

student, during his studies, will have occasion to study most of the important theories, and will refine his knowledge of the law.

For the present our concern is more with how the mind of the young student of law is trained so that he comes to, what is called in America, "think like a lawyer." The words, "thinking like a lawyer," have been taken from a 1973 film *The Paper Chase*, in which the famous Professor Kingsfield said in his Contracts class, "You teach yourself the law. I train your minds. You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer." This gave rise to the well known claim of "thinking like a lawyer." This type of thinking, it is said, begins with the ritual of Socratic dialogue that takes place between student and teacher in the first year of law school.<sup>3</sup> Indeed, the young student will gradually develop sophisticated ways of thinking about the law and about facts by the time he is ready to graduate. A lot, however, depends on how he learns and what he learns, and above all how hard he works.

## 1.1 The Definition and Functions of Law

The multiplicity of ideas mentioned above provides an adequate reason for the reluctance of scholars to define law. According to Pollock, the greater the knowledge of a person about law, the greater is his reluctance to define law.

No tolerably prepared candidate in an English or American law school will hesitate to define an estate in fee simple: on the other hand, the greater have been a lawyer's opportunities of knowledge, and the more time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, What is Law?<sup>4</sup>

The learned writer goes on to say that a complete answer to this question is not possible unless and until we have a complete theory of the nature and functions of human society, and we cannot

<sup>3</sup>Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009), 9.

<sup>4</sup>Fredrick Pollock, *A First Book of Jurisprudence: For Students of the Common Law* (New York: MacMillan Company, 1896), 4.

wait for such a theory. We live in a world in which rule, custom, and law beset us on every side, and we cannot ignore them.<sup>5</sup> The truth is that man cannot live alone; the individual cannot do without the family; and although family groups can be conceived as independent and self-sufficing, the family has from very early times been part of a larger society, whether it be a clan, a tribe, or a nation, with which it is bound up.<sup>6</sup> Wherever any considerable degree of civilisation has been reached, we find means appointed by public authority for declaring, administering, and enforcing some kind of rules. In dealing with these rules, both the persons administering them and those whose interests are affected have to attend not only to the rules or principles themselves, but to the conditions under which they become applicable, the mode in which they are applied, and the consequences of their application. The sum of such rules is what in common speech we understand by law.

The publicly appointed or recognised bodies which administer such rules are courts of justice. By justice, in this usage, we mean not only the doing of right, or the duty thereof, as between man and man, but the purpose and endeavour is to cause right to be done.<sup>7</sup> Later writers like Salmond, as we shall see, defined law in these terms, that is: rules, courts, justice.

### 1.1.1 Defining Law and Jurisprudence

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."<sup>8</sup> He defined civil law as "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong."<sup>9</sup> Blackstone's definition includes two notions: (1) that of a "superior," and (2) that of a "command." Later jurists held both of these notions to be incorrect; law, they say, is not something prescribed by a superior

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<sup>5</sup>Ibid.

<sup>6</sup>Ibid., 5.

<sup>7</sup>Ibid., 9-10.

<sup>8</sup>See, William Blackstone, *The Commentaries on the Laws of England*, 4 vols. (London: John Murray, Albemarle Street, 1876), vol. 1, 38.

<sup>9</sup>Ibid., vol. 1, 44.

to an inferior, because if it were, it would not include international law, nor laws adopted by the people of a country, like constitutional law.

Austin followed Blackstone's definition when he said positive law "is set by a monarch or sovereign member, to a person or persons in a state of subjection to its author,"<sup>10</sup> The notion of a command, however, does not generally prevail anywhere in the law. Other definitions of law worthy of mention are the following:

"Law is that part of the established thought and habit, 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."—Wilson.

"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 accordance 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.

"The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties."—Gray.

It will be noted at once that the above definitions do not apparently agree. Is this because they have not all been reduced to the

<sup>10</sup>John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), 2.

same lowest terms? Or is the apparent disagreement real? In order to answer this question it will be best to make an independent study of the subject of a correct definition of law, and the best way to make such a study is to study the phenomena of the law. After such a study we may know what are the principal notions, or concepts, embraced in the law; and then by combining these we may be able to frame a general definition of law. In this way we shall try at least to make our definition conform to the facts instead of trying to make the facts conform to our definition. It is with reference to the administration of justice, then, that we define law as "the body of principles recognised and applied by the state in the administration of justice. Or, more shortly: The law consists of the rules recognised and acted on in courts of justice."<sup>11</sup>

As compared to this the science of this law is called "jurisprudence."<sup>12</sup> "The science of law, that is, that organized body of knowledge that has to do with the administration of justice .... in accordance with principles or rules of general character and more or less uniform application, is usually called 'jurisprudence.'" Jurisprudence then is the discipline that studies law. In fact, the literal meaning of the word jurisprudence (*juris* and *prudencia*) is "understanding of law." In a book called, *Introduction to Law*, this is exactly what we are supposed to study, because it provides us with an understanding of the body of principles or rules that we call the law.

The other ingredient of the definitions is "justice." Justice is the end, law is merely the instrument and the means; and the instrument must be defined by reference to its end. But justice does not, of necessity, require law in the form of rules.<sup>13</sup> It may be administered either according to the will of the individual who administers

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<sup>11</sup>John W. Salmond, *Jurisprudence: Or The Theory of the Law*, 2nd ed. (London: Stevens & Haynes, 1907), 9.

<sup>12</sup>Roscoe Pound, *Introduction to the Study of Law*, 1st ed. (New York: Library of American Law / Practice, 1912), 1-2.

<sup>13</sup>"It is essential to a clear understanding of this matter to remember that the administration of justice is perfectly possible without law at all. Howsoever expedient it may be, howsoever usual it may be, it is not necessary that the courts of the state should, in maintaining right and redressing wrong, act according to those fixed and predetermined principles which are called the law." Salmond, *Jurisprudence*, 13. See also Pound, *Introduction to the Study of Law*, 1-2.

it for the time being or according to law.<sup>14</sup> 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.<sup>15</sup> 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 function of law.<sup>16</sup> 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.