

NATURE AND SOURCES OF LAW

Nature of Law

‘Jurisprudence’ is derived from the Latin term *juris prudentia*, which means *"the study, knowledge, or science of law."*

Jurisprudence, or legal theory, is the theoretical study of law. In jurisprudence, we study the nature, characteristics, sources, effects etc. of ‘Law’ itself.

The whole subject of jurisprudence is based on studying law, so what is the ‘Nature’ of law is a very good question to start this study.

Law is defined on basis of its source, effect on society and end purpose. There is no Consensus in between Jurists regarding any of these aspects. Their Opinions are divided and can be categorised in ‘schools’ of opinions. Which we call Schools of Jurisprudence

There are 5 Major Schools of Jurisprudence: **Natural School** (Philosophical School is similar to Natural School in its thought Process); **Historical School**; **Sociological School**; **Analytical School**; **Realist School**

In this chapter instead of repeating everything that we will study in the schools later we will just learn some important definitions, cram it up.

Ulpian – *Law is the art or science of what is equitable and good; The knowledge of things divine and human. The science of the just and unjust.*

Cicero – *Law is highest reason implanted in nature*

Pound – *Law is a social institution to satisfy social wants.*

Lord Moulton – *Law is the crystallized common sense of the community*

Paulus - *The law is not to be deducted from the rule, but the rule from the law.*

Keeton – *Law - ‘to attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straitjacket from which it is continually striving to escape’*

Jurisprudence - *‘The study and systematic arrangement of the general principles of law’*

Austin – *‘Law’ is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him*

‘Jurisprudence’ is the philosophy of positive law.

Salmond – *Law is the body of principles recognised and applied by the state in the administration of justice;*

Jurisprudence is science of the 1st principle of the civil law.

Holland - *Jurisprudence is the formal science of positive law*

C.K Allen - *Jurisprudence is the scientific synthesis of all the essential principles of law.*

Julius Stone - *Jurisprudence is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law.*

G.W Paton - *Jurisprudence is a particular method of study, not the law of one country, but of the general notion of law itself.*

Roscoe Pound – *Jurisprudence is 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*

T.W Arnold – *Jurisprudence is the shining but unfulfilled dream of a world governed by Reason*

As you can see there are several viewpoints and opinions on the definition of 'Jurisprudence' and 'law' itself, and several opinions means lots and lots of contradictions and conflicts. For understanding purposes, we can divide conflicting parties into 4 major groups under two categorizations i.e.

Formalists v. Realists

Formalism, or conceptualism, treats law like math or science. Formalists believe that a judge identifies the legal principles, applies them to the case, and logically deduces a rule that will govern the outcome of the dispute.

Realists believe that most cases before courts present hard questions that judges must resolve by balancing the interests of the parties and ultimately drawing an arbitrary line on one side of the dispute. The decision thus made is biased on basis of political, economic, and psychological inclinations of the judge.

Positivists v. Naturalists

Positivists argue that there is no connection between law and morality and the only sources of law are rules that have been expressly enacted by a governmental entity or court of law.

Naturalists insist that the rules enacted by government are not the only sources of law. They argue that moral philosophy, religion, human reason and individual conscience are also integrate parts of the law.

Sources of Law

Now when nobody agrees as to what 'law' is, we can't expect a uniform answer as to the sources of law, different schools have different answers.

But there must be some general consensus on something?

That was a trick question, actually there is no consensus.

But I found Salmond's classification here the most wholesome, Salmond defined sources of law into two major categories i.e. Formal and Material sources

FORMAL SOURCES

The formal sources law also be called the Actual or ultimate Sources of law.

According to Sir John Salmond, "sources" is that from which a rule of law derives its force and validity.

MATERIAL SOURCES

Material sources define the content of law. Salmond classified Material sources into two categories

Historical Sources - Only have persuasive value, evolved through time. (ex. Theories given by jurists)

Legal Sources - These are the actual rules of functioning of the society and the organs of the state, they can be classified as Legislation, Precedent, Custom and Agreement

Legislation

Legis means 'law' and **Latum** mean 'to make/put/set'

Legislation means making or setting the law. It is majorly of two types:

Supreme Legislation: which proceeds from the sovereign power in the State. It cannot be repealed, annulled or controlled by any other legislative authority (In India Constitution is a Supreme Legislation)

Subordinate Legislation: which proceeds from any authority other than the sovereign power. (Legislature makes these laws mainly). There are various kinds of Subordinate legislation like Delegated Legislation, Judicial Legislation, Municipal Legislations, Autonomous legislation etc

Precedent

Stare decisis: The legal principle which requires judges to abide by and respect the precedents laid down by similar prior decisions. The Latin maxim, *Stare decisis et non quieta movere* which means, “to stand by decisions and not disturb the undisturbed” forms the basis of this legal principle. The objective of this principles is to not disturb already settled matters to allow for continuity.

Precedents should be Constitutive and not abrogative which means that judicial precedent can make a law or add to a law but cannot alter the law.

Blackstone “judges only declare law; no new law is created by the judges”

Custom

A custom to have force of law should have the following characteristics.

- Reasonability – Should not be against morality or public policy
- Certainty – Should not be vague.
- Continuity – Should be immemorial and enjoyed peacefully in past.
- Conformation with existing law.

Legal Customs – They have the force of law *prio vigore* (of or by its own force independently). Custom for being legal custom should be Certain and absolute. It is negative in its operation, which means that, if the custom is not followed, certain desired consequences would not take place.

Legal Customs could be General or local.

Conventional Customs - According to Salmond, ‘A conventional custom is one whose authority is conditional on its acceptance and incorporation in agreement between the parties to be bound by it.’

Agreement: When two or parties promise each other to abide by certain terms and conditions (Governed by Contract Law)

Note: This Study material is not complete on its own, it is meant to be supplementary to the video provided with it. Do not Blame ‘YG LAW’ for the information provided in these notes if you did not watch the dedicated video provided with these notes in the respective course you enrolled.



Be part of YG Law Community and make studying law easier.

YouTube: [YG Law](#); Instagram: [YGLaw.in](#)

Facebook: [YGLaw.in](#); Twitter: [YGLaw_in](#)

[Click here to view my courses](#)