it for the time being or according to law.[14] In earlier times, and even today in some places, disputes may be resolved by the decree of a king or by the will of a military commander. This type of justice has been looked down upon as it does not convey the attribute of fairness rather it depends on the whims of individuals. As compared to this, the administration of justice according to law means administration according to some standard (that is rule), more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably certain of receiving like treatment.[15] Deciding according to pre-determined rules conveys a sense of fairness and justice.

It is this body of pre-ascertained rules that are the focus of the study of law and it is these rules that are used for the resolution of disputes. If disputes are not resolved through the machinery of the law, or they take so long that the rights of the parties are lost, then matters may deteriorate into personal violence and private vengeance; the aggrieved parties will be forced to take the law into their own hands, thus, destroying the basic fabric of society. Administering justice through pre-ascertained rules is, therefore, the primary funtion of law.[16] We may now turn briefly to the functions of law to see how law relates to society or how society is regulated or affected by law.

1.1.2 Functions of Law

The law is said to have five functions as follows:

1. **To establish order in society, with the help of rules, by resolving disputes.** In all but the primitive societies, a system of law performs social functions that are essential to the maintenance of society itself. The first function of law thus is the

[14] Pound, *Introduction to the Study of Law*, 1–2.

[15] Ibid.

[16] Pound points out that no system fully realizes this idea of having pre-ascertained rules. He says that even in the most matured systems, causes arise constantly for which the rule must be made or ascertained after the event. "But this is a necessary evil arising from the infinite variety of human actions and the constant changes to which all things are subject." Ibid., 2.

ordering and maintenance of society, a fact recognised in all societies. This function may also be called the administration of justice, which means simply the resolution of disputes and the solution of legal problems according to some standard of fairness.

2. **To reaffirm social norms that may have been violated.** Law is a structure of ordered norms (rules) that guide the conduct of individuals and institutions in society. A dispute arises when one party does not act in accordance with the expectation of the other party. The matter then goes before a court, which will decide, and reaffirm, whether the norm violated is or is not to be enforced.

3. **To make the functioning of society more efficient.** The law provides a framework within which members of society behave and interact with each other. This function allows one to predict how others will behave and adjust their behaviour accordingly. It brings efficiency into the functioning of the social system. For example, the law performs an important function in regulating everyday vehicle traffic. Our new motorway is an example.

4. **To act as an instrument of social change.** The law helps not only to codify existing norms, but to modify behaviour, to remould moral and legal conceptions, and identify the emerging attitudes, standards, and beliefs in a rapidly changing society. Law may, therefore, be used to educate people. Some people have an argument that the provisions of Islamic law, especially those pertaining to *ḥudūd*, should be applied only when society has been reformed and basic necessities have been met. The argument is wrong when we weigh it in the light of this function of law. If the argument is accepted, the entire Pakistan Penal Code should be scrapped. In other words, the application of the law is reform itself—through education.

5. **To enforce justice according to law through the principle of "rule of law".** If the social ordering of society is to be maintained the law must treat people equally—the governors and

the governed, the rich and the poor, the contented and the discontented. It is only then that the people will willingly accept the norms laid down and concretised by the law. This, in reality is, what we mean by rule of law. Consequently, a number of rules have been incorporated into the legal system to ensure this, although the reality may sometimes deviate from the ideal. It is, however, only the corrective aspect of justice. We will have more to say later about the other aspects justice, which are very much the function of law.

1.2 Functions of Law and the Training of the Lawyer

Jurists agree that the functions of law require and must provide for the training of personnel who understand the rules, the science of law, and are trained in providing skilled services to the system for the resolution of disputes. The specialists to be trained are primarily lawyers, but Western societies have for some time been training paralegals and members of the criminal justice sytem too. Here is what Bodenheimer has to say:

> The function which the law performs for society must necessarily control the ways and means by which lawyers are trained for their chosen vocation. If the chief purpose of the legal system is to ensure and preserve the health of the social body so that people may lead worthwhile and productive lives, then the lawyer must be viewed as a "social physician" whose services should contribute toward the achievement of the law's ultimate goal.[17]

One would assume that as modern legal systems have taken centuries to develop, the system for training lawyers must have reached perfection. The truth is that this is not the case. New methods and approaches to the training of lawyers have constantly been tried during the last two hundred years, and the process has still not come to

[17] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, 2nd ed. (Cambridge, Mass.: Harvard University Press, 1974), 401.

an end. Improvement in legal education is a never-ending need and process. This appears to be natural as the needs of the legal sytem are always on the increase as time passes. A student pursuing an initial course on introduction to law must understand how lawyers are trained and what is required of them.

There are two ideas or approaches about the law that are called "Formalism" and "Realism." The basic ideas of these two approaches have had a great impact on legal education and its methods. These are two more or less opposing attempts to guide the student as to how he or she should go about understanding and learning the law. We will call them the two approaches to the study of law. The first approach to be discussed tells us that law is a body of rules that have an internal logic of their own, therefore, the focus of the student should be on these rules. The second approach denies the crucial importance of rules, although it does not entirely negate them; it focuses more on predicting what the law will be in the future.

1.2.1 First Approach: Law as a Science of Rules

"Mr. Fox, will you state the facts in the case of *Payne v. Cave*?" That simple question marked the beginning of a revolution in Legal Education. In 1870, Professor Christopher Columbus Langdell, in the first contracts class he taught at Harvard Law School, put the question to a student and forever changed the way lawyers learned their craft, at least in the United States. No longer would law students sit passively and take notes while their professor lectured or read out of a legal treatise. Langdell's students read the reports of actual court cases and were required to discuss them in class. Langdell is credited with introducing the case-study method of instruction into U.S. law schools. Although there is evidence that Langdell was not the first to use the Case Method, as dean, he had the opportunity to shape the program of the influential Harvard Law School and in turn the law training programs of schools throughout the United States.

In his preface to the First Edition of the *Casebook on Contracts*, Langdell linked the science of law with the case method of studying law. The following statement summarises his philosophy:

> Law, considered as a science, consists of certain princi-

ples or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study.[18]

Our purpose here is not to elaborate the details of formalism, but to point out that it was once a leading way of thinking about law. Thinkers like Langdell pointed out that in this system using the case method was the best way of understanding this science of law and its rules. This view approaches law as a more or less coherent set of principles and rules that relate to each other according to a particular logic or dynamic. The object of study in jurisprudence is this internal logic and the rules and principles that circulate within it. According to this approach, law comprises a self-contained system that, with some notable exceptions, works like a syllogism, with abstract principles and legal precedents combined with the concrete facts of the issue at hand leading deductively to legal outcomes.

It is also not our concern here that Formalism has weakened under severe criticism from various quarters and has collapsed as a valid approach. It is still upheld by many, and has tremendous influence in Pakistan due to Sir John Salmond,[19] whose text is still used as the primary text on jurisprudence. We have intentionally included a few pages from this text among the Readings for this chapter, so

[18]Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (Boston: Little, Brown, / Company, 1879), viii.

[19]Salmond, *Jurisprudence*, 1–7.

that the whole outline of the system advocated by those who do not follow the case method can be seen.

Formalism presents law and its rules in terms of a number of related traits—specifically conceptualism, coherence, gaplessness, autonomy, and comprehensiveness.[20] Conceptualism implies that law contains concepts, which serve as a means for expanding the underlying meanings. Conceptualism renders the influence of social, economic, political effects of law irrelevant to proper legal decision making.[21] The effects of the law as a basis for decision making are not viewed as completely legitimate.[22] Coherence means that law as a system hangs together; it is analytically consistent. This means that the various rules are compatible and do not conflict with each other except to the usuall extent. There is little contradiction, ambiguity, and overlapping in distinctions.[23] The term gaplessness rules out the notion that law can be invented or created. "Since law is gapless, there is never any need for a court to invent or create law. Indeed, for a court to create law would be itself a lawless act."[24] Autonomy means that the law develops according to its own internal logic. The development of law does not depend upon other disciplines lik economics or sociology, but it is possible to have economic, sociological, or other understandings of law, however, these are neither necessary nor sufficient to actually understand law.[25]

The above summarizes for us what "formalism" or law as a science of rules stands for. The main focus, as we have seen, is on rules, their conceptualism, coherence, gaplessness, and internal logic. Sir John Salmond may be said to represent the approach of law as the science of rules. We have included a few pages from his book in which he highlights what needs to be studied if law has to be understood properly. We may now turn to the second approach, which was a reaction to this first approach. The attack on this approach was first witnessed in the writings of Oliver Wendell Holmes. Ma-

[20]Pierre Schlag, "Formalism and Realism in Ruins (Mapping the Logics of Collapse)," *Comparative Law Review* 4 (2011): 8.

[21]Ibid., 9.

[22]Ibid.

[23]Ibid.

[24]Ibid.

[25]Ibid., 10.

jor criticism, however, was launched by the Realists. Through this criticism a new approach to the study of law was developed.

1.2.2 Second Approach: Law as a Prediction of What the Courts Will Do

In the previous paragraphs we have seen experts and thinkers emphasizing the importance of rules and the coherent and analytically consistent nature of the system of rules that a student of law must absorb. In 1897, Oliver Wendell Holmes Jr., the famous American judge, released his *Path of the Law* that changed forever this supremacy of law as a system of rules.[26] We summarize some of his ideas here.

Holmes told us that when we study law we do not study a mystery but a well-known profession. We study law to acquire knowledge that we need to appear before judges. We also need this knowledge to advise people in such a way as to keep them out of court.[27] The reason why people pay lawyers to argue for them or to advise them, is that in our societies judges have been entrusted with power in certain cases, and the whole power of the state will be exercised to carry out their judgments and decrees. It is for this reason that people want to know when and to what extent they will run the risk of going against this very strong state power; they are scared of this force. They must find this out at all costs. Consequently, the object of our study is prediction, the prediction of when the public force will be activated against us through the courts.[28] Many concepts of law can be understood in terms of this prediction. Thus, even a legal duty is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court. He says: "The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies."[29] The same applies to a legal right.

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[26]Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 3–41.

[27]Ibid., 3.

[28]Ibid.

[29]Ibid., 4.

Addressing the student, Holmes says that if you want to know the law and nothing else, you must look at it as a bad man.[30] The bad man cares only for the material consequences of the court decision. He comes to know of such material consequences beforehand because of his prediction arising from his acquired knowledge. As compared to him the good man will find other reasons for his conduct. These reasons may lie inside the law or outside of it in the good man's morality. The bad man will base his conduct and behaviour on his prediction of how the courts will react.[31] Holmes then attacks the excessive attention given to rules and says:

> The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. *The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*[32]

This remarkable paper by Holmes had a huge impact on later legal development. We have included an abridged form of this paper in the Readings, and the student must read the entire paper. In fact, many of his sentences gave rise to whole approaches and methods of looking at the law. One such school that came into existence as a direct result of what Holmes had said were the Realists. The Realists set about demolishing the long held beliefs of the upholders of formalism or those who considered law as a science of rules. One such Realist was the famous Professor Karl N. Llewellyn, the author

[30] Ibid., 7.
[31] Ibid.
[32] Ibid., 9 (emphasis added).

of the well known Uniform Commercial Code (UCC). This is what he says about the law:

> What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of the law. But obviously those which most violently call for attention are the actual disputes, and to these our first attention must be directed. Actual disputes call for somebody to do something about them. First, so that there may be peace, for the disputants; for other persons whose ears and toes disputants are disturbing. And secondly, so that the dispute may really be put at rest, which means, so that a solution may be achieved which, at least in the main, is bearable to the parties and not disgusting to the lookers-on. This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.[33]

1.2.3 Striking a Balance Between the two Approaches

After saying this, he hints that those who uphold formalism will not agree with him in regarding law this way. It is much more common, he points out, to approach the law as being a set of rules of conduct. He acknowledges the significance of rules by saying that "rules are the heart of law, and the arrangement of rules in orderly coherent system is the business of the legal scholar, and argument in terms of rules, the drawing of a neat solution from a rule to fit the case in hand—that is the business of the judge and of the advocate."[34] He also acknowledges that some rules are the the objects of our focus irrespective of disputes, for example, the rule that everyone in a certain category will use the same form for filing a tax return; here it is

[33]Karl Nickerson Llewellyn, *The Bramble Bush*, 1st ed. (New York: Oceana, 1930), 3-4.

[34]Ibid., 4.

not a dispute but convenience of administration.[35] There are many other situations in which disputes do not come into the picture. Nevertheless, says he:

> The main thing is what officials are going to do. And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain. Then you have room for something else, another main thing for the lawyer the study of how to make the official do what you would like to have him. At that point "rules" loom into importance. Great importance. For judges think that they must follow rules, and people highly approve of that thinking. So that the getting of the judge to do a thing is in considerable measure the art of finding what rules are available to urge upon them, and of how to urge them to accomplish your result. ...Rules, too, then, and their arrangement, and their logical manipulation, make up an unmistakable portion of the business of the law and of the lawyer.[36]

Llewellyn is striking a kind of balance between the two approaches here. He points out that in many situations there is no dispute, but the rules still apply. These are situations in which the law is guiding people to follow a particular path; in fact, it wants them to follow that path and no other. In certain situations disputes are in the forefront and prediction of what the judges or officials will do is to be the focus of the student. At other times it is the rules and their organized operation that is to be studied. This may be required when the lawyer, instead of predicting, wants the judges and officials to behave in a certain way. The student will learn the truth of this statement as he advances in his legal education. We may now turn to a brief introduction of Islamic law in Pakistan.

[35]Ibid.
[36]Ibid.

