JURISPRUDENCE

A Teaching Version — Prof Samba Online University of Nigeria

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IMPRINT

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How to use this book: read a chapter, work the example, answer the discussion questions in writing, then read the summary again before you move on. Law is learned by working, not by looking.

Chapter 1 — The Questions Beneath the Law

Jurisprudence asks what the other subjects assume: what law is, where its authority comes from, and what it is for. This chapter introduces the great questions and the schools that answer them.

Why theory

Every lawyer carries a theory of law, examined or not: the judge who says 'the law is clear' and the advocate who says 'the law is unjust' are both doing jurisprudence, well or badly. The subject makes the theory explicit and tests it. Its questions are permanent because law is permanent: command or custom? fact or value? the ruler's will or the community's reason?

The student should not expect the questions to close; jurisprudence succeeds when the student can state each school's answer, its strength, and its wound.

The schools in preview

Natural law holds that law's validity answers to a higher moral order. Positivism holds that law's existence is a social fact, separable from its merit. Historical jurisprudence finds law in the people's evolved spirit. Sociological jurisprudence studies law in action. Realism watches what courts do. Marxist and critical schools unmask law's service of power; feminist jurisprudence its gendered structure. Each is a lens; the course tries them all on the same objects.

Nigeria's plural system is itself a jurisprudential laboratory: received law, custom, and religious law sharing one constitution raise every school's questions in working form.

Law and its neighbours

Law and morality overlap without coinciding: some immoral acts are lawful, some moral duties unenforced, and the border between them is the Hart–Devlin debate's country. Law and justice are related as instrument and end: a law may be valid and unjust, and the citizen's and the judge's duties in that case are jurisprudence's hardest practical questions.

Law and power: the gunman's order and the tax statute both coerce; what distinguishes them is jurisprudence's first question, and every school's answer is a different theory of authority.

Worked example

A statute validly enacted commands something the community judges wicked. The positivist calls it law, and asks separately whether it should be obeyed. The natural lawyer asks whether its wickedness has already unmade it as law. The citizen at the police station door lives inside the difference — which is why the question is not academic.

Discussion questions

• What are jurisprudence's three permanent questions?

• How do law and morality overlap without coinciding?

• What distinguishes the tax statute from the gunman's order?

Chapter summary

In this chapter you have studied the following ground. Jurisprudence asks what the other subjects assume: what law is, where its authority comes from, and what it is for. On why theory: Every lawyer carries a theory of law, examined or not: the judge who says 'the law is clear' and the advocate who says 'the law is unjust' are both doing jurisprudence, well or badly. On the schools in preview: Natural law

holds that law's validity answers to a higher moral order. On law and its neighbours: Law and morality overlap without coinciding: some immoral acts are lawful, some moral duties unenforced, and the border between them is the Hart–Devlin debate's country. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

Chapter 2 — Natural Law

The oldest school: law answers to a moral order woven into nature and reason. This chapter teaches its classical, medieval, and modern forms, and its decline and revival.

The classical root

For the classical world, nature is an ordered cosmos and reason the human share in it; law that accords with right reason participates in the order, and unjust enactments are corruptions of law. Cicero's formulation — true law is right reason in agreement with nature, universal and eternal — is the school's seed.

The tradition's strength is its refusal to let power define right; its danger is the question who speaks for nature, and with what warrant.

The medieval synthesis

Aquinas orders the doctrine: eternal law in the mind of God; natural law, the rational creature's participation in it; human law, derived from natural law by conclusion and by determination — the legislator filling nature's outline as an architect fills a plan. A human law contrary to natural law is, in his careful phrase, a corruption of law, binding in conscience only where disobedience would cause scandal or greater harm.

The care of that qualification matters: classical natural law is not a licence for each citizen to veto statutes, but a doctrine about law's nature and the limits of obligation.

Decline and revival

The school waned as science separated fact from value and positivism offered a cleaner account. It revived after the twentieth century's

catastrophes, when legal systems had enforced wickedness in perfect form, and jurists asked whether form alone could be law's whole story. The Nuremberg moment and the post-war constitutions' entrenched rights are the revival's monuments.

Fuller's inner morality of law — generality, publicity, prospectivity, clarity, consistency, practicability, stability, and congruence between rule and administration — is natural law proceduralised: a system that fails these wholly, he argues, fails to be a legal system at all.

Natural law today

Modern natural law, in Finnis's form, rests on basic human goods — life, knowledge, play, friendship, and others — known by practical reason, and on the requirements of practical reasonableness. It speaks to legislators and constitution-makers more than to judges undoing statutes, and in that modesty lies its modern influence.

Worked example

A regime enacts, in flawless form, a law confiscating one tribe's land without compensation or hearing. The natural lawyer's analysis does not stop at 'it was duly passed': measured against the basic goods and the inner morality — generality, congruence, the hearing that fairness requires — the enactment is law in form and corruption in substance, and the doctrine names what the citizen's conscience already knows.

Discussion questions

• State Aquinas's three laws and their relations.

• What are Fuller's eight requirements?

• Why did natural law revive in the twentieth century?

Chapter summary

In this chapter you have studied the following ground. The oldest school: law answers to a moral order woven into nature and reason. On the classical root: For the classical world, nature is an ordered cosmos and reason the human share in it; law that accords with right reason participates in the order, and unjust enactments are corruptions of law. On the medieval synthesis: Aquinas orders the doctrine: eternal law in the mind of God; natural law, the rational creature's participation in it; human law, derived from natural law by conclusion and by determination — the legislator filling nature's outline as an architect fills a plan. On decline and revival: The school waned as science separated fact from value and positivism offered a cleaner account. On natural law today: Modern natural law, in Finnis's form, rests on basic human goods — life, knowledge, play, friendship, and others — known by practical reason, and on the requirements of practical reasonableness. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

Chapter 3 — Legal Positivism

Positivism separates law as it is from law as it ought to be. This chapter teaches the command theory, Hart's reconstruction, and Kelsen's pure theory.

The command theory

Austin's province: law is the command of a sovereign — a determinate person or body habitually obeyed and obeying no other — addressed to subjects, with a sanction for disobedience. The theory's clarity is its charm; its wounds are famous: it cannot place the constitution that creates the sovereign, nor laws that confer powers rather than command, nor the continuity of law across sovereigns' deaths.

Bentham, positivism's other father, joined the separation thesis to the reformer's zeal: because law as it is can be identified cleanly, law as it ought to be can be criticised cleanly — censorship of law requires exposition of law, exactly distinguished.

Hart's reconstruction

Hart rebuilt positivism on rules: a legal system is the union of primary rules — duty-imposing — with secondary rules — power-conferring: rules of recognition, which identify valid law; of change, which amend it; and of adjudication, which empower courts. The rule of recognition rests on official practice, accepted from the internal point of view — the participant's attitude that distinguishes a rule from a habit.

Hart answers Austin at every wound: constitutions are secondary rules; power-conferring laws are law's other half; continuity is the recognition rule's persistence. His open texture doctrine — language's penumbra, where judges exercise discretion — concedes to realism its observation without surrendering law's rule-character.

Kelsen's pure theory

Kelsen purified law into a hierarchy of norms, each authorised by a higher, ascending to the basic norm — the Grundnorm — which is presupposed, not enacted: the constitution ought to be obeyed. Efficacy conditions the whole: a system whose norms are by and large obeyed is a legal system; revolution replaces the Grundnorm when a new order becomes efficacious.

The Nigerian transitions — independence, military seizures, restorations — are Kelsen's theory in national dress, and the courts' decisions in those hours are the theory's case law.

Positivism's debates

The separation thesis is positivism's heart: no necessary connection between law's validity and its morality. Inclusive positivists allow a rule of recognition to incorporate moral tests — a constitution's rights chapter does exactly that; exclusive positivists deny that morality can be a validity condition. Dworkin's attack — that principles, not only rules, are law, and that hard cases have right answers — is the school's great modern challenge, answered and re-answered across the journals.

Worked example

When a military regime seized power and the courts were asked whether its decrees were law, the judges stood inside Kelsen's question: has a new basic norm become efficacious? The courts' varied answers across countries and decades are the pure theory's hardest classroom — the student should read them as jurisprudence, not merely as history.

Discussion questions

• State Austin's theory and its three famous wounds.

• What are Hart's secondary rules?

• What is the Grundnorm, and what replaces it?

Chapter summary

In this chapter you have studied the following ground. Positivism separates law as it is from law as it ought to be. On the command theory: Austin's province: law is the command of a sovereign — a determinate person or body habitually obeyed and obeying no other — addressed to subjects, with a sanction for disobedience. On hart's reconstruction: Hart rebuilt positivism on rules: a legal system is the union of primary rules — duty-imposing — with secondary rules — power-conferring: rules of recognition, which identify valid law; of change, which amend it; and of adjudication, which empower courts. On kelsen's pure theory: Kelsen purified law into a hierarchy of norms, each authorised by a higher, ascending to the basic norm — the Grundnorm — which is presupposed, not enacted: the constitution ought to be obeyed. On positivism's debates: The separation thesis is positivism's heart: no necessary connection between law's validity and its morality. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

Chapter 4 — Historical, Sociological, and Realist Schools

Three schools turned jurisprudence toward society: law as the people's spirit, law in action, and law as what courts do. This chapter teaches each.

The historical school

Savigny taught that law grows with a people as language grows — the Volksgeist, the people's spirit, expressed first in custom and only later, and at peril, in codes. Codification imposed too early freezes a law not yet ripe. The school's gift to Nigeria is direct: customary law is not law's absence but law in its historical form, and the student of custom studies Savigny's insight in his own country.

Maine's famous generalisation — progressive societies move from status to contract — organised the nineteenth century's legal history into a single sentence, still argued with because still illuminating.

Sociological jurisprudence

Pound's programme: study law in action, not only law in books; weigh the interests law serves — individual, public, social — and engineer the balance with the least friction. The sociological jurist asks of every rule: what does it do, to whom, at what cost? The law-reform commissions and the impact study are this school's children.

Ehrlich's living law — the norms that actually govern associations' lives, often far from the state's texts — is the plural system's sociological mirror: in Nigeria, the market's and the family's living law decides more disputes in a week than the High Court decides in a year.

Realism

The American realists pushed observation to provocation: law is what officials do about disputes; rules are predictions of decisions; the judge's hunch precedes his reasons. Holmes's aphorism — the life of the law has not been logic but experience — is the school's motto. Scandinavian realism went further, dissolving rights into psychology and prediction.

Realism's permanent gift is hygiene: it teaches the student to check the text against the practice, the rule against the registry, the right against the remedy. Its excess — dissolving law into behaviour until normativity vanishes — is the wound its critics press.

The schools together

Hold the three as instruments: history explains a rule's birth, sociology measures its work, realism audits its enforcement. A rule understood all three ways is understood; a rule read only in its text is a rumour of itself.

Worked example

A statute forbids a market practice; the practice continues openly, unenforced, for thirty years, while the community's own arbitration settles its disputes. The historical school explains the practice's normative roots; Ehrlich names it living law; the realist notes the statute predicts nothing; Pound asks what interests the settlement serves. Four lenses, one market — the chapter's method in a single scene.

Discussion questions

• What is the Volksgeist, and why does it matter in Nigeria?

• Distinguish law in books from law in action.

• What is realism's permanent gift and its excess?

Chapter summary

In this chapter you have studied the following ground. Three schools turned jurisprudence toward society: law as the people's spirit, law in action, and law as what courts do. On the historical school: Savigny taught that law grows with a people as language grows — the Volksgeist, the people's spirit, expressed first in custom and only later, and at peril, in codes. On sociological jurisprudence: Pound's programme: study law in action, not only law in books; weigh the interests law serves — individual, public, social — and engineer the balance with the least friction. On realism: The American realists pushed observation to provocation: law is what officials do about disputes; rules are predictions of decisions; the judge's hunch precedes his reasons. On the schools together: Hold the three as instruments: history explains a rule's birth, sociology measures its work, realism audits its enforcement. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

Chapter 5 — Law, Morality, and Disobedience

When law and morality part, what follows — for the citizen, the judge, and the official? This chapter works the Hart–Devlin debate and the problem of the unjust law to its practical end.

The Hart–Devlin debate

Devlin argued that a society may enforce its shared morality as such, because the moral fabric is the society's cement. Hart answered that the enforcement of morality needs its own justification harm by harm, and that a changing morality enforced by law becomes the tyranny of the dead over the living. The debate frames every modern argument about criminalising private conduct.

The student's task is to argue both briefs before adopting either: Devlin's cement and Hart's liberty are both real goods, and the debate is their border war.

Civil disobedience

The citizen who breaks a law he judges unjust, openly and accepting the punishment, appeals to the community's conscience over its legislature's head — the tradition of Thoreau, Gandhi, and King. Its conditions are its morality: the law protested must be gravely unjust, legal remedies exhausted or futile, the act public and non-violent, and the punishment accepted. Disobedience that hides is crime wearing protest's clothing.

The official's disobedience is a different matter: the judge and the policeman hold offices the laws constitute, and their refusal is resignation's territory, not quiet sabotage — save in the extremity

where natural law's oldest question returns.

The judge and the unjust law

The judge in a wicked system faces jurisprudence's hardest chair: apply the law and lend it legitimacy, resign and abandon the bench to worse hands, or construe against the wickedness where construction honestly allows. History's verdicts on such judges are severe and divided, and the student should study the records before judging the judges.

Radbruch's formula — that an enactment whose injustice reaches an intolerable degree is not law at all — is the post-war German answer, adopted in the trials of the fallen regime's servants, and it remains the natural lawyer's foothold in the positivist's century.

The chapter's balance

The schools converge here on a practice: presume obedience, for law's existence is a good; argue injustice in law's own forums first; and reserve disobedience — citizen's or judge's — for the case that can carry its conditions. Jurisprudence ends, as it began, in judgment.

Worked example

A licensing officer is directed to apply a regulation, validly made, that excludes one community's traders from the market on a ground the constitution's equality promise condemns. The officer's roads are jurisprudence's roads: apply and protest internally, seek the court's ruling through a test case, or resign. What he may not do is quietly falsify the register — office is a trust, and its disobedience is resignation, not sabotage.

Discussion questions

• State Devlin's and Hart's positions in the debate.

• What four conditions discipline civil disobedience?

• What is Radbruch's formula?

Chapter summary

In this chapter you have studied the following ground. When law and morality part, what follows — for the citizen, the judge, and the official? This chapter works the Hart–Devlin debate and the problem of the unjust law to its practical end. On the Hart–Devlin debate: Devlin argued that a society may enforce its shared morality as such, because the moral fabric is the society's cement. On civil disobedience: The citizen who breaks a law he judges unjust, openly and accepting the punishment, appeals to the community's conscience over its legislature's head — the tradition of Thoreau, Gandhi, and King. On the judge and the unjust law: The judge in a wicked system faces jurisprudence's hardest chair: apply the law and lend it legitimacy, resign and abandon the bench to worse hands, or construe against the wickedness where construction honestly allows. On the chapter's balance: The schools converge here on a practice: presume obedience, for law's existence is a good; argue injustice in law's own forums first; and reserve disobedience — citizen's or judge's — for the case that can carry its conditions. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

Chapter 6 — Justice, Rights, and the Critical Schools

The final chapter teaches the theories of justice, the concept of rights, and the critical schools that ask whose interests law serves.

Theories of justice

Justice wears several faces: corrective justice repairs wrongs between parties — tort and contract's philosophy; distributive justice allocates goods and burdens — taxation and welfare's philosophy; procedural justice guarantees fair process. Rawls's theory — principles chosen behind a veil of ignorance: equal liberty, and inequalities only where they benefit the least advantaged — is the modern distributive debate's starting point; Nozick's entitlement theory answers from liberty's side.

The utilitarian measure — the greatest happiness — judges law by consequences and built the reforming century; its critics answer that some rights may not be traded for sums.

Rights

A right, in Hohfeld's indispensable analysis, is four things wearing one name: a claim against another, who owes the duty; a liberty, where no duty binds; a power, to alter legal relations; an immunity, against another's power. Half the confusions of rights-talk dissolve when the speaker says which of the four he means.

Interest theories ground rights in the holder's protected interests; will theories in the holder's control. The debate decides hard cases: whether infants and the unborn hold rights, and what animals' moral status implies for law.

The critical schools

Marxist jurisprudence reads law as superstructure: the legal forms of an age express its relations of production, and rights talk can mask domination as neutrality. Critical legal studies pressed the indeterminacy charge — that doctrine underdetermines outcomes, and politics fills the gap. Feminist jurisprudence exposes law's male standpoint in its categories and its remedies, and has remade fields from rape law to labour law by the exposure.

Postcolonial jurisprudence — the Nigerian student's inheritance — asks how received law served empire, what decolonising doctrine requires, and how customary law's dignity is restored without romanticism. Each critical school is a suspicion with a method; the student's task is to use the suspicion and test the method.

Revision: the schools' map

The course in one view: natural law asks law's warrant in morality; positivism, its existence in fact; history, its growth in a people; sociology, its work in society; realism, its truth in the courtroom; the critics, its service to power. A jurist is a lawyer who can ask all six questions of any rule — and the examination, and life, will supply the rules.

Worked example

A new tax falls, by design, on market women's stalls while sparing bonded warehouses. Corrective justice is silent — no wrong between parties; distributive justice interrogates the allocation; the feminist lens notices who was seen and who was spared in the drafting; the positivist notes, correctly and insufficiently, that the tax is valid law. The scene needs every lens the chapter supplied — that is the chapter's point.

Discussion questions

• Distinguish corrective, distributive, and procedural justice.

• Name Hohfeld's four meanings of 'right'.

• What charge do the critical schools bring, and how should the student use it?

Chapter summary

In this chapter you have studied the following ground. The final chapter teaches the theories of justice, the concept of rights, and the critical schools that ask whose interests law serves. On theories of justice: Justice wears several faces: corrective justice repairs wrongs between parties — tort and contract's philosophy; distributive justice allocates goods and burdens — taxation and welfare's philosophy; procedural justice guarantees fair process. On rights: A right, in Hohfeld's indispensable analysis, is four things wearing one name: a claim against another, who owes the duty; a liberty, where no duty binds; a power, to alter legal relations; an immunity, against another's power. On the critical schools: Marxist jurisprudence reads law as superstructure: the legal forms of an age express its relations of production, and rights talk can mask domination as neutrality. On revision: the schools' map: The course in one view: natural law asks law's warrant in morality; positivism, its existence in fact; history, its growth in a people; sociology, its work in society; realism, its truth in the courtroom; the critics, its service to power. Work the discussion questions before you continue; the summary is a map for revision, not a substitute for the chapter.

PRACTICE PROBLEMS WITH GUIDED OUTLINES

Four problems follow, one for each of the first four chapters' ground. Attempt each in writing, under time, before reading its outline. The outline names the points a full answer must reach; it does not write the answer — that labour is yours, and it is where the learning is.

Problem 1 — The Questions Beneath the Law

Advise on a dispute raising the ground of this chapter. A full answer must reach, in order: Why theory; The schools in preview; Law and its neighbours. It must state each doctrine before applying it, must argue the other side's best point, and must conclude. Compare your attempt with the chapter's worked example: "A statute validly enacted commands something the community judges wicked. The positivist calls it law, and asks separately whether it should be obeyed. The natural lawyer asks whet..."

Problem 2 — Natural Law

Advise on a dispute raising the ground of this chapter. A full answer must reach, in order: The classical root; The medieval synthesis; Decline and revival; Natural law today. It must state each doctrine before applying it, must argue the other side's best point, and must conclude. Compare your attempt with the chapter's worked example: "A regime enacts, in flawless form, a law confiscating one tribe's land without compensation or hearing. The natural lawyer's analysis does not stop at 'it was duly passed': measure..."

Problem 3 — Legal Positivism

Advise on a dispute raising the ground of this chapter. A full answer must reach, in order: The command theory; Hart's reconstruction; Kelsen's pure theory; Positivism's debates. It must state each doctrine before applying it, must argue the other side's best point, and must conclude. Compare your attempt with the chapter's worked example: "When a military regime seized power and the courts were asked whether its decrees were law, the judges stood inside Kelsen's question: has a new basic norm become efficacious? The ..."

Problem 4 — Historical, Sociological, and Realist Schools

Advise on a dispute raising the ground of this chapter. A full answer must reach, in order: The historical school; Sociological jurisprudence; Realism; The schools together. It must state each doctrine before applying it, must argue the other side's best point, and must conclude. Compare your attempt with the chapter's worked example: "A statute forbids a market practice; the practice continues openly, unenforced, for thirty years, while the community's own arbitration settles its disputes. The historical school ..."

A LAST WORD TO THE STUDENT

You have finished this teaching book. Finish is the wrong word: a law book is a tool, and it earns its place only when you return to it with a problem in your hand. Keep it beside the other books of this library, work the questions again after a month, and let each return teach you what the first reading could not. That is how lawyers are made — by return, by work, and by patience.

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