arbitrariness, inequality, uncertainty, unfairness, unreasonableness and self-interest***; conflict-ridden in which those with the most physically, financially or otherwise powerful would rule.

Thus - law maintains *order and justice* in the community, making it possible for persons with different and competing interests to live together.

It establishes a *myriad of human relationships*- from **domestic partnerships and marriage** to ties between **business and trading partners**; the relationship between *people and the state* and the relationship between *people and objects/things*

The law does this specifying the **nature and extent** of ***rights, duties, powers and immunities*** arising in these relationships.

It also establishes *authoritative systems* of conflict resolution - describes how disputes should be resolved.

THE LAW & IDEOLOGY

Law should be more than *decrees and rules* enforced by state power.

In a democracy, it should reflect the shared values of the **majority of the population**.

Underlying any legal system, **is an ideology**; a value system

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CHARACTERISTICS OF THE LAW (cont)

Economic Values- free market capitalism and socialism

Political Values- democracy/ one-party authoritarian/dictato-rship

Social Values- achievement of equality/maintenance of class differences

Moral Values- conservative/ permissive/liberal

LAW, IDEOLOGY & LEGITIMACY

When the law/legal system does not reflect *shared values (economic, political, social, moral) = **LEGITIMACY CRISIS:** members of society lose their belief and confidence in the legal system.

Apartheid South Africa - majority of South Africans had no voting rights = **legitimacy crisis**

Due to the fact that the law is *underpinned by ideology*, it is possible to give differing explan-ations of *what the law is and should be.*

People with *differing ideological beliefs* come up with *differing explanations* of what the law is and should be.

NATURAL LAW & POSITIVISM

THE LAW & JUSTICE: GENERAL

From the earliest times, justice was regarded as ***an ideal for any legal system.***

NATURAL LAW & POSITIVISM (cont)

Justice does not have fixed content or meaning. There a myriad of different perspectives on what justice entails - something that humans have reflected on and philosophised about for centuries.

The Ancient Greek philosopher ***Aristotle*** drew a distinction between **distributive justice** and **corrective justice.**

Distributive Justice means that there must be an equal distri-bution among **equals.**

Corrective Justice aims at ***restoring inqualities.***

Equality is usually and essential ***element of justice.***

ADJECTIVE (PROCEDUR-AL)/SUBSTANTIVE (MATERIAL)

Procedural Law: comprised of the *legal rules and processes* according to which a court reaches its decision or solution.

Substantive Law: consists of the ***material legal rules.***

*Our legal process strives towards **formal/procedural** justice in the following respects:

NATURAL LAW & POSITIVISM (cont)

- it arises from the overriding principles that *like cases must be treated alike.* The system of precedent is the *judicial instrument* which ensures this.

Criminal Procedure regards an accused person as innocent until proven guilty. The process requires that ***both sides be heard, a person must appear before court within a reasonable time, and that no force or undue influence may be used to induce an accused to confess to a crime.***

S35 of the Constitution with respect to Criminal Law

Material Law

The content of material law/legal rules does not necessarily coincide with justice.

E.G. ***The Groups Areas Act 42 of 1950*** embodied social injustice - *system of racial influx control that led to the disintegr-ation if families and introduced other social evils.

The essence of **justice and equality** was negated through legislation *(material law)* - only certain sections of the community were adversely affected.

LEGAL POSITIVISM & NATURAL LAW

Should the law embody justice to qualify as law?

Legal Positivism: legal positi-vists answer the question of the law by referencing that *which "-is"* and not that which *it ought to be*

NATURAL LAW & POSITIVISM (cont)

According to this approach, it is *irrelevant whether the law is fair or just*

Morality and law are distinctly *separate* from each other; law is set down in statute books, in rules and in court decisions.

Only rules that are given the *force of positive law* (by the relevant authority)* can be regarded as law.

Definition: an approach to law where laws are recognised as valid if they have been enacted by the *sovereign*, ***regardless of whether they are fair or just.***

According to **legal positivism**, judges have an almost *mechanical function* merely to ***apply the law: ius dicere non facere ("judges speak the law; they do not create it")***

Natural Law

In direct contrast to positivism.

Law has a *moral dimension* - the law is not only that which is promulgated (given positive content), but what **ought to be.**

Moral code or a set of moral principles that exist irrespective of human interaction or positive law.

Higher norms against which human positive law can be judged.

If positive law conflicts with these norms, ***it is unjust.***

UNJUST LAW = NOT LAW

The legality of legal rules for natural lawyer depends on the *moral content* of laws.

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NATURAL LAW & POSITIVISM (cont)

Definition: an approach to law where laws are recognised as valid only if they comply with universal principles of morality and justice.

The phrase *'natural law"* indicates that these norms are found in the harmony and order of nature a or in human nature.

They apply universally, for all times and places. *No legislature* is necessary to impose them or give them content.

Passive disobedience; civil disobedience - must a legal rule be obeyed even if it is regarded as unfair or unjust?

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