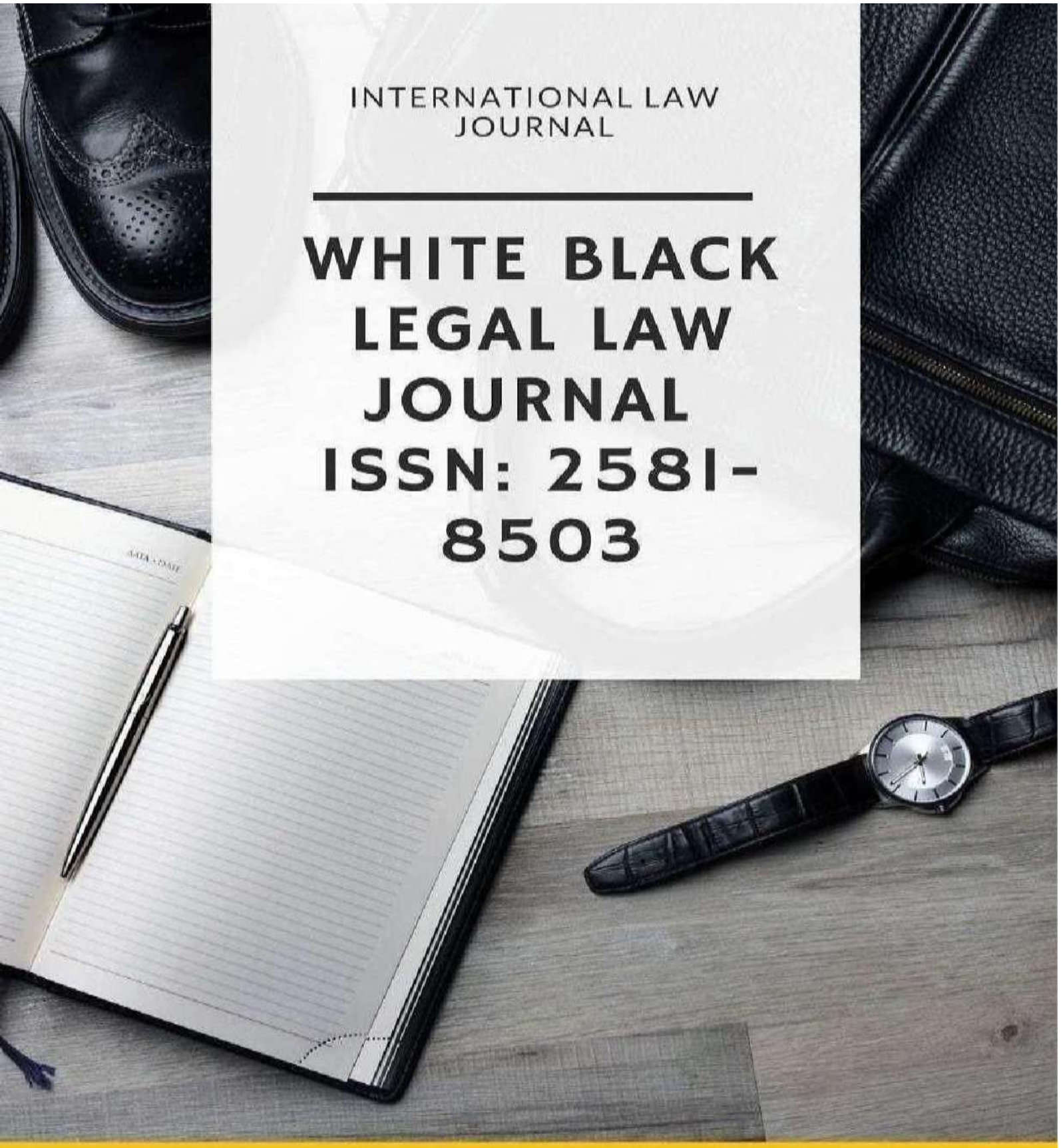

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With this thought, we hereby present to you

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WHY IS GENERAL JURISPRUDENCE INTERESTING? A REFLECTION ON ITS ALLURE AND RELEVANCE

AUTHORED BY - LAKSHMI PRAHARSHITHA KODURI

What Jurisprudence is, has been a concept of academic debate for ages. The meaning changed for the times, purposes and philosophers, while being associated in different degrees with different disciplines – religion, morality, state and politics, and law.[1] For the purposes of this essay, I would not venture into what view I support, nor would I try to give jurisprudence a narrow definition of my own. I state what I understand it to be - a huge repository of the wisdom about law.[2] Before venturing into the topic of discussion, which is *'what makes general jurisprudence interesting'*, I believe it is important to affirm my claim as to 'what the purpose of jurisprudence is'. I assert that Jurisprudence is not obliged to serve any particular ultimate purpose, so as to validate its undeniably omnipresent existence. Being an evolutionary product of so many tributary ideas, across the times, I suppose, it is analogous to what millennials would call a database. It has important consequences and applications, but not purposes, though some of these applications gradually get acknowledged as its functions- ex., interpretation of the law,[3] or reformation of the law[4] etc. The relevancy of the above assertions lies in setting a premise to the 'consequentialist approach'[5] I adopt to discuss the topic of this essay. Firstly, I will set out reasons as to why my chosen approach of focussing on the consequences of jurisprudence would help me prove that it is interesting. Secondly, I would justify my argument using certain real-time issues in the contemporary societies.

Jurisprudence and its ability to answer complex questions

Unlike several other jurisprudence enthusiasts, I attempt to justify the 'allure of jurisprudence' based on what is does, or what consequences it in-generates, rather than relying on its nature or the degree of normativity it beholds.[6] Both factors are relative, subjective and highly

[1] Tamanaha B., What is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law, Transnational Legal Theory, (vol. 2, 2011) 288.
[2] Gardiner expresses a similar view in his Law as a Leap of Faith, (Oxford University Press, 2012).
[3] McGinn, *Truth By Analysis: Games, Names, and Philosophy* (Oxford University Press, 2012)213.
[4] Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, 133
[5] The approach focuses on one or more applications and beneficial consequences of the discipline.
[6] See Enoch D., Reason-Giving and the Law, (Oxford Studies in Philosophy of Law, 2011).

contestable in terms of evaluating practical effects of philosophical thoughts. This consequentialist approach is preferable predominantly because it is as relevant to practitioner interests, as it is to philosophical interests.[7] This approach is not entirely novel.[8] In fact, few philosophers in the past found philosophical interest of jurisprudence (or the lack of) in its ability to investigate law's capabilities of generating compliance/obedience.[9] Few appreciated it for facilitating evaluation of laws to avoid pre-mature willingness to comply with them.[10] I argue that what actually makes it interesting is its unparalleled ability to offer answers to complex questions, something which is a consequence of both the above functions.

Societies, and hence legal systems, are dynamic and fast evolving.[11] New practices result in new norms which cannot escape the questions of moral, ethical, theological, social, political, or legal acceptability or validity.[12] Here comes the two-fold functionality of Jurisprudence- one, encouraging numerous alternative perspectives to view such issues with; and, two, resolving upon evaluating such complex phenomena in a multi-disciplinary manner based on several evaluatory standards. In other words, Jurisprudential enquires, besides helping with timeless questions about the nature and purposes of law, also provide most sensible explanations to unanticipated issues which arise with times. As such, the unpredictable ways in which Jurisprudence works, in both instigating and resolving moral, ethical or legal dilemmas, makes it intriguing, engrossing and entirely interesting.

The above assertions share certain similarity to the thoughts of Ronald Dworkin on the importance of philosophical study of law in addressing practical issues faced by judges and lawyers.[13] Dworkin argues that the philosophy of law aims to bring coherence to legal systems.[14] Gardiner criticizes this approach, arguing that philosophical thinking is exclusive to the job of the judges and trail lawyers.[15] Though, I understand where this criticism is coming from, I argue that no philosophical thought is capable of not leaving any implications on the making or practice of law, when it operates to become common knowledge.[16] It might not

[7] Ludwig W., *Philosophical Investigations* (Rev. 4th edn, Wiley-Blackwell, 2009), 56
[8] See Hart, H. L. A. The Concept of Law, (Clarendon Press, 1961.)
[9] Scott Shapiro, *Legality* (Belknap Press of Harvard University Press, 2011), 95
[10] Leslie Green, The Concept of Law Revisited, (*Michigan Law Review* 94,).
[11] Giudice M., Analytical Jurisprudence and Contingency, (New Waves in Philosophy of Law, 2011) 58.
[12] Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press, 1990) 52.
[13] Ibid 53.
[14] See Dworkin R. The Philosophy of Law (Oxford University Press, 1977).
[15] Gardner J., Law as a Leap of Faith, (Oxford University Press, 2012).
[16] Dickson J.. WHY GENERAL JURISPRUDENCE IS INTERESTING, (49.147, 2017) 11

reflect in the end result but the process of genesis is unlikely to not have considered certain perspective operating in the realm.[17] While jurists tend to derive thoughts from existing practices, Judges tend to contemplate jurisprudential perspectives to draw conclusions.[18] In other words, it is absurd to deny the unavoidable consequences of jurisprudential thought on practitioner interests, when in fact, the very aspect plays a major role in arguing the functionalism and the allure of jurisprudence.

Another popular criticism against consequentialist approach pertains to the commonly held view of jurisprudence as a battle between opposing schools of thought each offering a set of ideals which either win as a package or lose as a package.[19] In fact, this is one of the reasons why some find jurisprudence uninteresting. However, consequentialist approach makes sense predominantly in two senses. One, by focussing on consequences, practitioner (law makers, office-holders, judges, lawyers etc.) interests could be better served. Secondly, the fundamental importance and relevance of discussing real world implications cannot be denied in entirety by any group of scholars. Therefore, I reaffirm that in jurisprudence's functionalism to encourage discussion and solve complex problems, lies its ability to behold a lawman's interest could be perceived to be more likely.

A lawman's dilemma

With all the theoretical assertions made, it becomes imperative to extend few examples in support. There is no dearth in thought provoking situations in the contemporary societies, popular examples being novel trends and debates on homosexual rights, abortion laws, pornography, prostitution etc, a couple of which I would discuss in the next part. These debates reveal clashes of several values like- right to private life versus social demoralisation, freedom of expression versus protection of children, etc.[20] There is always a controversy awaiting policy solutions, before lawmakers. If they leave them unresolved, the struggles reach the walls of the court and then to the consciences of the judges.[21] A judge owing to her duty to adjudicate cannot leave an issue undetermined, and might have to use her cognitive abilities to go beyond the limits of existing law to arrive at a conclusion.[22] Though it is highly contested that judges

[17] Ibid 13
[18] Ibid 15
[19] Leiter B., Realism, Hard Positivism and Conceptual Analysis, Legal Theory, (vol. 4, 2012) 533.
[20] Tamanaha, B., What is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law", Transnational Legal Theory (vol. 2,2011) 289
[21] Ibid 293
[22] See Hart, *The Concept of Law*, 136–41.

rarely need to go further than what law readily furnishes them with,[23] I believe it is impossible for law to predetermine everything leaving nothing beyond anticipation.[24]

Several situations of dilemma are also faced by other agents in a government. An office holder might be required to act by law, even if he is morally opposed to the norms set thereby. As regards as an official's dilemma about continuing or quitting his job in an unjust state, few may argue that quitting is a morally sound option, as choosing to stay essentially means 'to support'.[25] However, from another viewpoint, continuing could be morally excusable, or suggestible, in cases where evil could indeed be mitigated from within.[26] In fact, in real-time legal systems, it is most likely that he chooses to stay, and arguments as to what he could choose to do while staying, become relevant silent/tacit resistance, formal challenge, effective advocacy, or even outright action for achieving good.[27]

In situations like above, it is important for lawmakers, judges, and other office holders, to remain impartial and not succumb to external or internal biases.[28] But to act in such a manner, they need an authoritative backing to stay rooted to, and this I argue is the most important application of the discipline of jurisprudence.[29] It is an authority which clarifies legal principles, evaluates competing arguments, and resolves ambiguities, all the while considering numeral legal, moral and ethical dimensions. In short, while encouraging multi-faceted understanding, it facilitates guided decision making which is grounded to both principles and purposes on laws.

Controversies, perspectives, and answers

I herewith discuss certain specific arenas like prostitution, surrogacy, and conscription to further my above claims.

The debate regarding prostitution and demands for its legalization or criminalisation (depending on the legal system) could topically seem to be all about morality. The opposition

[23] Ibid 139
[24] Ibid 140
[25] David Luban
[26] Higgins R., The Moral Limits of Law: Obedience, Respect, and Legitimacy, (Oxford University Press, 2014) 143.
[27] Ibid. 140
[28] Ibid. 144
[29] Dickson J. WHY GENERAL JURISPRUDENCE IS INTERESTING, 15, n 15.

majorly stems from the alleged argument that it is intrinsically degrades the moral worth of human sexuality.[30] Objections to its legalisation, however, could be based on other perspectives of human liberty, freedom, and other rights.[31] One could make the case that the act is not often done willingly because external factors such as poverty, drug dependence, or other unfavourable circumstances can lead to coercion. Moreover, there are concerns about fraudulent or tainted consent. Likewise, individuals who are against surrogacy and selling of babies argue that a decision to carry a child for payment is not entirely voluntary because the woman giving birth may not anticipate how motherhood would be.[32] Conversely, some believe that even if an agreement to sell a baby is fully informed and voluntary, it is still morally unacceptable because certain things should not be commodified.[33] Additionally, some argue that contract pregnancy devalues women by using their reproductive capabilities for commercial purposes In both the above cases, arguments and subsequent inferences are different based on what approach in jurisprudence has been adopted- natural law, realism, liberalism, contractarian theories, post modernist feminist theories, etc.

Similarly, there are different schools of thought regarding allocating military service by conscription. Theories on nationalism and realism support it in the interests of patriotism and national security respectively.[34] On the other hand, those like pacifism, libertarianism, and feminism, oppose it on the grounds that it violates individual rights, perpetuates violence and inequality, and reinforces patriarchal norms respectively.[35] These approaches differ in both reasoning and conclusions. When it comes to the issue of morality, there are two different viewpoints can be considered. The first argues against blindly advocating for a volunteer army without considering societal factors such as poverty and economic disadvantage. In such circumstances, the decision to serve in the military may not necessarily be voluntary, but rather the result of a lack of alternatives.[36] The second viewpoint holds that all citizens have a duty to serve their country, and turning military service into a paid job corrupts or diminishes the sense of civic duty.[37] While these arguments exist, there are also libertarians who propose outsourcing military responsibilities to private companies or developing nations with lower

[30] Sandel, Michael J, What money shouldn't buy, (The Hedgehog Review, 2003) 77.
[31] Ibid 78
[32] Ibid 80
[33] Ibid 81
[34]See J. Rawls, A Theory of Justice,(Harvard University Press, 1971) 213
[35] Ibid 217
[36] Ibid 211
[37] Ibid 212

wage rates

In all the above cases, there are varied approaches and all differ to great degrees. However, such distinct yet somehow complementary inferences drawn from various schools of jurisprudential thought provide a comprehensive background analysis required for instituting a policy measure, or setting a judicial precedent.

Conclusion

Law must keep up with the changes, and be socially acceptable.[38] Jurisprudence provides the necessary aid and catalyses the whole process, without compromising the common values of consistency and integrity. The two-fold functions that jurisprudence has come to perform- 'driving' and 'resolving' philosophical debates, are what makes it highly relevant, and consequentially, a very interesting discipline. All that being said, jurisprudence is not to be seen as a magic bullet that alone can solve every legal problem. I reaffirm that it sets a premise, drives thought, and motivates to draw conclusions. In other words, it is a navigating tool to help travel endless voyages.

[38] Giudice M., Analytical Jurisprudence and Contingency, (New Waves in Philosophy of Law, 2011) 59.