

COLLEGE OF THE BAHAMAS
UNIVERSITY OF THE WEST INDIES LL.B PROGRAMME

JURISPRUDENCE

WORKSHEET 1 - 2002/2003

A. WHAT IS JURISPRUDENCE ABOUT?

- Jurisprudence has been variously described as being essentially a study of the nature and function of law,¹ or as a science² which deals essentially with what Hart calls “non-optional obligatory conduct”.³ Though it may be easy to identify the general subject matter which Jurisprudence deals with, namely ‘law’, it is not so easy to define the concept or idea of law in terms of what gives it its unique force and validity. Why is a legal rule different or special as opposed to a mere moral or social rule? How do you identify, or distinguish between, a legal and a non-legal rule? Who or what validates the various elements of distinction and why? The nature of these questions suggests the difficulties which attend this subject matter. Or, perhaps, the difficulties only arise because we are seeking one right answer where there are a number of right answers or where the issue is not really about finding right answers at all.

- The Realist, Karl Llewellyn, asserted that : “Jurisprudence is as big as law - and bigger”. This may be a truism, but it, nonetheless, begs the question as to what is law? Lord Radcliffe also expressed the view that you cannot learn law by merely studying law. He stated that: “If it (law) is to be anything more than just a technique it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life.”

- Both of these views, though incisive and valuable, nevertheless reflect a particular definition of law which may be less comprehensive than other definitions.

B. THE NATURE AND FUNCTION OF LAW

1. HOW IS LAW DEFINED

- Natural Law Definition - Here law is defined according to whether the ‘law’ in question satisfies certain moral conditions or criteria.

¹ See J.G. Riddall, Jurisprudence (2nd edn., 1999) at p. 17.

² This is Austin’s description which Hart refers to in “The Concept of Law” (2nd edn., 1994) at p. 6.

³ See Hart, The Concept of Law (2nd edn., 1994) at p. 6.

The major focus of this definition is on the content of law, rather than on the process of lawmaking.

- Definition according to the School of Legal Positivism - This School essentially defines 'law' as the command of the sovereign or law-making body or authority. This command, which has the authority of 'law strictly speaking', is identified by reference to its compliance with certain approved and pre-existing procedures of lawmaking. Here the central focus of the definition is on the process of lawmaking, rather than on the content of law.
- The Realist's Definition - Realism adopts a definition of law which focuses on what the Courts or judges decide or say the law is. This definition looks at the practice of the Courts or judges in their interpretation and application of both statutory and case law. Here, the main thrust of the definition is neither content or process oriented, but is rather practice oriented.
- Other Definitions - The focus of the Sociological, Historical and Economic Schools of jurisprudence is suggested by the respective names of these schools. Here, there is a blend of process, practice and some elements of content.

2. IS THERE A LEGALLY (OR MORALLY) CORRECT DEFINITION?

- Note that the definition one adopts depends upon the school of jurisprudence or philosophy one embraces. Or is it the other way around? On this issue, Lloyd observes: "...not only does every jurist have his own notion of the subject-matter and proper limits of jurisprudence, but his approach is governed by his allegiances, or those of his society, by what is commonly referred to nowadays as, his 'ideology'. No doubt such ideological factors are frequently implicit rather than openly avowed; thus Holmes description of them as 'inarticulate major premises'."
- Is one's choice of definition essentially an exercise of moral judgment? In the article "Law, Religion and Morality", I offer the view that "At the heart of the matter is the issue as to how these schools of Jurisprudence choose to define law (which choice)...in itself may be informed by non-legal considerations, such as religion, morals, ethics, ideology, etc." Indeed, it was further contended

at page 19 of “Law, Religion and Morality” that even the choice of definition of legal positivism is a moral one thus: “The positivist’s choice of definition is also a moral one or one which results from the exercise of a value judgment that places compliance with procedural requisites above rules prescribing the content of law.”

C. IS THE STUDY OF JURISPRUDENCE NECESSARY OR EVEN RELEVANT?

- Lloyd, in the leading text “Introduction to Jurisprudence” at pages 2 – 6, illustrates how questions involving theories of law often arise in the arena of legal practice. The fact that these questions may generally not be satisfactorily answered may be a reflection of a greater need to “teach students (who will ultimately become practitioners and judges) the rudiments of moral arguments.”

- One illustration of this is the House of Lord’s decision of *Oppenheimer v. Cattermole* (1976) A.C. 249. In this case, Lord Cross expressed the view at page 278 that a Nazi law which deprived a German Jewish refugee of his German citizenship constituted “so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.”

- Lloyd also sees the requirement for judges to justify their decisions by giving good and sufficient reasons as another argument illustrating the relevance of the study of jurisprudence. A study of jurisprudence ought to help in evaluating arguments and counter-arguments in the process of arriving at a reasoned judgment or decision.

D. REFERENCES

READ AND STUDY THE FOLLOWING:-

- Lloyd’s *Introduction to Jurisprudence* (6th edn.), pages 1-78;
- Morrisson, *Jurisprudence* (1997, reprinted 2000), pages 1 – 14;

- Riddall, Jurisprudence (2nd edn., 1999), pages 1 – 16;
- Hart, The Concept of Law (2nd edn., 1994) pages 1 – 17;
- Law, Religion and Morality by Calvin Eversley, July 1999 University of Guyana Law Review, Vol 1, No. 1, pages 3, 15-16, 18-20;

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⁴ **IN RENDERING UNTO THE CAESAR THE THINGS THAT ARE CAESAR’S AND UNTO GOD THE THINGS THAT ARE GOD’S, I HEREBY ACKNOWLEDGE AND GIVE CREDIT TO ALL THOSE PERSONS WHOSE SOURCES I HAVE SPECIFICALLY REFERRED TO IN PREPARATION OF THIS WORKSHEET. HOWEVER, WITH RESPECT TO MY OWN INPUT, INCLUDING MY UNDERSTANDING AND MY EXPRESSION OF THAT UNDERSTANDING WHICH I HAVE GRATEFULLY RECEIVED FROM THE LORD, I HEREBY FREELY AND JOYFULLY GIVE ALL HONOUR, ALL PRAISE AND ALL GLORY TO MY MOST GLORIOUS HEAVENLY FATHER IN AND THROUGH MY MOST BLESSED LORD AND SAVIOUR JESUS CHRIST.**