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A Definition of Law

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Recommended Citation

Willis, Hugh Evander, "A Definition of Law" (1926). *Articles by Maurer Faculty*. Paper 1250.
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A DEFINITION OF LAW.¹

WHAT is law, in its legal sense?

Blackstone said that law, in its most general and comprehensive sense, "is that rule of action which is prescribed by some superior and which the inferior is bound to obey."² Civil law he defined as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."³ In Blackstone's definitions there are two main concepts: (1) the concept of a "superior," and (2) the concept of a command."⁴ Is Blackstone's definition correct in either of these respects?

Is law something set, or given, by a superior to an inferior, or by a sovereign to a person in a state of subjection? This concept of Blackstone would exclude all international law, as perhaps it should, but it has been criticised on this account.⁵ It would also exclude constitutional law and all law adopted by a people of a country, as in the United States. Such constitutions, and for that matter all law in such jurisdictions, is adopted by the sovereign people for their own control, not by some superiors for other inferiors. Since Blackstone's definition does not include this sort of law, the proper conclusion is, not that there is no such law, but that the definition is inadequate.

Is law a command? Even Austin had difficulty in fitting his definition to "laws explaining the import of existing positive laws, and the laws abrogating or repealing existing positive law." How could it any better be applied to any of the common law?

¹ The substance of this article will later appear as part of a chapter in a book on Introduction to Anglo-American Law, which the author has in process of preparation.

² 1 BLACKSTONE, COMMENTARIES, 38.

³ 1 BLACKSTONE, COMMENTARIES, 44.

⁴ These two concepts, though worded differently, are the basis of Austin's definition: "Positive law is set by a monarch or sovereign member, to a person or persons in a state of subjection, to its author." 1 AUSTIN, PROVINCE OF JURISPRUDENCE, 2.

⁵ CLARK, PRACTICAL JURISPRUDENCE, 134, 172, 186, 187; HALL, INTERNATIONAL LAW, 17; POLLOCK, OXFORD LECTURES, 19.

In the United States, as concerns all civil as distinguished from criminal law, law is not a command. The law does not command people not to commit trespasses and other torts; nor promisors to perform their promises, except perhaps in the few rare cases where the remedies of injunction and specific performance are available. The state has policemen, judges, and other officers of the law, but they are not ordinarily commanding anyone to do anything with respect to what is known as civil law. They may give people advice. In the course of time they may bring people into court for some civil wrong that they may have done. But they do not issue commands to people telling them how they must treat each other. As concerns criminal law, Blackstone's concept seems nearer the truth. It might easily be possible to think of the state as commanding the people not to commit certain criminal acts. Yet the true concept of criminal law is not that of something commanded not to be done. In this respect it is like civil law, as will be pointed out later on.⁶ Hence Blackstone's definition is inadequate in both respects. Leon Duguit was right when he said, "Law is not the command of a sovereign state, but a by-law governing a group."⁷

What, then, is a correct definition of law?

From what has been said above, it should be noted that law is a scheme of social control. It is not the simple thing that a "command from a superior to an inferior" would be. It is a complicated contrivance; a connected combination of things. It is a scheme. In the first place the scheme is a form of social control. It is not a scheme of individual control. The individual is free to control his own conduct, so long as it does not affect others. He may choose his own vocation, choose his own domicile, and regulate his own conduct in a thousand and one other ways, without any interference by the law, provided he alone is concerned. But if his conduct affects the lives of his fellowmen, then there is a possibility of control by the law.

In the second place it should be noted that, while law is a scheme of social control, it does not attempt to control all social relations. It controls them only so far as social interests require

⁶ See Criticism in DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 10.

⁷ 32 Yale L. J. 425.

such control. As human beings come in closer contact with each other they have more wants, or social interests. Kant has truly said that if a man was alone in the world, or on a desert island, he would call nothing "his own" (*proprius*). What is true of external things is true of personality. A solitary human being would have no wants against other human beings. Hence there would be no social interests. But the more people are thrown into contact with each other, the more social interests they have. People in rural districts do not have as many social interests as people in urban communities. People in small urban communities do not have as many social interests as people in large cities. As social life becomes more complex, more social interests have to be recognized. In the early history of the world there were not as many social interests as there are today. In the early history of our country there were not as many social interests as there are now. At first the only social interest recognized was that of the preservation of the peace. Later there was a social interest in the maintenance of the *status quo*. This was a paramount social interest in Greek, Roman, and English history before the nineteenth century. In modern times numerous social interests have grown up. What social interests shall be recognized is determined (theoretically) by the sovereign power,—in the United States by the majority of the people in the state, as they express themselves through their representatives in the halls of legislation and their judges on the benches. The determination of a new social interest is often a difficult matter. Society is made up of many conflicting and overlapping groups, as capitalists, laborers, farmers, consumers, producers and the like. Representatives may be governed by self-interest and judges influenced by bias and prejudice. Under such circumstances it is often difficult to decide what is the social interest. What, for example, is the social interest in such matters as the tariff, child labor, liquor, and drugs? Yet, in the complex modern world, if many social interests were not recognized and protected, life would be intolerable. The human race, through warfare, degeneracy, ignorance and laziness would soon destroy itself. Law, then, is a scheme of social control, for the protection of

those social interests which society in some way decides shall be protected.⁸

However, in order to understand the nature of law, it is necessary, not only to know what its purpose is, but also how it accomplishes its purpose. As a matter of fact the greater part of the scheme of social control known as law consists of the means whereby it accomplishes its purpose. We have already noted that the law does not protect social interests by sending someone out, like a policeman, to see that all people respect them. The scheme is much more complicated. What is the nature of this scheme? In order to find the answer to this question let us examine the phenomena of the law; let us keep our feet on the ground; let us get the exact data; so that, after we have got the data we may make our definition conform to the facts, instead of first framing a definition and then trying to make the facts conform to our definition.

In pursuance of this policy, let us examine the law of contracts, which is one of the phenomena of the law. What do we have in a contract? A first thing which we observe is that we have a promise, or two promises each given for the other. But there is not anything magical in a promise. People are making promises all of the time. Most of them are not contracts, and do not have any legal consequences. A contract is a promise which has legal consequences. What are they? Clearly the law

⁸ Pound gives the following as a classified list of all the social interests which have received protection up to date:

I. General Security.

A. Personality.

1. Physical Person.

- a. Direct Injury.
- b. Bodily Health.
- c. Freedom of Will—Physical Existence.
- d. Mental Health.
- e. Nervous System.
- f. Privacy.

2. Honor and Reputation—Social Existence.

3. Belief and Opinion—Spiritual Existence.

B. Domestic Relations.

1. Parental.

2. Marital.

C. Substance—Economic Existence.

1. Property.

“commands” no one to make a contract. But after he has made a contract the law has something to say about it. What is it? In the first place it says that one person—the promisee—and both persons—if each is a promisee,—has a legal right to the performance of the promise, and the other party is under a correlative legal obligation to perform the promise. Why? Because the promise in the form of a contract is one of such importance that its non-performance is liable to have bad social consequences in that it would tend to destroy the general security which is necessary for a stable and permanent social order, or perhaps even to disturb the peace of society. In other words, because there is a social interest in general security which the law believes should be protected. In the second place, we observe, that if a promisor who has made a contract breaks his promise the law begins to do the only thing which looks the least like a “command.” It offers the facilities of the courts and legal procedure to the man wronged to enable him to get something as a substitute for what he ought to have received, and what he would have received if the other party to the contract had carried out his promise. Sometimes the law actually decrees “specific performance” though it is now too late for performance to occur at the time promised and it is, therefore, really “specific reparation”; but ordinarily it gives the party a judgment for damages in lieu of that which he should have obtained and helps him by an exe-

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- 2. Freedom of Industry and Contract.
 - 3. Promised Advantages.
 - 4. Advantageous Relations.
 - 5. Free Association.
 - II. Security of Social Institutions.
 - A. Domestic.
 - B. Religious.
 - C. Political.
 - III. General Morals.
 - IV. Conservation of Social Resources.
 - A. Natural Resources.
 - B. Dependents and Defectives.
 - V. General Progress.
 - A. Economic (Free invention, trade, property, industry).
 - B. Political (Free criticism and opinion).
 - C. Cultural (Free science and learning).
 - VI. Individual Life.
- See 3 Dunster House Papers, 3-4; 28 Harv. Law Rev. 343, 445.

cution to obtain his damages if it is possible to do so in the state of the promisor's financial condition and in the state of the machinery of the law.

What we have just found to be true in the case of contract is true of all the other phenomena of the law. If in pursuance of our policy we should go through the entire realm of the law,—domestic relations, property, torts, crimes, equity, negotiable instruments, sales, public callings, constitutional law and all the other branches of the law,—we should find (1) a right, or some other capacity of influencing the conduct of another recognized by the law in one person, or set of persons, and (2) some machinery of the law available for the use of the injured person, or persons, if he does not get that to which he is entitled from the other person.

Thus we see that the law accomplishes its purposes by a two-fold arrangement (1) the recognition in persons of capacities of influencing the conduct of others, and (2) of permitting them to resort to the courts for assistance. These are the third and fourth characteristics of the scheme of social control which is known as law.

In the third place, then we should note that the law embraces legal capacities. A legal capacity, or ability, is the capacity, or ability, given one person, because of some social interest, to control the conduct of others, through the power of the state. These legal capacities of influence are rights, powers, privileges and immunities.⁹ A legal right is the legal capacity to enforce action or forbearance by another, as, for example, a contract, or property, or personal safety.¹⁰ A legal privilege is the legal capacity to do as one pleases in a certain matter, because he is under no duty to another, as, for example, a revocable license to walk on another's land.¹¹ A legal power is the legal capacity to change

⁹ The best explanation of these terms will be found in an article written by Hohfeld, 23 Yale L. J. 16 and 26 Yale L. J. 710.

¹⁰ Other definitions of the term "right" are the following: "A right is one's affirmative claim against another." Hohfeld. "A right is the legal relation of two where society enforces action or forbearance for one." Corbin. "A legal right is the capacity residing in one man of controlling with the assent and assistance of the state, the actions of others." Holland.

¹¹ Other definitions of "privilege" are: "A privilege is one's freedom from the right or claim of another." Hohfeld. "A privilege is one's relation to

or create new legal capacities or liabilities for another or others, as, for example, ratification or disaffirmance of a contract, or sale.¹² A legal immunity is the legal capacity to be free from the legal power or control of another, because it is his privilege, as, for example, the violation of the obligation of a contract by a state.¹³ With the exception of infants, insane persons, and certain other persons under disability, the law has given to natural persons full legal capacity, that is, they have all the rights, privileges, powers, and immunities known to the law. Corporations have only the legal capacity given to them expressly or impliedly by their charters of incorporation. A sovereign state has legal capacity against persons, but persons do not have legal capacity against it except as it gives its consent. Thus, correlative with the capacity, or ability, to influence the conduct of others, is the liability to have such conduct influenced. Correlative with every right there is a duty; with every privilege, a no right; with every power, a no privilege; and with every immunity, a no power.

The most important legal capacities are legal rights, and the most important legal liabilities are legal duties. Social interests are generally protected by rights, rather than by powers, privileges and immunities. As there are many social interests which society has decided need protection, so there are many legal rights, varying with the social interest. Legal rights are classified¹⁴ as antecedent (or primary) and remedial (or secondary). Antecedent rights are classified as public and private, and *in rem* and *in personam*. Remedial rights are all *in personam*. Private

another where he may conduct himself as he pleases in a certain matter." Corbin. "A privilege is an immunity from liability for what but for the privilege would be a violation of duty." Pound.

¹² Other definitions of "power" are: "A power is one's affirmative control over a given legal relation as against another." Hohfeld. "A power is the legal relation of one to another where one by his voluntary act may create new legal relations between them, or between the other and a third." Corbin. "A power is a capacity conferred or recognized by law of creating, divesting, or altering rights and so creating or altering duties." Pound.

¹³ Other definitions of "immunity" are: "An immunity is one's freedom from the legal power or control of another as regards some legal relation." Hohfeld. "An immunity is the legal relation where one has no legal power to affect at least one of the legal relations of another." Corbin.

¹⁴ HOLLAND, JURISPRUDENCE, 160.

antecedent rights *in rem* include personal safety, society and control of family and dependents, property (both real and personal), freedom of locomotion, reputation, immunity from fraud, advantages open to the community generally, and privacy; all of which have been given in their historical order, that is, in the order in which they have been recognized as legal capacities. Private antecedent rights *in personam* include contracts, *quasi* contracts, trusts, bailments, public callings, and other fiduciary relations. Remedial rights are classified as preventive and redressive, and redressive rights as restorative and compensatory. Preventive remedial rights include injunction, prohibition and exemplary damages. Restorative remedial rights include reformation, rescission, specific performance, *mandamus*, ejection, replevin, *habeas corpus* and *quo warranto*. Compensatory remedial rights are the rights to damages of some sort, as nominal, direct, consequential, general, special, etc., which vary according as the action for damages is *ex contractu* or *ex delicto*. Enough has been said about rights to give some idea of their scope. The curricula of our law schools are mostly concerned with them. Most of the law books are about them. If there was nothing to the law but rights and duties it would be a very complicated thing and would have to be called a scheme of social control.

All of the social interests, which society has decided need protection are protected by means of some of these capacities of influence, and only in this way; and this is as true in the realm of criminal law as in the realm of civil law. The law gives to the state certain public rights, as it gives to individuals private rights. The first social interest historically recognized was that in the preservation of the peace. This was protected civilly by giving to the individual first the right of personal safety, then by giving him the right to the control and society of family and dependents, then by the right of property, and finally by the rights of freedom of locomotion, reputation, immunity from fraud, advantages open to the community generally, and privacy. The different social interests are not all protected in the same way. The social interests in the preservation of the peace, or in general security, so far as it relates to the

protection of the physical person against direct injury is protected by the private antecedent right *in rem* of personal safety and by an analogous public right. In the same way the social interest in the general security of personality so far as it concerns honor and reputation is protected by the private antecedent right of reputation, and by an analogous public right. Some social interests are protected by private rights only, as in the case of promised advantages. Other social interests are protected by public rights only, as in the case of general morals and the conservation of social resources. Still other social interests are not protected by rights at all, but by privileges, powers or immunities. The social interest in the freedom of the will is not only protected by rights, as in the cases of procuring refusal to contract or breach of contract, fraud and freedom of locomotion, but by the privilege to avoid a contract procured by duress, or by undue influence. The economic existence is often protected by powers and immunities, as well as by rights. This seems a roundabout way for the law to accomplish its purposes, but since it is the way of the law it must be considered when anyone takes up the task of formulating a definition of law.

In the fourth place, something more than the recognition of legal capacities is, however, as we have seen, necessary for the protection of social interests. It is not enough to give people legal capacities and liabilities, rights and duties, etc. Law is a much more complicated scheme of social control. If there were not some means for enforcing these rights, powers, privileges and immunities they might become empty things. The law has recognized this, and has provided for their enforcement, either by authorized self-help, as in the case of self-defense, recaption, entry, and distress *damage feasant*, or by the courts under established rules of legal procedure, known as pleading, evidence, and practice.

A court "is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law." Courts are of general or limited jurisdiction, of original or appellate jurisdiction, and of exclusive or concurrent jurisdiction. In the United States there is a dual system of courts, state and Federal. Legal procedure, or adjective law (because it exists for the sake of substantive law), prescribes

the modes whereby remedial rights may be secured. In those exceptional cases where the law still permits self-help it points out the limits within which it may be exercised. In other cases it announces the steps which must be taken to set in motion and to carry through to execution the machinery of the law courts. Pleadings are the written allegations as to claims and defenses in an action in court. They are supposed to be a scheme for the determination of the issues between the litigants. "Evidence in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." It is the information, given by the respective parties, in the form of statements of witnesses, documents, or observations made by the tribunal, to the tribunal before which the cause is tried, upon which to base its decision upon the issues, or disputed matters of fact. Practice includes all the steps in legal procedure not included in pleading and evidence, such for example, in a criminal case, as indictment, warrant, arrest, preliminary examination, bail, arraignment, plea, empanelling and swearing the jury, opening statement of state's attorney, introduction of state's evidence, opening statement of defendant's attorney, introduction of evidence by defense, requests for instructions, arguments of counsel, instructions of court, verdict, new trial, appeal, judgment, and sentence. Legal procedure itself is no small scheme, and of course it is a part of the scheme of social control known as the law, and must enter into any definition of the term law.

We have now discovered four concepts, as the chief characteristics of law. Two of them have to do with the purposes of law, and two with the means whereby it accomplishes those purposes. A definition of law which includes all of these concepts and no others would seem to be a correct definition. Law in the legal sense may, therefore, be defined as follows: *Law is a scheme of social control, backed and sanctioned by the power of the state, for the protection of social interests, by means of legal capacities and legal redress.*¹⁵

¹⁵ The following definition by Wilson is framed on the same theory as the definition given above, but it does not embrace all the legal concepts which it ought to embrace: "Law is that part of the established thought and habit,

The result of law is legal justice, which when perfect may be defined as such an adjustment of the relations of human beings as to make all discharge all of their duties and other liabilities, and all obtain all of their rights, privileges, powers and immunities. What these are depends upon the social interests which society decrees shall have protection. Legal justice is not as broad as social justice. Social justice recognizes more social interests than does legal justice. Consequently it recognizes more rights and duties. Social justice also recognizes no favored classes, and it protects groups within nations or as nations as well as individuals. Legal justice does not go as far as this, but it is tending in the direction of social justice and it may sometime be synonymous with social justice. Of course, as a matter of fact, the law does not make all people discharge their duties, nor see that all people obtain their rights, privileges, powers, and immunities. The law is not perfect. The reason for this is for the most part the fault of the courts and legal procedure. In England, because of its reformed court system and reformed legal procedure, there is a fair approach to an ideal result; but in the United States the situation is far from it. Criminal procedure is worse here than civil procedure. But the defects and failures of legal procedure do not change the nature of law. They simply show its imperfection and the need of reform. The law is only a "scheme." The scheme may fail, at least at some times and in some places, yet the scheme still remains. As a result of the scheme the legal justice obtained may be very poor, yet it remains true that the law is a scheme for the administration of justice. For this reason law may be defined, not only as a scheme of social control, but as the science, that is, the organized body of knowledge composed of principles, rules and standards, which deals with the administration of justice. A law, in the specific sense, may be defined as a principle, rule, or standard in accordance with which justice is administered.¹⁶

which has been accorded general acceptance, and which is backed and sanctioned by the force and authority of the regularly constituted government of the body politic."

¹⁶ This is the more usual way to define law, as witness the following definitions: "The science of law is that organized body of knowledge that has to do with the administration of justice by public or regular tribunals in ac-

The definition just stated is in reality the same as that heretofore given. If the law, through its courts and legal procedure, administers justice, human beings will discharge all their duties etc., and obtain all of their rights, etc.; and if human beings discharge all of their duties, etc., and obtain all of their rights, etc., all of the social interests as yet recognized will be protected; and if social interests are protected in this way, the law is a scheme of social control. Hence, law is a scheme of social control, backed and sanctioned by the power of the state, for the protection of social interests, by means of legal capacities and legal redress.

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cordance with principles or rules of general character and more or less uniform application." Pound. "On the whole the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on the members of the commonwealth as such." Pollock. "The law may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of rules administered by courts of justice." Pollock and Maitland. "Law is a rule of conduct obtaining among a class of human beings and sanctioned by human displeasure." Clark. "Law is a general rule of external human action enforced by a sovereign political authority." Holland.