

# **JURISPRUDENCE STUDY NOTES**

**(Based on the unpublished lecture Mimeograph of Professor Obinna Boniface Okere)**

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## **INTRODUCTION TO JURISPRUDENCE**

### **I. MEANING AND RELEVANCE OF JURISPRUDENCE**

Jurisprudence is an unpopular subject both with students and practicing barristers. In the words of Dicey, Jurisprudence is a “word which stinks in the nostrils of a practising barrister”. Practicing barristers and judges view it as impractical and irrelevant in interpreting legislation and administering laws.

Thus for you to appreciate and make most of your study of jurisprudence, it is important from the outset to grasp the meaning, nature and relevance of jurisprudence as well as the correct approach to the study of jurisprudence.

#### **A. WHAT IS JURISPRUDENCE?**

In its original conception, jurisprudence which is derived from the Latin “jurisprudentia” signified a “knowledge of the law”.

For the Romans, jurisprudence was closely allied with philosophy and must proceed from the depths of philosophy. It involves an examination of the human mind and human society. Its original scope was thus too broad as was exemplified by Ulpian’s definition of jurisprudence as “jurisprudence is the knowledge of things human and divine, the science of the just and the unjust”.

There has been no definite consensus as to the precise meaning of jurisprudence since the roman era. Various definitions put forward by the proponents of the various schools of jurisprudence include

“The science of law... an organised and critically controlled body of knowledge both of legal institutions and legal precepts and of the legal order, that is the legal ordering of society” – Roscoe Pound (Sociological school)

“The science of jurisprudence... is concerned with positive law or with laws strictly so called, as considered without regard to their goodness or badness” – John Austin (positivist)

Definitions may fail to capture the essence of the object defined and it may be more effective to outline and understand the nature and scope of jurisprudence in order to properly understand the notion of jurisprudence.

The difficulty in defining jurisprudence arises from the following factors;

1. It is a term encompassing the totality of law which in itself is a term not free from ambiguities.
2. It is closely dependent and borrows from related disciplines like economics, philosophy, sociology, ethics, politics, psychology, science, anthropology etc. The expressions – Jurisprudence is a “mansion with many rooms”, or “a field traversed by many paths”, refers to the multifaceted nature of jurisprudence.
3. The ingredients that make up jurisprudence are mainly value laden or ambiguous/controversial concepts like rights, duties, justice, morality, law, philosophy etc.

#### **B. NATURE OF JURISPRUDENCE**

1. It is concerned with rules of external conduct of human beings, that is, rules that human beings are required to observe and obey. And by virtue of this, it is related to other sciences that study human nature and society like economics, ethics, sociology, anthropology, Psychology and political science.

It proceeds from the assumption of *ubi societas, ibi jus*- once there is a society or community at a certain level of development, there is law. It studies methods by which societal pressures and problems are solved rather than the particular solution. It seeks to construct a science which will explain the relationship between law, and its concepts or the life of the community.

2. It dwells on the nature of the law and its purposes, on questions of legal validity and efficacy and their interrelationship, the interaction between law, justice and morality and the institutional and theoretical apparatus for creation, adjudication, enforcement and modification of law.

#### **C. RELEVANCE OF JURISPRUDENCE**

1. The questions which jurisprudence deals with are of great importance to the organisation of any society and have led to deep thinking and ideas that have affected human thought and action.
2. Jurisprudence exposes the student to the wealth of intellectual contributions of great minds and thus broadens the horizon of the student, sharpens his perception of basic human problems and brings theory and actual life into focus.

Note that the student is expected after an exposure to such an exposure to a diverse collection of theorists and philosophers to take up or adopt his own well-reasoned moral or political view.

3. Jurisprudence enables the student to reflect and think on fundamental questions of human existence, of rational and legal ordering of society and of man’s place in the universe. Jurisprudence provides him a basic/fundamental initiation into these philosophical questions
4. Everyone has a personal philosophy which is the sum of his/her ideas and convictions and thus a study of philosophy in general as contained in jurisprudence will help in streamlining this philosophy

5. Jurisprudence deepens the student's knowledge of the law, through its critical and thorough analysis of law, and also sharpens the student's logical faculty and proper grasp of logic and thus further improves the student's command of language. Thus the three essential ingredients of jurisprudence – law, logic and language
6. Knowledge of jurisprudence will also aid a practicing lawyer or judge in cases of first impression or locus classicus cases which raise important jurisprudential questions
7. It promotes orderly transmission of knowledge from generation to generation

#### **D. PROPER APPROACH TO STUDY OF JURISPRUDENCE**

1. Develop a clear objective and proper focus for the study of jurisprudence or you may become frustrated with Jurisprudence
2. Prepare your mind to engage with the theories and ideas actively, thinking about them critically before accepting or discarding any idea. Your mental powers will be stretched if you are to properly understand and reconcile the divergent views and opinion. Jurisprudence is synonymous with thinking and can't accommodate intellectual laziness
3. Your study should not be confined to mere scientific analysis shorn of practical value and irrelevant to societal needs. Apply your study to life and address your mind to practical application of the concepts and ideas.
4. Criticize the ideas you are receiving and seek to have a basic understanding of their import and possible practical application.
5. To properly grasp jurisprudence you must be able to fall back on the knowledge you have already acquired throughout your five years of law study. Also the knowledge in other ancillary courses like Introduction to philosophy, Psychology, Logic and clear thought, humanities, etc. will be relevant.
6. Seek to grasp the following objectives of jurisprudential study as you study the theories;
  - a. The nature of law and its function both in the administration of justice and in the operation of the other activities of the modern state.
  - b. The processes employed in determining what the law is and applying its rules to new situations
  - c. The relationship of law to the other social sciences and to the general framework of society
7. Make sure you have access to well written, foreign and indigenous textbooks. Despite its scarcity and cost try to obtain a copy of one of the original texts and consult the source. It makes a difference when you have read the source yourself and are not just relying on extracts which might not give you the context of the discussion and how the arguments have progressed. In the alternative many extracts can be obtained freely on the internet or at a moderate cost.

8. Understand the logic and basic subdivision of the course content of jurisprudence into
  - a. Legal theory – schools of jurisprudence and their overlaps
    - **Natural law**
      1. **Jewish natural law**
      2. **Greek natural law**
      3. **Roman natural law**
      4. **Scholastic natural law**
      5. **Enlightenment natural law and classical thought**
      6. **Decline and revival of natural law**
      7. **Contributions of natural law**
    - **Positivism**
      1. **Jeremy Bentham**
      2. **John Austin**
      3. **Hans Kelsen**
      4. **H.L.A Hart**
    - **Historical school and customary law**
      1. **Carl Von Savigny**
      2. **Henry Maine**
    - **Sociological school**
      1. **Jeremy Bentham**
      2. **Dean Roscoe Pound**
      3. **Leon Duguit**
    - **Realist school**
      1. **Wendell Holme**
      2. **Karl Llewellyn**
      3. **Paton**
    - **ECONOMIC School**
      1. **Karl max**
      2. **Fredriech Engels**
  - b. Jurisprudential concepts – rights and duties, ownership, possession, legal personality, law justice and morality
  - c. Sources of Nigerian law –
    - relationship and hierarchy of sources
    - stability and change in the law
    - apparent antinomy between precedent and change
    - interpretation of statutes
    - declaratory and constitutive theory of judicial function (activism/passivity)

- codification of customary law

9. You may also need to make use of such practical helps as
- a. study groups
  - b. proper time management and focussed and guided reading
  - c. techniques for quick and speed reading because of the voluminous work you need to cover

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- over-reading
- scanning
- skimming
- proper use of past questions

## **E. JURISPRUDENCE AS A SCIENCE**

Jurisprudence in studying human behaviour and positive law, accumulates facts and clarifies them and tries to discover certain fundamental features and precepts as basis for generalisation and rationalization. This is the methodology of science which jurisprudence has adopted both in the collection and analysis of facts, and systematic declaration of principles from data relating to the working of the legal system

### **NOTE THE FOLLOWING PERENNIAL ISSUES IN JURISPRUDENCE**

1. What law is as opposed to what law ought to be?
2. Law versus morality
3. Descriptive versus prescriptive aspects of the law
4. Looking at law through different philosophical perspective
5. Subject matter of law and what law is
6. Subject matter of the working of the legal system
7. Subject matter of the structure of the law
8. Understanding the differences between the various theorists like Bentham, Austin, Kelsen, Hart and their various schools, what essential question are they dealing with? Compare and contrast their views on the same subject matter. Gaining a proper understanding of the difference between the theorists will help you form a personal conclusion about the same question

## **II. MEANING OF LAW**

A good definition of law should

- a. Include what is generally accepted as being properly within the sphere and subject matter of law
- b. Exclude things normally rejected as not being law
- c. Include or exclude borderline cases by rational comparison of the borderline cases

Law in the abstract implies the entire body of law while law in the concrete refers to specific laws like statutes, enactments, ordinances, decrees. In the abstract it is referred to as *ius*, or *droit*, and in the concrete it is called *Lex*, or *Loi*.

Some summarized definitions are

- Cicero – highest reason implanted in nature
- Aquinas – rule or measure of conduct, rational ordering of things which concern the common good
- Plato/Aristotle – voice of reason
- Austin – command set directly or circuitously by a sovereign
- Holland – a general rule of external human action enforced by a sovereign political authority
- Kelsen – coercive order of human behaviour

Glanville Williams properly summarizes the question of definition of law by stating that only a multiple definition will be sufficient as law is a word with multiple meanings. Such definition should include the coercive character of law, its social acceptance, its purposiveness and its generality.