

What is Law

There are two great subdivisions of thought in regard to what is law, which have prevailed in our English literature and jurisprudence — the one that of Sir William Blackstone and the strictly legal technical writers who have followed and the other that of Hobbes, Bentham and Austin, all of whom represent an intellectual revolt against the unscientific and illogical methods of the former school of thought.

Blackstone defines law to be "a rule of action ~~and~~ prescribed by a superior for the conduct of an inferior." He approaches it through the laws of nature which he declares to be rules of natural action prescribed for the government of natural bodies by the Creator. Thus he arrives at the conclusion that Municipal Law

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civil conduct
is a rule of action prescribed by the
supreme power of the state, prescribing
commanding what is right and prohib-
iting what is wrong.

The fallacy of this long accepted defi-
nition is apparent at a glance. Indeed,
for more than a hundred years, hardly a
writer has cited it as the foundation of
any work upon jurisprudence who has not
pointed out its defectiveness. Yet such
is the force of this author's ferried fancy,
positiveness of statement and the charm
of his exquisite language, that de-
spite the fact that almost every
word in it is used and must
be construed in a figurative

sense in order to make it even tolerably correct, it has held its place and is still the accepted definition of the legal profession.

Specifically, stated, the objections to this definition are -

1 - Law is more than a rule of "action".

It prescribes the conditions of being, existence as a part of humanity as an integral element of society.

2 - It is ~~only~~ in some cases, very many indeed, only constructively, prescribed by ~~the~~ ^a definite superior. The

supreme power of a state in our Anglo

Saxon sense, - its political head or

recognized sovereignty - has but

a negative relation to the great

body of our law. Indeed, it is itself regulated, restrained and controlled, by the principles which constitute the basis of that law. While it may be said in a secondary sense to prescribe these rules for its own regulation, and thus to be the source of law, the reasoning, however beautiful and practical, is far too subtle and remote to commend itself to scientific or commendation. As a fact, the great body of human law has sprung from custom - has been the unconscious growth of centuries of habit - rather than the conscious act of

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any form of human authority or any act of human will.

3 - In the third place, only a small portion of the law is either mandatory or prohibitory. The great body of it is permissive, regulative, and directory, merely. ^{Much} it is founded on ~~the~~ ^{many} of them ~~are~~ "universal principles of human nature on the results of human experience, which Blackstone elevates to the dignity of natural law and ~~absolutely~~ ^{absolutely} enough declares that "no human laws are of any validity if ~~the~~ ^{contrary} to this."

4 - In the fourth place this definition of law and all the resulting definitions and classifications are curiously and confusingly ~~un-~~ ^{un-}logical. The "common" implies

the "superior", and to "command what is right, ex vi termini, is to "prohibit what is wrong."

The very defects of this definition, have, however, led Austin, into a sort course of abstract speculations, in which "law" as abstraction — a single comprehensive idea — is strangely and confusingly mingled with luminous and exquisite discussions of the elements of "laws". In these speculations which it is unnecessary here to trace, he has fallen into a confusion, which has compelled the use of a strained and figurative terminology, hardly less scientifically reprehensible

them that which he attacks. In this it is easy to trace the conflict of the subtle power of analysis which he possessed in such a rare degree, with the potent premonitions with which he strove in vain to reconcile his conclusions.

In a sense, it would seem pre-
 sumptions to attempt a fuller or more
 exact definition of the term "law"
 or the kindred expressions "laws". The con-
 fusion arising from the figurative character
 of them we have referred to, and the fact
 that their inconsistency is not only aff-
 firmed by the almost universal au-
 thority of legal writers and recognized

juridical thinkers, makes it necessary to attempt to arrive at a more reliable definition for the purposes of this course at least. In so doing, while it will be necessary to depart somewhat from the phraseology as long accepted, it is by no means necessary to throw aside the ideas or abandon all of the reasoning on which these definitions are based.

Law, in its broadest sense, may therefore be defined as ^{the} rule, by which relation is fixed and determined.

The law of nature determines the relations of natural forces and forces. The

Law of God, fixes the relations of the creature to the creator or to ~~each~~ other creatures; the law of gravity determines the relations of moving bodies; ~~the~~ of crystallization the relations of matter affected by a specific force, and so on through the various uses of the term "law."

As applied to humanity, law is that system of rules by which the relations of ^{humanity} ~~humanity~~ are determined. This embraces that portion of ~~divine or~~ natural law which regulates the functions and relations of human life, as well as the ~~results of~~ ^{its relations to natural forces and regulations} ~~human~~ regulation of human conduct by ~~divine or~~ human institutions. In other words it is the whole body of principles by which human life and conduct is

regulated.

As originating with humanity, law is ~~the~~ ^{entire} ~~system~~ ^{it embraces all} of rules or principles by which ^{humanity regulates, controls, or} ~~social conventions~~ ^{which} modifies the relations of men & ~~kind~~ ^{kind}. In this sense, it includes ~~with man~~ ^{philosophy} ethics, certain phases of religion and the rules by which social intercourse is ~~is~~ ^{is} governed.

In the more restricted sense in which it is employed in the science of judi-
cature, law is ^a ~~that~~ ^{system} of rules and ~~principles~~ ^{by which political conven-} ~~or~~ ^{tion} ~~modifies~~ ^{fixes or determines} ~~human relations.~~ ^{human relations.}

This ~~case~~ ^{definition}, which is the one with which in these lectures we shall be chiefly concerned, will be found to consist of the following elements:

- 1- "Law is a system of rules or principles."

It is a "system" - a complete whole, the entire body of "rules and principles." ~~This is just in the abstract~~ ^{the terms "rules and principles" is used} ~~to avoid the unnecessary confusion resulting from subtle distinctions upon the force of the term "Rule".~~ The law as a science embraces not only the "rules" by which human relations are fixed and determined but also the "principles" - that is

the fundamental truths, by which on which these rules are based.

2- These "rules and principles" of the law, are prescribed by "political convention". I have chosen this term rather than "sovereign" or "supreme power of in a state", as being less likely to be misconstrued. While these latter terms have come to have a vague significance to the legal profession that prevents practical confusion in regard to their meaning, yet it is almost impossible for the scientific thinker to refrain from remark, when he traces this con-

"sovereign" or "supreme power in a state"
 through, "Senators and Representatives"
 "Kings and Commons" to the people
 only to find that over them all
 is the judicial power and that
 even this apparent last resort, is
 itself dominated and controlled
 by some fundamental principle which
 custom, usage or more broadly
 still, any form of "political convention"
 has made "supreme still." "Politi-
 cal convention" then embraces
 every form of usage, custom, ad-
 judication, ~~statute~~, which has be-

come binding or obligatory upon the brain and conscience of the judge, as well as the specific enactments of the legislative branch of government.

This definition is not based upon any theory as to what the term "law" ought to mean, but upon careful study of that usage which must always control scientific definition. The plural form "laws" or the specific singular "a law," have, however, an entirely different significance. "A law" is a rule, regulation, limitation. It

simply no doubt, power, penalty and subjection - on the duty of obedience. In jurisprudence this term, "a law" refers to a specific act of the law-making branch of the sovereignty. It excludes custom, usage and the fundamental principles of human rights on which all laws are supposed to rest. "The law" as confined to any particular jurisdiction has the same force as the abstract term; that is, it embraces the whole system of rules and principles which political convention of any sort has made operative

in that particular community for fixing and determining the relations of the inhabitants thereof.

"The laws" of a particular realm, however, differ materially in scope from "the law" of the same region.

"The laws" of the State of New York includes only the enactments of her Legislature approved by the Governor whose assent is necessary to give their acts efficiency as such. "The Law" of the State of New York, embraces the whole body of the common law not specially abrogated by statute. In construction, the constitution

of the State and of the United States,
 and those customs of business and
 trade which the courts have decid-
 ed to be binding upon her
 citizens as well as certain unde-
 fined and it is claimed indefinite
 principles upon which society is
 based and the existence of which
 is assumed as an indubitable
 basis of legal determination.

regulate human relations, the
 source of jurisprudence, the
 basis and character of the

The term "political convention" is used in this definition also, in order to exclude "social" conventions which are without the pale of political consideration, and therefore no part of the law of the land.

The law then, or if the term be preferred, civil law or municipal — the law of the land, in familiar phraseology — is that system of rules and principles by which political convention fixes and defines ^{or perhaps better still} ~~termines~~ ~~human relations~~ ~~regulates~~ human relations. The science of jurisprudence is the analysis and classification of these

"rules and principles."

Having thus defined the law as the political regulation of human relations, it remains to define its scope with reference to those relations.

A moment's reflection will show us that Man's relations are

- 1 - To God.
- 2 - To Man.
- 3 - To Things.

To the first he sustains a twofold relation

- 1 - Spiritual - as belief - disbelief.
- 2 - Temporal - which includes the former and privilege of and duty of

worship and

- 2-Morality - on the duty or obligations of the believer to or disbeliever to humanity.

Our law - the Anglo Saxon birthright - rarely touches the domain of human relation to deity. In our country it tolerates and protects all forms of worship and rarely interferes with religious teachings or beliefs of any sort. There are two exceptions - (1) In ~~many~~^{all} states until recently and in many even yet, a belief in a divine being was an essential qualification of a citizen. (2) - If a belief of specific religious faith permits or enjoins acts in contravention of universal individual right or the morality established by political convention

the law will not sanction such acts. Beyond of this the obligations of celibacy, ^{obedience} and seclusion voluntarily assumed by members of certain religious orders cannot be enforced in the courts. Such obligations are not prohibited but merely are not recognized, because inconsistent with the fundamental doctrine of personal liberty.

So too, the Mormon doctrine of plural wives, or more properly since wife implies of itself a legal relation — "spiritual union" cannot be permitted, being obnoxious to our monogamous law — although it is enjoined upon sincere believers as an act of worship and essential to salvation.

3 - So too while all forms of worship are protected, the forms, ceremonies, and observances thereof must not conflict with the ideas of public peace, safety and decency, which the State prescribes.

While the relation of man to deity is usually said to belong entirely to the domain of religion we see that despite the religious freedom of our which characterizes our institutions, the ~~limits~~ ^{limits} as a part of them are limited and determined by political convention and so within the domain of law.

the...
 the...
 the...

Of the relations of Man to man,
 almost any of them may at any
 time become a part of the domain
 of law whenever the subject-matter
 rises to the dignity requisite for polit-
 ical regulation or control.

Of the relation of man to things
 it is doubtful if there really be any
 such relation which is the subject-
 of legal political determination -
 I have given enjoyment and
control as such relations,
 but it is questionable if these
 are not relations to human

ity rather than to ~~the~~ the things
 & enjoyed or controlled. In other
 words it may be doubted whether
 there are relations to things at all.

Admitting them to be, however,
 and we have seen that law —
 the civil law — is practically co=
 extensive with human relation
 — save and except only his spir=
 itual relation with the ^{Duty} ~~Divine~~.
 The science of the law is therefore
 the science of human life so far
 as the same is limited, con=
 trolled or colored by the con=