

# **Jurisprudence and Legal Theory**

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## **Nature and Scope of Jurisprudence**

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# **Chapter#1**

## **Nature and Scope of Jurisprudence**

### ➤ **Study of nature of law.**

Jurisprudence is study if nature of law and its related concepts by which we discuss the need or ideology behind the law. Different jurists developed and evaluated their own definition of law by which question of morality, immorality, validity, effectiveness, sociology, history, freedom and equality are to be evaluated.

### **Two schools of thought:**

#### **1. Positive law**

- ✚ Law had no connection with morality.
- ✚ What is law?
- ✚ Descriptive theory.
- ✚ Positive law describe the system as it is instead of getting into the merits and demerits of it.
- ✚ Source of validity.

#### **2. Natural law**

- ✚ The validity of law is dependent upon morals. (**Latin Maxim: Lex Injusta Non est**) (Unjust or evil law is not a law at all).
- ✚ What the law ought to be.
- ✚ Prescriptive theory.
- ✚ Substance, merits and demerits.

Under jurisprudence there exists two school of thoughts, positivism and naturalism.

### 1. Positivism.

As per this school of thought there is no close connection between law and morality and legal system is to be defined what it is instead of getting into the merits and demerits of it. Positive law is concerned with source of validity that is if a law is coming from valid source then it is valid.

### 2. Natural law

As per natural law is interdependent upon morals and evil law is not regarded as a law at all. Thereby naturalists base their validity of law upon morals. Naturalists focus upon subjective ambit of law and focus on merits and demerits of it. (Substantive analysis).

**Quote of John Austin: John Austin stated that “the existence of law is one-thing; its merits and demerits is another. A law which actually exists is a law though we happen to dislike it or though it varies from the text”**

It is important to distinguish between descriptive and normative theory.

**Descriptive theory** is one which describe things as they are, meaning by describing what the law is instead getting into the merits and demerits of it.

**On the other hand**

**Normative theory** prescribe how people ought to or may behave while living in a society and primarily focusing on substance of law. Under normative theory morality is involved and opinion is based on expectations and value judgements and natural law is pointing

towards common good of public. However morality is and extremely subjective concept which varies from person to person.

Law can be both normative and descriptive at the same time, since law is made by the parliament so it is descriptive and since it carries guidance or code of conduct to us so it becomes prescriptive or normative. For example section-15 of theft act 1968 stated “that law is (description) that people ought not (normativity) to obtain property by deception”.

### **Why do we need jurisprudence?**

Law is complex phenomena with no agreed definition and entails diversity of facts. Aristotle once said “law must be made for the betterment of people”. In order to serve the interest of public at large and to achieve the element of justice jurisprudence exists in background. Mere achievement of certainty is not a precondition of a valid legal system and at the same time it should ensure that protection of fundamental human rights and justice. Normally relevant jurisprudence on particular subject matter exists under the ambit of legislation as well as precedent. However in hard cases where there is no express legislation the judge will have to consider particular facts by applying his or her juristic mind to reach a conclusion and in doing so general principals of law, ethics, morality, value, traditions, and norms are to be considered. Jurisprudence serves as an evolutionary enterprise by which changing trends are reflected and compatibility with modern society be achieved. For example **R vs. R, Airedale, NHS vs. Bland, Re-A (co-joined twins), Re-M.**

## **The Spelunchean Explorer Case: (Hypothetical case written by Fuller in 1949)**

### **Facts:**

Five explorers while exploring a cave trapped in it due to land sliding. It would take around 10 days to rescue them while they only had food for two or three days. One of the explorers **Roger Whatmor** came with suggestion to kill anyone of them in order to ensure the survival of other four. Subsequently this plan was executed and upon being rescued they were charged with manslaughter. Five judges bench sat to consider their appeal.

1. **Chief justice** affirmed their conviction and stated that it was not necessary to get into the details of defendants conduct. He also mentioned that govt. must also think of their pardon ship.
2. **2<sup>nd</sup> judge** reversed the ruling and maintained that at time of crime they were far from the civil society and civilized law would not be applicable to them. The judge went into the purpose of the statute.
3. **3<sup>rd</sup> judge** morally conflicted recused himself from the bench.
4. **4<sup>th</sup> judge** the conviction was affirmed however he criticized the chief justice and maintained that he was no one to direct the govt.
5. **5<sup>th</sup> judge** reversed the conviction on the basis of commonsense.

**HLA Hart: (Legal positivist)** HLA hart talked about linguistic analysis. In his book the “concept of law” he spent time in debating about the merits (advantages) of choosing wide

conception of law over a narrow conception of law. He says that the main reason for identifying laws independently of morality is to preserve individual conscience from the demands of the state. He also maintained that there is difference between “concept” (ought) and “application” (is) of law. Nazi and Apartheid regime legal system are examples.

**Ronald Dworkin:** (he is neither naturalist nor positivist he present interpretive theory) Devorken introduced the theory of interpretivism and he maintained that the main idea in interpretation is making the best of something that it can be. Law is not a set fact and it is how a judge interprets it so judges while interpretation looks at the purpose of that particular law. Law is not separated from morality but at the same time they cannot be combined either.

**Fuller: (naturalist):** fuller thought that law could be characterized in a moral way.

**Weber: (Positivist):** Weber thought that law could be characterized free of morals.

### **Theory and Evaluation:**

Whenever a philosopher gives a theory it is always subjected to his own evaluation that is what was in his mind or what was the context of his theory. Legal theory is an abstract phenomena and in order to get best understanding of it evaluation is of fundamental importance. For example trichologist defined baldness as inability of hair grow while his son can describe it as much more a matter of style. So both are perceiving the same things but by different ways.

### **Basic definitions:**

1. **Analytical jurisprudence:** (positive law interpret the system/ law as it is no concern with merits or demerits). It involves scientific analysis of legal structure and concepts involves in discovering and explaining the basic elements constitution laws in specific legal systems. For example defining what the legal system is and it can also be referred as descriptive theory, positivism or “is” proposition.
2. **Normative jurisprudence:** (natural law) it involves evaluation of legal rules and legal structures on the basis of some standard of perfection and specification of criteria for what constitutes good law. It is also referred as prescriptive theory natural law or ought to proposition.
3. **Economic jurisprudence:** economy has an integral part to play in defining the law. Law only serves the interests of the powerful and the rich and upper class uses economy to exploit the lower class and the law is in the hands of those who own the means (it is also referred as Marxism).
4. **Feminism:** it involves relationship between law and gender. It can be referred as protection of rights of women that can take radical as well as equality approach. Feminist took a stance that law is in the hands of those who own the means (men) and law only serves only the interest of males and ignore female perspective. Feminist schools are as follows:

- i. Liberal feminism (equality approach)
- ii. Cultural feminism (special rights)
- iii. Radical feminism (revenge approach)

**5. Imperative theory:** imperative theory is that theory which has notion of threat or sanction attached to it. For example Austin, Kelsen, Bentham.