

legal theory – LAWS2249 notes

part 1: before the law – utopia and dystopia

things to consider:

- origin of law;
- why law is necessary for human society;
- utopia or dystopia; and
 - **utopia**: human laws originate in failure & constantly strive to reclaim something lost
 - **dystopia**: human laws originate in chaos & constantly strive to impose order
- power in structuring society's design of laws & legal systems, and their implementation.

1 in the beginning: the genesis of law

book of genesis (ch 1-3)

summary: God's presence is revealed in the form of law → law is a 'shadow' cast by an invisible God

origin of law	- God is law → establishes the legitimacy of the authority and His law - chapter 1: God's spoken word establishes the 'laws' of the universe → repeated phrase 'Let there be' - dark reading: law exists to express authority → it isn't good nor evil, just an authoritative avenue ◦ the rule was not implemented to maintain order, rather to establish obedience 1. authorisation: God's authorisation and conferral of power to Adam and Eve when He said 'You are free to eat from any tree in the garden;' (2:16) 2. prohibition: God's assertion of authority by creating the rule 'But from the tree of knowledge, good and evil, you shall not eat,' (2:17) 3. threat of punishment: God's authorisation and prohibition is accompanied the threat of punishment 'for on the day you eat from it, you are doomed to die.' (2:17) → humans were cursed with the knowledge of inescapable death a. 'walk through the valley of the shadow of death', Psalm 21:4 → humanity lives in the shadow of death all our lives b. is the knowledge of our own mortality a punishment → the 'shadow of death' shapes the way we live our lives (e.g. creation of meaningful relationships) - God's introduction of law and transgression into the world → <i>is authority itself the original sin?</i> ◦ law created difference, hierarchy, and conflict which create transgression and punishment
necessity for human society?	natural law: an observable law relating to natural phenomena → laws of reason physical law: found in chapter 1 during the establishment of the 'laws' of the universe → laws of physics moral law: unchanging moral principles regarded as the basis for all human conduct → discovered by reason *NOTE: this is different to moral subjectivity: every individual has their subjective morals formed by custom and social practices → this view does not fall under natural law

	positive law: law gives people a choice and free will → a distinction is made between those who obey and those who don't divine positive law: God posits the law → God created positive law to create authority - following the introduction of free will (gift of choice in obedience), human choice and decision-making results in transgressions → Adam and Eve choosing to eat the forbidden fruit (3:6) - transgression is a natural consequence of free will → <i>is transgression always undesirable?</i> - transgression can be an opportunity for growth - instead of punishing us with death, God perhaps has given us the difficult gift of freedom human positive law: humans (the State) take on the role of God and posit laws - law is a condition for human freedom → hierarchy emerges from the law - law is inherent in our world opinion: law is necessary for human society given that humans are apt to making decisions which fulfil their immediate desires/pleasure → this may not benefit others and is often a selfish choice. Adam and Eve's transgression once given free will demonstrates this and reveals need for law to establish a distinction between good and bad so there is incentive to act/not act a certain way.
utopia or dystopia?	1 – 2:4: creation prior to introduction of the rule & prohibition utopia before human laws → under God's law (when obeyed) there was paradise and it was 'very good' (1:31) 2:5 – 3: introduction of the rule & prohibition, results in humanity's transgression and fall, punishment - human laws originated in failure (sin) → constantly striving to reclaim the perfection & paradise lost following sin, result = dystopia
role in structuring society's laws, legal systems, implementation design	our laws/legal system rely on their enforceability in our society → if there is no punishment or 'fall', there is no incentive to obey authority nor adhere to society's moral standards

before the law, franz kafka

summary: the absence of law revealed in the form of God → God is the shadow cast by an invisible God

origin of law	- law = a series of anxieties which disciplines people - the gatekeeper represents a priest of Christianity - if law originates from an inaccessible God, the individual's life will be spent anticipating this unseen God's judgment
necessity for human society?	'before' the law → (1) prior to the law, yet (2) subject to the law. e.g. endless legal procedure - the countryman is solicited into a position of conformation and obedience by the doorkeeper's vague 'we'll see'-like statements (instead of yes or no) → society alike in being covertly disciplined by the law opinion: society requires law to function without falling into disarray and destruction. As human nature desires self-autonomy and freedom, this covert method of influencing society to obey and conform to the legal system may be reasonably effective, despite its seemingly dishonest and deceptive nature
utopia or dystopia?	utopia: law is portrayed as inscrutable → difficult to access - despite being outside the legal system, the country man is still restrained by the

	law and is subject to it ○ applicable to the experience of law by minority groups (especially indigenous people) → they often exist in the land 'before' the law but are subject to the law and the violence of the state without reaping the benefits of the law
role in structuring society's laws, legal systems, implementation design	- this portrayal provides a necessary spotlight on the inaccessibility of law - as the law is hidden by many doors → conveys the many barriers to people's understanding of the law (education, language, money) - we are before God in the same way as we are before the law - the story's application to death → we are before death yet are always subject to it leading to one's constant ponder of mortality ○ society's fear/discomfort with death shapes the punishments prescribed by the legal system → used to be torture & public execution to a stripping of one's autonomy and individuality until death (imprisonment) now - we are subjugated by mystery

2 the goddess of justice and the birth of law

oresteia (agameemnon, eumenides)

summary: the legal order is complex, intertwined with contradictions and deeply rooted in human experience

origin of law	- emergence of law occurs when Athena establishes a court and legal process to replace the cycle of blood feuds - written 4 years after a murder trial → origin of the trial ○ taking the law out of private hands (dictators' hands → gods) and into the community's> ○ development of patriarchy and misogyny in our legal system → Athena siding with Orestes because she identifies herself as more masculine (comes from the thigh of Zeus, and has no mother)
necessity for human society?	- legal system is necessary for human society, as it replaced the story of kills in Oresteia → Agamemnon (father) and Iphigenia (daughter), then Clytemnestra (wife) and Agamemnon (husband), then Orestes (son) and Clytemnestra (mother) - the place of rhetoric in the legal system: ○ <i>peitho</i> = persuasion, seduction, rhetoric ○ <i>nike</i> = victory ○ <i>dike</i> = justice <u>tension between reason and rhetoric</u> - Agamemnon: <i>lex talionis</i> ○ <i>peitho</i> is the problem of law ○ certainty is the solution ○ the Furies represent precedent and legalism → bound to applying past law - Eumenides: <i>pathei mathos</i> ○ certainty is the problem of law ○ <i>peitho</i> is the solution
utopia or dystopia?	- dystopia: laws originated in chaos of blood feuds and the cycle of revenge → Athena established an organised legal system for humans to take control of the law and have since constantly strived to impose order

role in structuring society's laws, legal systems, implementation design	<u>resolution:</u> 1. not gods but humans: law as a social institution, structural change → Athena's 'This is too hard for a God' a. the play defends the use of a secular trial with a jury (Areopagus) 2. not decision but judgment: law as a social discourse, rhetoric as necessary a. tension between reason and rhetoric → law can be (1) abstract and clinical, and (2) an oratory practice
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aeschylus' law, paul gewirtz

summary: relevance of literature to the field of law, specifically through analysing

Aeschylus' Oresteia

- Aeschylus' portrayal of law highlights the complexity, contradictions, and dualities inherent in the legal system's basic enterprise

origin of law	- explores the origin and necessity of law in human society through Aeschylus' Oresteia trilogy → law emerges when Athena established court and legal system - o historical turning point as blood feuds are replaced with a structured legal system
necessity for human society?	<u>2 aspects of law emphasised:</u> 1. role of passion as a central element of law: inclusion of the Furies in the legal order is crucial → represent emotions of fear and vengeance a. inclusion of the Furies within the legal order <i>challenges</i> the idea that law is purely rational b. law and passion are inseparable 2. gendered nature of law: inclusion of the female perspective within the legal system portrayed as a myth of inclusion → also indicates female subordination <u>2 laws established:</u> 1. Lex talionis: 'word for word and wound for wound' → represented by the Furies a. law of sameness → currency approach of law b. war applies the currency approach to lives → unique individuals are returned as indistinguishable ashes 2. Pathei mathos (Zeus' law): wisdom through suffering, change possible through injustice → change and difference is possible since law is put on the public stage (everyone decides)
utopia or dystopia?	- dystopia: in 3rd play, Eumenides, Athena acknowledges the human 'deadlock' and their need to take control of the law as opposed to revenge → she moves the system to one of socialised, political and informed justice - o trial scene with the jury vote - can see the dystopic development of law through the 3 plays: 1. Agamemnon: vengeance to law 2. The Liberation Bearers: old gods (feminine → the Furies) to new gods (masculine → Apollo and Athena) 3. Eumenides: law to judgment
role in structuring society's laws, legal systems, implementation design	- law presented as a gendered phenomenon in Oresteia with predominantly male legal regime incorporating female forces - o the inclusion of the female perspective in law seen as essential but comes with elements of female subordination

- paul encourages reflection on the terms of inclusion in contemporary discussions of gender equality within legal institutions
- literature like the Oresteia can offer valuable insights into the legal world
- modern feminism has opened up new ways of interpreting ancient tales
- emotion and rhetoric in law → using presentation and persuasion to mask justice
 - important for women
 - **plato – Gorgias (464-5)**: against rhetoric and is deceptive → 'pastry making is to medicine'
 - **cosmetics**: an illusion of making self appear better/more attractive than one actually is
 - **pastry**: delicious taste fools body into craving more despite its unhealthiness
 - association between law and theatre → lawyers as actors pretending with some grain of authenticity

contrast between genesis and orestesia: OT moves to NT which centres on **forgiveness**.

values pluralism

- **trade-off of forgiveness**: punishment is given up, but so is justice
- contrast between the language of law and language of love
- **e.g.** the solution of forgiveness following the apartheid was headed by the Archbishop of Johannesburg (Christian influence) → resulted in the rise of violence and vengeance in modern South Africa
 - **why?** the widespread approach of forgiveness **marginalises social injustice**

3 state of nature 1: nasty, brutish & short

leviathan – part 1, thomas hobbes

summary: law originates from the need to escape the state of nature (constant conflict and insecurity) → individuals enter into social contract where authority is given to a sovereign power (to establish order and peace)

- law is essential (Hobbes' view) in preventing chaos of the state of nature & imposing order on society
- ***NOTE**: Hobbes is a legal positivist → man creates the State which creates the Law

origin of law	1. natural condition of mankind: state of nature as a condition without civil laws or government → life is solitary, nasty, brutish, short a. state of war: in the absence of law, individuals are in constant conflict due to their natural desires b. the great equaliser: humanity is born naturally equal → despite having unequal talents (intelligence, strength, etc) the great equaliser is sleep = makes everyone weak and vulnerable c. no security: no security in the state of nature: i. competition for scarce resources ii. desire for glory → would only take a couple of greedy people for things to escalate into brutish violence d. life in the state of nature: <i>Homo homini lupus</i> → human is wolf to human i. 'Every human is enemy to every human' → 'war of all against all'
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	ii. there would be 'continual fear and danger of violent death, and the life of man [would be] solitary, poor, nasty, brutish and short.' 2. first and second natural laws and contracts: to escape the state of nature, individuals enter into a social contract → surrender some of their rights and power to a sovereign authority (leviathan) a. natural law 1: to seek peace b. natural law 2: to give up some of one's natural rights to secure this peace c. necessity of contracts: contracts are made to establish the legitimacy of political authority, forming the basis of law d. leviathan: the State is the third party who power is surrendered to (e.g. arms handed over to) → the State is a monster i. creation of the monster → the only solution from the state of nature is that the State needs to instil fear and terror → state only needs to be better than the state of nature to exist ii. pre-existence of reason: reason must have always existed in order for man to have known to create the Leviathan 3. other laws of nature: found in <i>Table 1</i> below a. man creates The Social Contract (with one another) → social construct creates the State → the State posits the Law 4. the concept of 'persons': the concept of 'person' is introduced → includes artificial persons (e.g. governments) created by the consent of the individuals to represent them a. legal systems and laws are the result of this artificial person → ensures social order and reduces conflict
necessity for human society?	- law is essential in preventing chaos of the state of nature & imposing order on society
utopia or dystopia?	dystopia: to remedy the constant conflict of mankind's natural condition, individuals seek an escape from this state of nature and willingly enter into a social contract where they surrender some of their rights and power to a sovereign authority → peace is sought and secured by the giving up of one's natural rights
role in structuring society's laws, legal systems, implementation design	- with the consent of individuals, the State is created and is allowed to create laws → legal positivism o progressive at the time → the State is something created by man <i>instead</i> of God however, Hobbes also believed that the State could enforce religion (conservative) ▪ frontispiece of Leviathan: sovereign king in the centre made up of blurred-together individual bodies of the citizenry (co-signers of the social contract) who face away from the viewer and towards the sovereign → giant king wields a sword (earthly authority), and a crosier (ecclesiastical authority). ▪ the sovereign makes the State and the people o theism: believes the State to be the mortal god of our world → modern social contract theorists have taken Hobbes' theory without the theological lens ▪ secularises the Bible ▪ the idea of violent oppression by the Sovereign to instil peace and order among the people → turns the people into a 'commonwealth'