

JURISPRUDENCE AND LEGAL THEORY

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Course outcomes

- **On successful completion of this course you will be able to:**
- CO1: Demonstrate an advanced and integrated understanding of the political, social, historical, philosophical, and economic context of law.
- CO2: Engage in identification, articulation and critical evaluation of legal theory and their implications for policy.
- CO3: Critically analyze and research complex problems relating to law and legal theory and make reasoned and appropriate choices amongst alternatives.
- CO4: To differentiate various schools of law.
- CO5: To understand term ownership, possession, title, rights and duties.



JEREMY BENTHAM 1748 to 1832

Analytical school



John austin

John Austin (3 March 1790 – 1 December 1859) was an English legal theorist, who posthumously influenced British and American law with an analytical approach to jurisprudence and a theory of legal positivism.^[1] Austin opposed traditional approaches of "natural law ; arguing against any need for connections between law and morality. Human legal systems, he claimed, can and should be studied in an empirical, value-free way.



salmond

Sir John William Salmond [KC](#) (3 December 1862 – 19 September 1924) was a legal scholar, public servant and judge in New Zealand.



Sir Thomas Erskine Holland

Sir Thomas Erskine Holland [KC](#), [FBA](#) (17 July 1835 – 24 May 1926) was a British jurist. ^[1]

After school at [Brighton College](#) and studies at [Oxford](#), he practiced law as a [barrister](#) from 1863 onwards. In 1874, he returned to Oxford, succeeding [William Blackstone](#) as [Vinerian Reader](#). Later, he became professor of international law and fellow of [All Souls College](#).



Hans Kelsen

Hans Kelsen (German: October 11, 1881 – April 19, 1973) was an Austrian jurist, legal philosopher and political philosopher. He was the author of the 1920 Austrian Constitution, which with amendments is still in operation.

NEED FOR STUDY OF JURISPRUDENCE

- After understanding the meaning of jurisprudence we also need to know that why jurisprudence is essential to be studied. Jurisprudence has various branches like
- **Natural School of law**: Natural school of law- supported natural law. Through natural law we understand that nature creates law and it has its own way to punish for sins. We need to study natural law because in the present scenario when no law is able to provide justice to a person then at that time there is natural justice which provides justice. It is practiced even today.
- **Analytical School of law**: This school considers the law as it is. Various ideas of this school are practiced today like codification of law, study of the conception of legal rights and duties, law to be made by the state, etc.

Historical School of law:

This school believes that law is the outcome of a long historical development of society. We need to study this because by this we get to know that how customs and usages have been accepted as law. In the present scenario some customs are accepted as law example: The Hindu Marriage Act, 1955.

Sociological School of law: This school treats law as social phenomenon. We need to study the thoughts of this school because this school believes that law is created by society. We get to understand the role of society in law making. There are so many other reasons to study jurisprudence in common understanding we need to study jurisprudence:

To understand law:

Jurisprudence helps us to understand the law. As we understand from the above given definitions, jurisprudence is the language of law means it gives language to law which could be understood by the followers. It is the grammar of law. Grammar is the important part of learning of a language, it includes the rules for correct writing and speaking, grammar includes the instructions for how a language should be used correctly. Likewise, jurisprudence includes the instructions how a law should be written and spoken correctly and gives a correct interpretation of the law. It explains how a law should be studied and helps the people to make their own interpretation with their knowledge of that law.

To know the idea behind law:

jurisprudence helps to understand the idea behind any law, that why a particular law exist and what is the purpose of existence of that law. For example, Indian Penal Code, this law exist because in case of occurrence of any criminal act, this penal code states whether that act is a crime or not and if it is then up to what extend it is punishable and determines the nature of that criminal act.

To know the impact of law: Jurisprudence explains the impact of law on the society. At very first jurisprudence determines whether a law is correct or not and then determines its impact on the society. Law is something which is made by human to modulate the society, law gives justice and protection to the victims and punishment to the wrong doers. In many other ways laws leave its impact on the society.

To know the wholesome of law: Jurisprudence helps the jurists and scholars to understand the benefit of law it helps to determine the morality, necessity, the cleanliness, ethics and goodness of law.

To check the credibility of law: Jurisprudence checks the credibility of law, it determines whether a law is of such quality that it can be trusted and believed in. It checks whether a law is trustworthy or not and it can provide justice to the people.

It makes the law dynamic:

According to the changing society and time jurisprudence helps the law to change according to that changing society and time. This makes the law acceptable to the society.

To understand the different perspective of law:

jurisprudence explains the different perspective of law. What law is according to something, for example: depending on the view, from which we examine the law, lead us different legal regime, like civil law, criminal law, commercial law, international law, etc.

To give decision according to law:

Jurisprudence helps the judges to apply the correct law on the basis of their knowledge of law and give the correct decision. As jurisprudence makes understanding of any law easy, the judges are able to judge the situation and nature of the case correctly and apply correct law according to it.

It is a kind of weapon for law persons:

As it is known that jurisprudence helps to interpret the law, it helps to determine the validity of the law, helps to apply the correct law on any situation, etc. Therefore, it is a kind of weapon for the law person who can correctly use the correct law by making the correct interpretation of it. It is the path finder, the path which leads to justice. (Indian young lawyers Association vs state of Kerala. Sabarimala case)

Helps to present the case:

Jurisprudence helps the lawyer to present the case in the court of law. Not only judges but it also helps the lawyers to determine the situation and nature of the case and claim for justice with the help of correct law.

To make society aware about the law:

Jurisprudence makes the society aware about the law. It studies the conscience of society, meaning that it senses the responsibility towards the society, towards the need of society, the problems of the society and the injustice in the society. Like this it gets to know about the society and work according to it and make the people aware of their rights and duties. It makes the people aware of their obligation towards their society and how to cope up with any problem. It makes the people believe in law and make them determined and help them to fight for themselves and also help other people.

It works as the basic element of law:

Jurisprudence provides what a law should consist of to be correct, effective and to be successfully accepted by the people. It determines for any branch of law what elements are necessary, example: legal right is something which is very essential for a person because no one live without rights ,the basic elements of legal right (as given by salmond) are: subject, person is bound for duty, the act or forbearance, the object of right and title.

Jurisprudence helps in proper implementation of law:

As we have already got to know from the above discussion that jurisprudence helps to understand the law in a better way and it also explains the reasoning behind every law, then when law is properly known to us then this proper understanding of law helps in proper implementation of law.

Jurisprudence shows pros and cons of the law and maintain check and balance:

We can understand this with an example: if any person kills other person then earlier it was law that the murderer shall be killed later the law was changed that a proper process shall be there to punish the criminal and direct capital punishment shall not be given because as he had no right to take someone's life in the same way no one has the right to kill that person if this is done it create huge chaos in the society, capital punishment can be given only in case of rarest of the rarest. Like this jurisprudence shows pros and cons of the law and maintain check and balance in the society.

Conclusion

- From the whole discussion we get to understand that Jurisprudence is very essential part of law or we can say law is a part of jurisprudence one cannot imagine law without Jurisprudence.
- We can say this because Jurisprudence is the base of every law which exist in the society. Jurisprudence is that theory which explains the meaning of the existence of any law and also becomes the language of law.
- We got to know that the meaning of jurisprudence has been interpreted by different jurists and every interpretation is different from each other. The meaning of jurisprudence is itself an ambiguity and any scholar has not given a clear meaning to it, for one it is a science then for other it is a philosophy and then for other it is a fictional study.

Therefore, there is no clear meaning to the word jurisprudence. Now coming to the need to study jurisprudence, we have get to see various needs to study jurisprudence all the needs which we have discussed leads to justice.

The different branches of jurisprudence like natural school, analytical school, historical school and sociological school also has great importance.

The different characters of all these schools have their essence in the existing laws which are applicable in the society so it is important to study different aspect of jurisprudence.

By studying jurisprudence we get to understand what jurists and judges think and their level of interpretation of any law. Now we can conclude that jurisprudence is although not clear in its meaning but we can understand it works as the language of law, **it also acts as the grammar of law** and has different meaning at different place. It proves to be very essential part of law which is needed to be studied to understand any law in better way.

Meaning and definition of the jurisprudence

- The study of jurisprudence started with the Romans.
- The term Jurisprudence is derived from Latin word 'Jurisprudencia' which means either "Knowledge of Law" or "Skill of law".
- The word "juris" means law and prudentia mean **knowledge, science or skill**.
- Thus Jurisprudence signifies knowledge or science of law and its application.
- In this sense, Jurisprudence covers the whole body of legal principles in the world.

JURISPRUDENCE MEANING

- Jurisprudence in its widest sense means. " knowledge of the law" but in its limited sense evolution and explanation of general principles upon which actual rules of law are based.
- It is mainly concerned with the rules of external conduct which people are compelled to obey. Therefore sometimes it is said that jurisprudence is that science which gives us knowledge about "law" but the term law we always use in its abstract sense i.e. not in the sense of concrete statutes but in the sense of principles underlying law.
- Thus, for example, there are various branches of law existing in the modern legal system such as contract, crime, trust, properties, companies, labour etc. In jurisprudence, we have to study the basic principles of each of these branches and we are not concerned with the detailed rules of these laws. We definitely study these laws in detail when we study those branches of law separately. Jurisprudence examines the general principles of law, therefore, Jurisprudence may be considered to be the study and systematic arrangements of the general principles of law.

Definition of jurisprudence

- It is very difficult to define term 'jurisprudence', However, several attempts were made in this context to define the term. Some of the definitions of the term "jurisprudence" given by various eminent jurists as under -

JOHN AUSTIN (3 March 1790
– 1 December 1859)

Austin was the first jurist to make jurisprudence as a science. He **defines 'jurisprudence' as "the philosophy of positive law."** He opines that the appropriate subject to jurisprudence is a positive law **i.e. law as it is** (existing law). In other words, jurisprudence is not a moral philosophy but it is a scientific and systematic study of the existing, actual and positive law has distinguished from natural, ideal or moral law.

Austin divides jurisprudence into two classes. Viz **'general Jurisprudence and Particular Jurisprudence.** According to him 'General Jurisprudence is the philosophy of positive law. On the other hand 'particular jurisprudence is the science of any such system of positive law as now actually obtains or once actually obtained in a specifically determined nation or specifically determined nations.

Criticism: Austin's definition criticised by Salmond and Holland and other Jurists on the ground that it is not proper and appropriate to classify as the general Jurisprudence and Particular Jurisprudence.



**Sir Thomas Erskine
Holland** (17 July 1835 – 24
May 1926)

An English Jurist Sir Thomas Erskine Holland defines, Jurisprudence as, "**Jurisprudence is the formal science of positive law**" According to him jurisprudence should only concern itself with the basic principles of concepts underlying in any natural system of law.

Criticism:

Many eminent jurists have criticised the definition of Holland that jurisprudence is the formal science of positive law. It is not free from defects. The question arises what is a formal science? Holland himself explains that by the term 'formal' he means that jurisprudence concerns itself with human relations which are governed by the rules of law rather than the material rules themselves, for the latter are the subject of legal exposition, criticism or compilation rather than jurisprudence.



Sir John William Salmond

**(3 December 1862 – 19
September 1924)**

Salmond defines Jurisprudence as,

**"Jurisprudence is the science of the first principle
of the civil law."**

Criticism :

Salmond's Definition has been criticised on the ground that he has narrowed down the field of jurisprudence by saying that it is a science of civil law and hence covers only particular legal system.



Robert Ernest

Keeton (December 16, 1919
– July 2, 2007)

Keeton Defines
jurisprudence as " the
study and systematic
arrangement of the
general principles of law".



Nathan Roscoe

Pound (October 27, 1870 –
June 30, 1964)

Dean Roscoe Pound
defines jurisprudence as "
the science of law, using
the term law in the
juridical sense, as denoting
the body of principles
recognised or enforced by
public and regular
tribunals in the
administration of justice".



ULPIAN

was a Roman jurist born in Tyre (then Phoenicia, today Lebanon). He moved to Rome and rose to become considered one of the great legal authorities of his time. He was one of the five jurists upon whom decisions were to be based according to the Law of Citations of Valentinian and supplied the [Justinian Digest](#) about a third of its contents.

Ulpian a Roman Jurist defines jurisprudence as " Jurisprudence is the knowledge of things divine and human, the science of just and unjust."



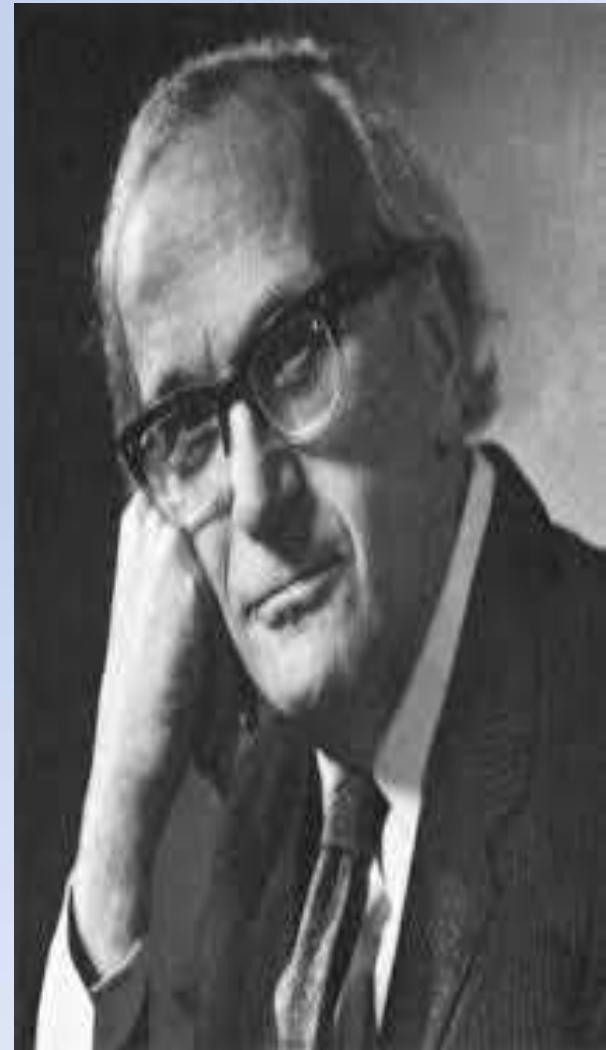
Herbert Lionel Adolphus

Hart (18 July 1907 – 19

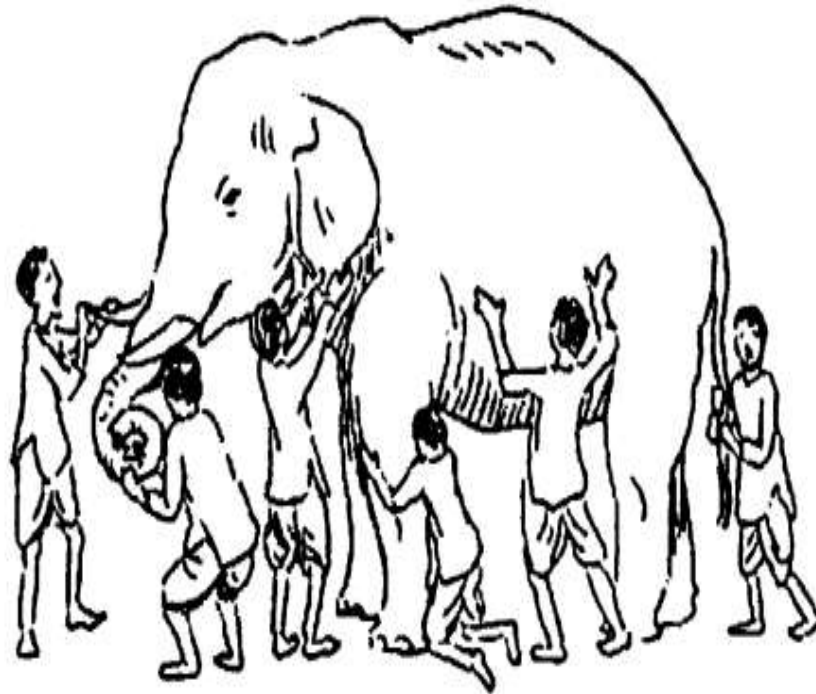
December 1992)

A legal system consists of primary and secondary rules. These rules explain the nature of law and provides key to the science of jurisprudence. He viewed Jurisprudence as a science of law in a border perspective by co-relating law and morality.

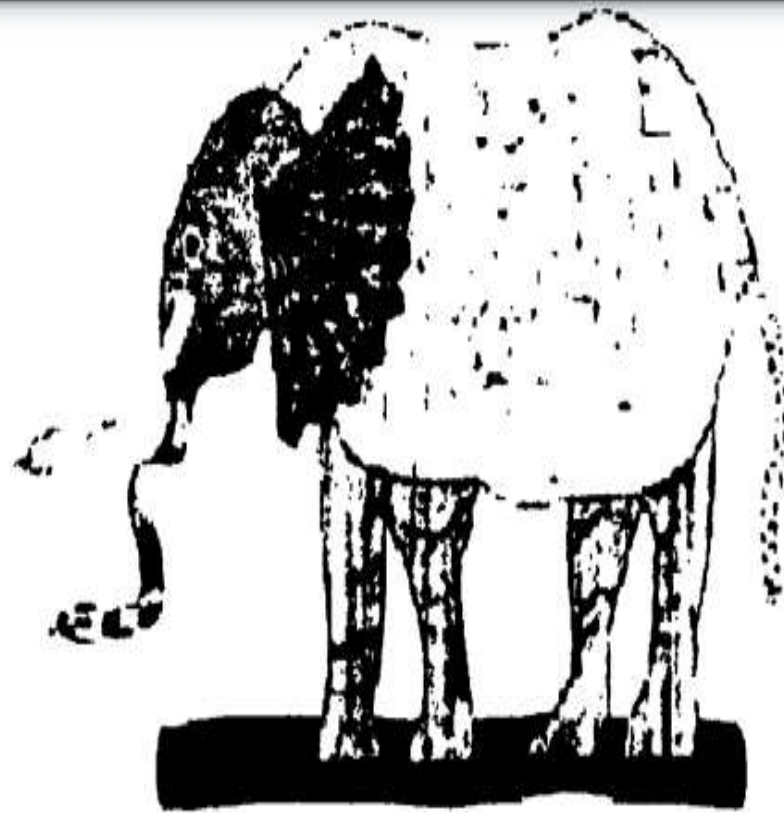
From the above definitions of Jurisprudence, it could be seen that there is no commonly agreed definition of Jurisprudence. Each Jurist guided by his own consciences but since the conception of the term law till the beginning of the 20th century, a new approach to the study of law in relation to society is given. Some jurist, therefore, treats law as "social engineering" an instrument to bring social change. Thus the function of law is the supplement to social sciences.



THE NATURE OF LAW



There were six blind men defined the structure of an elephant. One on them, by touching the trunk of that elephant and said that elephant is like a "python". Second man, by touching the tusk and says that elephant is like a "sword". Third man, by touching the ear and says that the elephant is like a "fan". Fourth man, touching the leg and says that elephant is like a "pillar". Fifth man, by touching the belly and says that elephant is like a "wall". Then the last man touched the tail and narrated that elephant is like a "rope". If we assume the words of those blind men, then we will derive the elephant as given below:



Likewise, each and every jurist defined the concept of “law” in their own view according to their brought up, their livelihood, their social and economic factors, their ideology, their prophecy, etc., but, there is no exhaustive definition for law which encompasses all the society. Hence, the law is very difficult to define, to understand the concept and apply in the respective arena. Thus, the concept of law is an interesting field to do research which never stops. This made the significant development of the human existence to enact this much of laws to regulate themselves.

Legal Rights

Duty

Liability

Obligation

**Meaning of
Law**

Ownership

Possessions

Property

**Sources of
Law**

Titles

Persons

**Justice &
Punishment**

LAW

Internal

External

**Different
Types of Law**