JURISPRUDENCE AND LEGAL THEORY

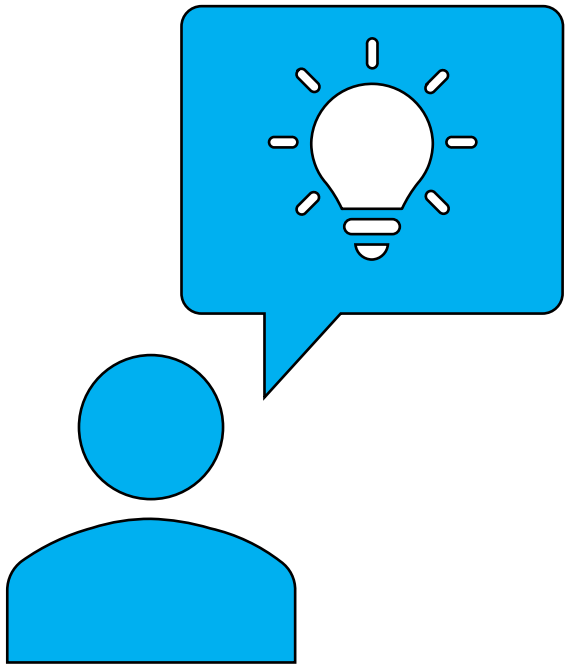
Lecture 1

By Ahmad Waqas



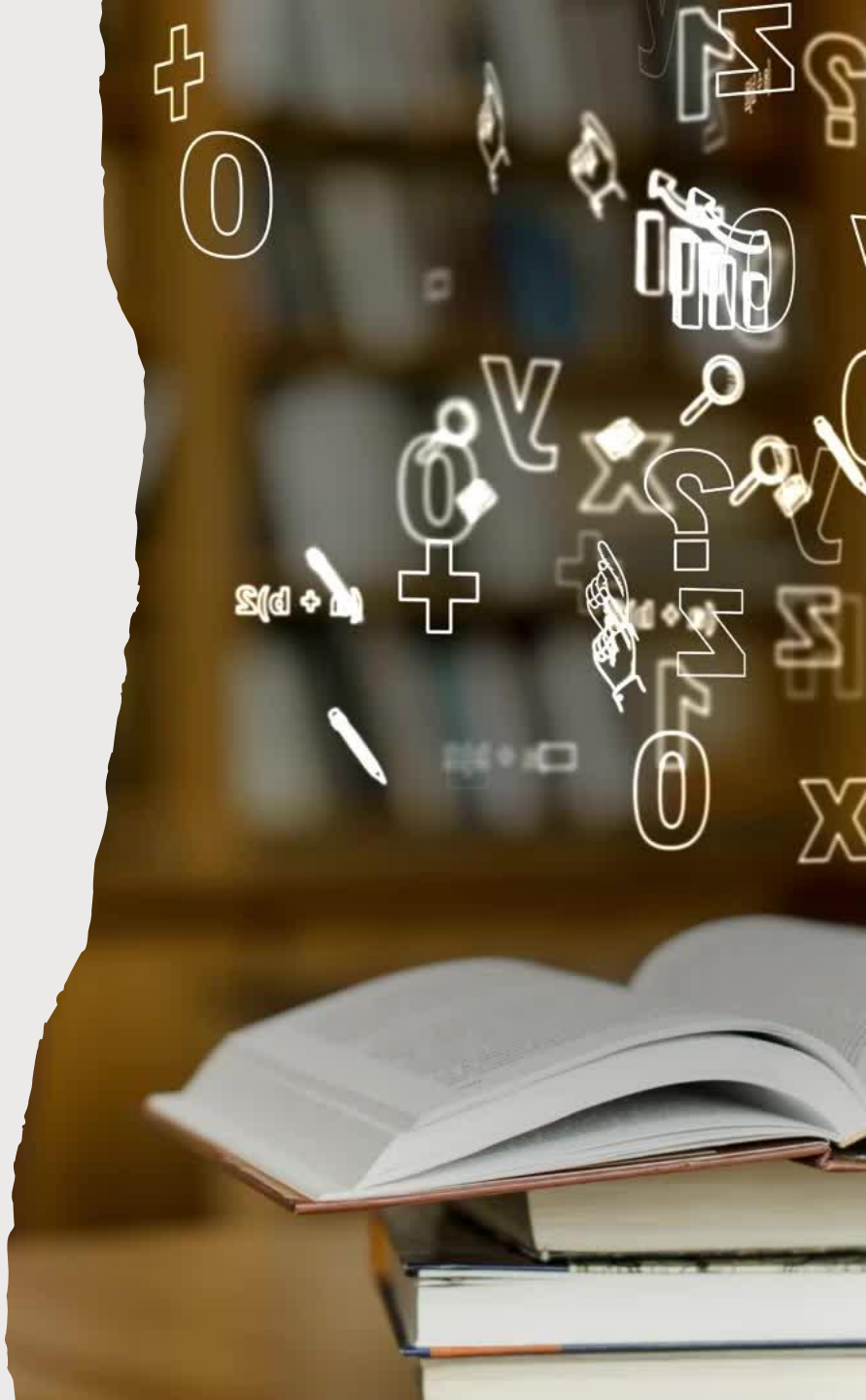
WHY STUDY JURISPRUDENCE?

- It will make you a better thinker; and a better lawyer
- Training in thinking at an abstract level
- Don’t panic: use and develop your skills
- Constructing and evaluating argument
- An opportunity to engage with philosophical thought and to learn from rigorous argumentation



THE THEORY OR PHILOSOPHY OF LAW.
قانون کا علم

- **Jurisprudence** is the philosophy and theory of law.
- It is concerned primarily with what the law is and what it ought to be?



ESSENTIAL READINGS

Freeman, M. (ed.) *Lloyd's introduction to jurisprudence*. (London : Sweet& Maxwell, 2014) ninth edition [ISBN 9780414026728] (hereafter referred to as 'Freeman').

Hart, H.L.A. *The concept of law*. (Oxford: Oxford UniversityPress, 2012)third edition [ISBN Paperback 9780199644704, Hardback 9780199644698].

‘DESCRIPTIVE’ THEORY VS ‘NORMATIVE’ THEORY

- a ‘descriptive’ theory – loosely, one that describes things ‘as they are’

- While a ‘normative’ theory, it means a theory which says how people **ought to** or **may** behave (or **must**, or **should**, etc. ...you’ll get the idea).
- You should therefore be able to see why normativity and rule following are two closely related ideas. Laws are normative because they tell people how they ought to, or may, behave.
- And a moral theory like utilitarianism is a normative theory because it says that people **ought** to act in the interest of the general happiness.

THINK ABOUT THESE TWO BASIC QUESTIONS;



What is law?



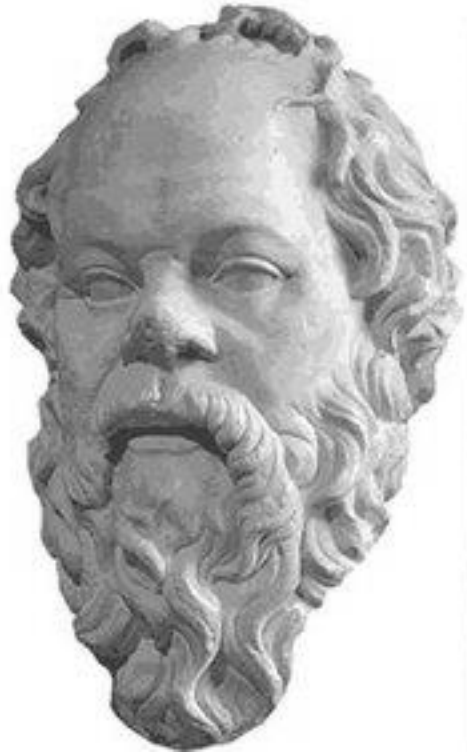
Why do you follow it?

CLASSICAL NATURAL LAW THEORY

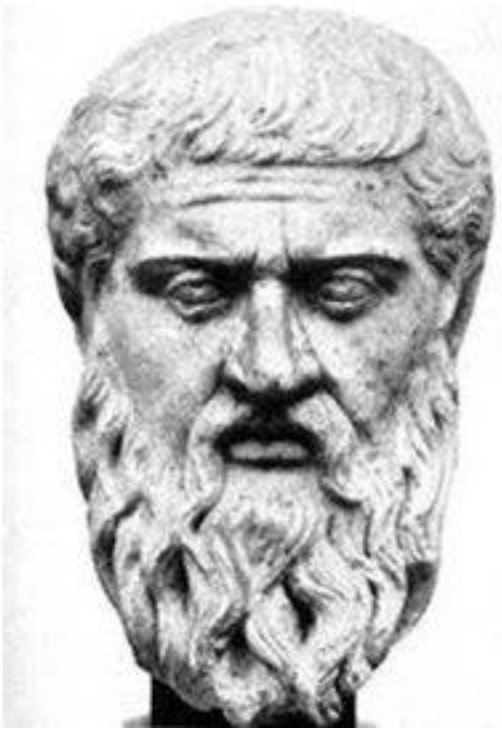
- From the time of the ancient Greeks up until the 16th or 17th centuries, there really was only one kind of 'legal theory' – natural law.
- . Natural law is considered first since it is by far the oldest type of formal reasoning about law, having a relation with religious and political thought that stretches back at least to the ancient Greeks.
- The essence of this legal theory was that the law must be understood as a practical application of morality; hence law and morality are intimately connected
- Theory of morality
- This morality of reason and revelation was a morality which purported to take account of man's **nature**, hence the title 'natural'/

Greek Philosophers

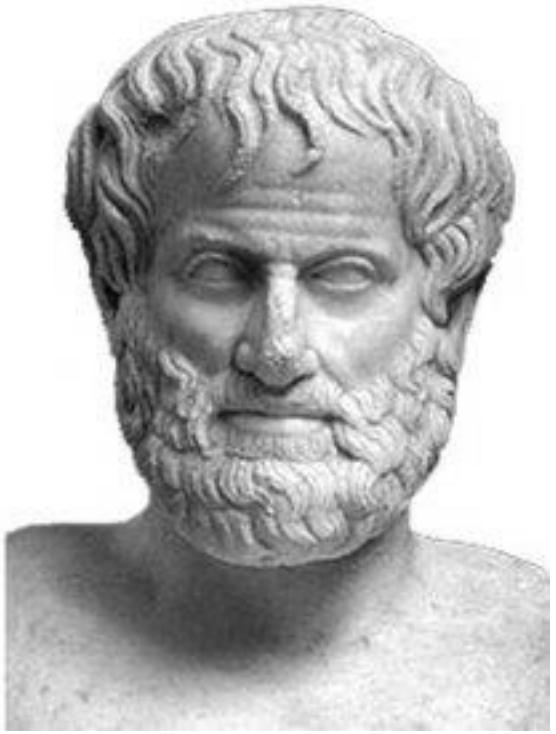
Socrates
470-399 B.C.



Plato
428-348 B.C.

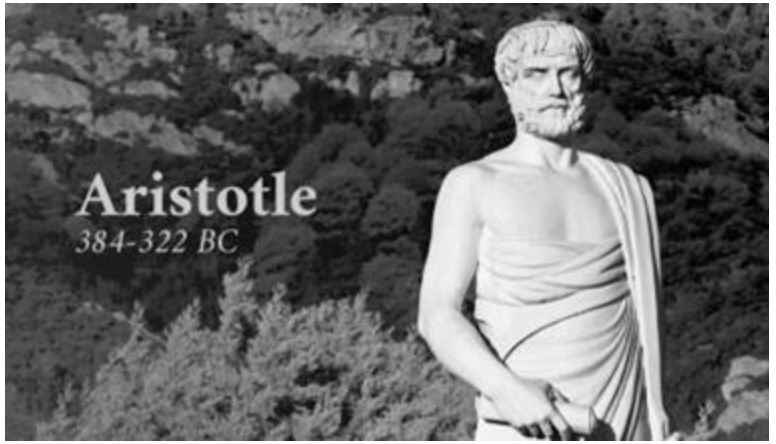


Aristotle
384-322 B.C.



GREEK PHILOSOPHY

- Aristotle believed that the primary purpose of law is to achieve justice in society. He saw law as a means to ensure that individuals receive what is fair and right, and that their rights and interests are protected. Law, in Aristotle's view, should be a reflection of justice.
- "At his best, man is the noblest of all animals; separated from law and justice he is the worst." Aristotle, from "Politics"



ROMAN EMPIRE: JUS GENTIUM

- The spread of the Roman Empire created a need for some system of law, simpler and wider-ranging than the *jus civile (civil Law of Rome)* of Rome.
- Justinian remarked that throughout the known world every people ... used partly a law peculiar to itself and partly a law common to all mankind.
- jus gentium was therefore created as a universal code of law applicable throughout the Empire.



THOMAS AQUINAS

"Lex injusta non est lex" An unjust law is no law at all

- The principal exponent of natural law ideas in the middle ages was Thomas Aquinas (1224-1274)
- In his major work *Summa Theologica* Aquinas distinguished between
  - Eternal law - the rational guidance of God, necessary since man is ordained to a particular end (eternal happiness) and cannot attain this through his own powers alone;
  - Divine law - the part of eternal law that has been revealed to man through the Holy Scriptures;
  - Natural law - the participation of rational creatures in the eternal law, by use of man's reason to discover that part of eternal law which applies to the human condition; and
  - Human law - laws made by man (in accordance with divine law and natural law) to regulate society so that man can live in harmony with his fellows.



NATURAL LAW VS POSITIVE LAW?

