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SOME FUNDAMENTAL LEGAL CONCEPTS*

HUGH EVANDER WILLIS†

Within the last few years legal analysis and terminology have been receiving a more important place than they received in early Anglo-American legal history. Law writers have written upon them, § practitioners have learned that a knowledge of their use was an aid to the accurate and effective presentation of cases, and judges have discovered that a knowledge of legal analysis and terminology often means a right decision where but for such knowledge a wrong decision might have resulted. It is the purpose of this article to examine some of the principles of legal analysis and terminology which are basic in the law.

LAW

There is no more important and fundamental legal concept than that of "law" itself. For this reason, before discussing any of the more specific legal concepts, we shall first discuss this general legal concept. What is the meaning of law? How should the term law be defined? ‡

There have been a great many definitions of law. Probably the best known definition of law is that of Blackstone. Blackstone's definition once had great vogue, but it is now generally repudiated. 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."¹ Civil law he defined as "a rule of civil conduct prescribed by the supreme power in the state, commanding

* This article and subsequent articles to be published in the INDIANA LAW JOURNAL are taken in large part from *Introduction to Anglo-American Law*, a treatise to be published in the near future as an *Indiana Study*. This study will be divided into four parts: the first, legal philosophy; the second, legal history; the third legal biography; and the fourth, legal bibliography. It has been prepared for use by first-year law students as an introductory orientation course.

* See biographical note p. 32.

§ References:

Pound: *Interests of Personality*, 28 HARV. L. REV. 343, 445; 3 *Dunster House Papers*, 3-4; *History and System of the Common Law*; *The Spirit of the Common Law*; *Introduction to Philosophy of Law*; *Interpretations of Legal History*; 1 LIB. OF AM. LAW AND PRAC. 1, 8.

Hohfeld: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. JOUR. 16, 26 YALE L. JOUR. 710. Also, 11 MICH. L. REV. 537.

Corbin: *Legal Analysis and Terminology*, 29 YALE L. JOUR. 163.

Kocourek: 15 ILL. L. REV. 24, 347; 20 COL. L. REV. 394; 68 PA. L. REV. 322; 19. MICH. L. REV. 47; 30 YALE L. JOUR. 215.

Goble: 4 ILL. L. Q. 94; 5 ILL. L. Q. 36.

Wilson: *The State*, 610-635.

Amos: *Science of Jurisprudence*.

Gray: *Nature and Sources of Law*.

Holland: *Jurisprudence*.

Pollock: *First Book of Jurisprudence*.

Salmond: *Jurisprudence*.

‡ The substance of the first part of this article is also treated in an article to be published in the *Virginia Law Review* for January, 1926.

¹ Blackstone, *Commentaries*, 38.

what is right and prohibiting what is wrong."² Blackstone's definition includes two notions: (1) that of a "superior," and (2) that of a "command." Both of these notions are incorrect. Law is not something prescribed by a superior to an inferior. If it were, not only would it not include international law,³ which might be forgiven in view of the present status of international law, but it also would not include constitutional law and all other law adopted by the people of a country, as in the United States, for their own control; and no one can contend that these are not law. Hence the proper conclusion is that Blackstone's definition is wrong in this respect. Law is not a command. Austin, who 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,"⁴ had difficulty in fitting his definition to "laws explaining the import of existing positive laws, and the law abrogating or repealing existing positive law." But Austin's difficulty does not stop here. The notion of a command does not generally prevail anywhere in the law. In the realm of civil law clearly the law is not issuing commands. It does not command people not to commit torts, nor to perform their promises, except in a few rare cases. The state has policemen, judges, and other officers of the law, but they are not ordinarily commanding people what to do and what not to do. If people do not do what they legally ought to do they may in the course of time feel the strong arm of the state, but that is a different thing from a command. In the realm of criminal law, the law might very easily have proceeded by way of issuing commands, yet even here it did not do so but followed the same scheme which it followed in the case of civil law. Leon Duguit was right when he said, "Law is not the command of a sovereign state, but a by-law governing a group."⁵ Hence Blackstone's definition is incorrect in both respects.

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.

² Blackstone, *Commentaries*, 44.

³ Clark, *Practical Jurisprudence*, 134, 172, 186, 187.

⁴ Austin, *Province of Jurisprudence*, 2.

⁵ 32 YALE L. JOUR. 425. See also Dillon, *Law and Jur. of Eng. and Am.* 10.

“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 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 to make the facts conform to our definition.

The phenomena of the law are a form, or device, for eternal human social control; certain growing social interests which mark the boundaries of this control; legal rights, powers, privileges, and immunities (or capacities of influence), recognized by the law as one means of securing and protecting such social interests, and classified and studied as contracts, torts, crimes, property, equity, negotiable instruments, sales, public callings, constitutional law, damages, etc., and courts and legal procedure (including pleading, evidence and practice) another means given by the law for the protection of such social interests.

One of the phenomena of the law is contracts. Let us examine this for the purpose of discovering the true nature and scope of law. What do we have in a contract? We have a promise, or set of promises. But there is nothing magical in a promise. Most promises involve no social control. They have no legal consequences. But if a promise, or set of promises, are in such form as to become a contract, they do involve legal consequences. The law then begins to exert some control. It does not “command” people to perform their contract promises, any more than it commands them to make them. Yet it has evolved a scheme for making a promisor, or promisors, perform their promises. In the first place it recognizes that the promisee, or promisees, have a legal right to the performance of the promises, and that the promisor, or promisors, are under a correlative legal obligation to perform the promises. Why? Because the promise in the form of a contract is one of such importance that its non-performance would be likely to have bad social consequences. It would tend to destroy the general security which is necessary for a stable and permanent social order, if people could not depend and rely upon promises of this sort; in other words, there is a social interest in general security

involved in a contract which the law believes should be protected. In the second place, if the promisor or promisors, do not discharge their legal obligations, but break their promises, the law offers the facilities of the courts and legal procedure to the man, or men, wronged. Sometimes the courts will decree what is called specific performance, but since it is now too late for performance at the time promised this is really specific reparation; ordinarily the courts give a judgment for damages as a substitute for what the promisee, or promisees, would have got had the promisor, or promisors, carried out their promises, and renders certain assistance to help in the collection of the damages. These are the characteristics of the law so far as concerns contracts.

What we have just found to be true in the case of contracts, is true of all the other branches of the law. If we should go through all the other branches of substantive law—torts, crimes, property, agency, domestic relations, equity, sales, public callings, trusts, wills, constitutional law, negotiable instruments, corporations, insurance, mortgages, quasi contracts, partnership, suretyship, bankruptcy, conflict of laws, administrative law, etc.—we would find a scheme for controlling the conduct of people, where the law recognizes some social interest, by the recognition in one person of a right or some other capacity of influencing the conduct of another person (who thereby is under a corresponding legal duty) and by making the machinery of the law available for the use of the injured person if the other person does not discharge his duty. In other words, the law here has the same characteristics as it has in contracts.

Thus four concepts stand out as the chief characteristics of the law: 1. It is a scheme of social control; 2. It is for the protection of social interests; 3. It accomplishes its purpose by the recognition in persons of capacities of influencing the conduct of others; and 4. by affording the machinery of the courts and legal procedure to help the person with capacity. "Order, through generality, equality, and certainty, and not compulsion, is the fundamental characteristic of the law." A correct definition of law would seem to be one which embraces all of these concepts and no others. The following, therefore, may be taken to be a true definition of law in the legal sense: **LAW IS A SCHEME OF SOCIAL CONTROL, FOR THE PROTECTION OF SOCIAL INTERESTS, BY MEANS OF CAPACITIES OF INFLUENCE, BACKED AND SANCTIONED BY THE POWER OF THE STATE.**⁵

⁵ It will be observed that Mr. Wilson's definition comes the nearest to being like the above definition. Most of the definitions have the concept of a sanction by the state in the form of courts and legal procedure. Some of them have the concept of social control. The concept of protection of social interests and the concept of recognition of capacities of influence as a means thereto are implicit in Mr. Wilson's and Mr. Pound's definitions, but they seem to be ignored by other definitions.

Justice. Justice 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.⁷ What these are depends upon the social interests which society decides should have protection. Social justice at the present time recognizes more social interests than does legal justice. It consequently recognizes more rights and duties. It also recognizes no favored classes and protects groups within nations and nations as well as individuals. Legal justice has not as yet gone so far as this, but it is tending in the direction of social justice. As a matter of fact, at the present time the law does not always give even legal justice. This is because it is not perfect, especially in the matter of courts and legal procedure. England is much better in this respect than the United States, and the United States is probably better in respect to civil procedure than in respect to criminal procedure. The law does not always give justice: it is only a scheme for giving justice. If justice is truly administered, human beings discharge all their duties and other liabilities and obtain all of their rights, privileges, powers and immunities; if this results, social interests will be protected; and if social interests are protected there is social control. Hence law may be defined, not only as a scheme of social control as it has been defined above, but as the science (that is the organized body of knowledge composed of principles, rules and standards) which deals with the administration of justice.⁸ However, the writer prefers the definition first above given because it leaves less to inference.

I. *A Scheme of Social Control.* From what has been said above we have learned 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. It is a connected combination of things. It is a scheme. It is a scheme of social control. It is not a scheme of individual control. The individual is free to control his own conduct, so long as he does not come into legal relations with his fellowmen. He may choose his own vocation and his own domicile, and he may regulate his own conduct in a thousand other ways, without any interference by the law, provided he alone is concerned. But when his conduct affects the lives of his fellowmen, there is a possi-

⁷ "Justice consists in bringing the actions of each into harmony with the actions of all by a rule of general application instead of by an arbitrary act."—Kant (Pound). Justice is "the liberty of each limited only by the like liberties of all."—Spencer. "Justice means the satisfaction of everyone's wants so far as they are not outweighed by others' wants."—Ward.

⁸ "The science of law, that 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, I LIB. AM. LAW AND PRAC. 1. "Law in the juridical sense is the body of rules (and principles) recognized or enforced by public or regular tribunals in the administration of justice."—Pound, I LIB. LAW AND PRAC. 8.

bility of control by the law. When such control begins will be considered under the next heading.

II. *Social Interests.* The law does not attempt to control all social relations. It controls them only when there is a social interest which requires such control. Social interests include the wants of the individual, the state and the social group. As human beings come into closer and closer contact with each other their wants, or social interests, grow. Kant has truly said that if a man were 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 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 so many social interests as people in urban communities. People in small urban communities do not have so many social interests as people in large cities. The more complex the social life, the more social interests there are. In the early history of the world there were not so many social interests as there are today. In the early history of our own country there were not so many social interests as there are today. At first the only social interest recognized was that in the preservation of the peace. Later there was a social interest in the maintenance of the *status quo*. The latter was a paramount social interest in Greek, Roman, and English history before the nineteenth century. In modern times numerous social interests have come to be recognized. When a new social interest shall be recognized is determined by the people of a state, but they have to express themselves through their representatives in the halls of legislation and their judges on the bench. Hence the determination of a new social interest is a difficult matter. Society is made up of many conflicting and overlapping groups, like capitalists, laborers, farmers, consumers, producers, the learned, the ignorant, and the like. Representatives may be governed by self-interest and judges may be influenced by bias and prejudice. Under such circumstances how can a new social interest be determined? What is the social interest, for example, in such matters as the tariff, taxation, child labor, liquor, and drugs? Yet there are many social interests about whose recognition there can be no doubt. In a 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 thinks important enough to be protected.

The following is a classification by Pound of all the social interests which he thinks that Anglo-American law has recognized up to the present time:⁹

⁹ 3 *Dunster House Papers*, 3-4; 28 HARV. L. REV. 343, 445.

A. General Security

1. Personality
 - a. Physical Person

<ol style="list-style-type: none"> (1) Direct Injury (2) Bodily Health (3) Freedom of Will (4) Mental Health (5) Nervous System (6) Privacy 	}	Physical Existence
---	---	--------------------
 - b. Honor and Reputation—Social Existence
 - c. Belief and Opinion—Spiritual Existence
2. Domestic Relations
 - a. Parental
 - b. Marital
3. Substance—Economic Existence
 - a. Property
 - b. Freedom of Industry and Contract
 - c. Promised Advantages
 - d. Advantageous Relations
 - e. Free Association

B. Security of Social Institutions

1. Domestic
2. Religious
3. Political

C. General Morals

D. Conservation of Social Resources

1. Natural Resources
2. Dependents and Defectives

E. General Progress

1. Economic (Free invention, trade, property, industry)
2. Political (Free criticism and opinion)
3. Cultural (Free science, art, learning)

F. Individual Life

III. *Legal Capacities.* The law protects the social interests named above, not by sending someone out like a policeman to see that all people respect and care for them, but by recognizing in persons legal capacities of influencing the conduct of others and of requiring the assistance of the courts for the accomplishment of that result when it becomes necessary.

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. Legal capacities include rights, privileges, powers, and immunities.¹⁰

All of the social interests, which society has decided need protection are protected by means of some legal capacity, and in no other way; and this is as true in the realm of criminal law as it is 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 social interest was protected civilly by giving to individuals, first, the right to personal safety, and, later, by giving them the right to the control and society of family and dependents, the right of prop-

¹⁰ 23 YALE L. JOUR. 16; 26 YALE L. JOUR. 710; 29 YALE L. JOUR. 169.

erty, the rights of freedom of locomotion, reputation, immunity from fraud, advantages open to the community generally, and finally privacy. This social interest also came to be protected criminally by giving to the state analogous public rights. The social interest in the general security of personality so far as it relates to honor and reputation is protected civilly by the private right of reputation and criminally by an analogous public right. Some social interests, like promised advantages, are protected by private rights only. Other social interests, like general morals and the conservation of social resources, are for the most part protected by public rights. Still other social interests are not protected by rights, but by privileges, powers, or immunities. The social interest in the freedom of the will is generally protected by the privilege of avoiding a contract. The economic existence is often protected by powers and immunities and privileges as well as by rights. However, the most important legal capacities are legal rights, and social interests are generally protected by them. The curricula of our law schools and most law books are mostly concerned with legal rights. A scheme of social control which accomplishes its purposes by means of legal capacities is a roundabout scheme, but since it is the way of the law it must be considered if we would understand the law.

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, or may have, all the rights, privileges, powers, and immunities known to the law. Corporations have only the legal capacity given to them expressly or implied 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 has given its consent.

Correlative with the capacity, or ability, to influence the conduct of others, is the liability to have such conduct influenced. Thus correlative with every right is a duty; with every privilege, a no right; with every power, a no privilege; and with every immunity, a no power.

A. Right. 1. Definition. A legal right is the legal capacity, or ability, to enforce action or forbearance (performance) by another. Illustrations of rights are contracts, property, personal safety, reputation, etc.

“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.

The correlative of a right is a duty. A legal duty is the legal liability to perform some act or forbearance for another. When a legal duty is in *personam* it may be called a legal obligation.

“A legal duty is the legal relation where society enforces action or forbearance by one.”—Corbin.

“A legal duty exists where one is bound to do or not to do something because of some interest, social, public, or private, which the law undertakes to maintain through the power of the state invoked in judicial proceedings.”—Pound.

2. Elements. The elements of a right are four: a. The person who has the legal capacity to enforce performance; b. the person under legal liability to render performance; c. the conduct (act or forbearance) to which one is entitled and which the other owes; and d. the object to which such conduct relates.

Persons. Persons are those legal entities to which the law gives legal capacity and liability. Persons are such, not because human beings, but because of their legal capacities and legal liabilities. When slavery was recognized, slaves were not persons, yet they were human beings. Neither all human beings are persons, nor all persons, human beings. Human beings sometimes act collectively. Such groups may be recognized as entities and given legal capacities. Hence persons are classed as natural persons and artificial (juristic) persons. Artificial persons are the state, corporations, partnerships, and any other organization (like labor unions) recognized as legal entities.

A corporation is an artificial legal entity, or juristic person, composed of one or more individuals and possessing a personality and legal capacity differing from that of such individuals.

“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law; being the mere creature of the law it possesses only those attributes which the charter of its creation confers upon it either expressly or as incidental to its very existence.”—Marshall.

The notion once prevailed and Marshall's definition embodies the notion, that a corporation is a fiction; but more recently the notion has been growing that a corporation as well as a partnership, labor organization or other group organization has a personality and is as real as an individual.¹¹ Corporations are classed as public, private, and *quasi* public.

A partnership is a voluntary association of two or more persons as co-owners for the purpose of carrying on a business with a view to profit. They may be classified as ordinary partnerships, limited partnerships, and joint stock companies.

Persons may also be principals or agents.

¹¹ Pollock 116; *United Mine Workers v. Coronado Coal Co.*, 42 Sup. Ct. 570.

“Agency is a legal relation, founded upon the contract of the parties or created by law, by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons.”—Mechem.

It has already been pointed out that corporations do not have full legal capacity. They also do not have full legal liability. They have incapacities differing from those of natural persons. They can do only those things which can be done by an agent. There are certain crimes which they cannot commit. They are not liable for *ultra vires* acts, that is acts in excess of the legal capacities given them by their charters. However, coincident with the development of the notion that corporations are real entities, there is developing the notion that they should be treated like natural persons so far as concerns liability, and that the doctrine of *ultra vires* is unsound.¹² The capacities of agents and the liabilities of agents and principals for the acts of agents are limited by the doctrine of scope of authority. Partners and the members of other unincorporated organizations have in the past been treated as individuals, but there is a tendency developing to treat the organizations as legal entities.

Conduct. The conduct which is the element of a legal right consists either of some positive act, as in a contract, or of some negative forbearance, as in the case of rights *in rem*. Acts are more liable to produce rights, or to bring persons into relations with things, than to be the element of a right, and they therefore will have more extended consideration in another place. For present purposes it is enough to say that acts may be void, voidable, or valid. A void act amounts to nothing so far as concerns performance, but it may have other consequences. A ceremony of marriage between two persons, one of whom is already married, is a nullity, but it will constitute the offense of bigamy. A voidable act is one which a party may perform or not at his option. Such an act is one promised by an infant. A valid act is one whose performance is obligatory.

Objects. The fourth element of a legal right is an object, or objects. This object, or objects, may be either personality, or an external thing, or things. Personality is the object in the natural rights *in rem*. Things are the objects in the property rights *in rem* and *in personam*. The Roman law classified things as corporeal and incorporeal. The common law classifies them as (1) land, or corporeal hereditaments, (2) easements, franchises and rents, or incorporeal hereditaments—both objects of real property ownership, (3) chattels real (leaseholds and emblements), and (4) chattels personal, which in turn are classified as (a) corporeal, or in possession, and (b) incorporeal, or in action—all objects of personal property ownership. Corporeal chattels are also classified as animate and inanimate, and incorporeal chat-

¹² See articles on this subject by Edwin M. Borchard in *YALE L. JOUR.* for 1924-5 and 1925-6.

tels as debts, secured and unsecured, and various other intangible things. Since things are the objects of specific rights, to be considered hereafter, further discussion of them will be postponed until such specific rights are discussed.

3. Classification. The most general classification of rights is as public and private. These are classified as antecedent and remedial. Antecedent rights are classified as *in rem* and *in personam*. Remedial rights are all *in personam*. Rights *in rem* and *in personam* are still further classified. The following table shows this classification:¹³

A. Rights

- | | | |
|-----------|---|---|
| 1. Public | { | Criminal Law
Constitutional Law
Administrative Law
Municipal Corporations
International Law |
|-----------|---|---|
2. Private
- (a) Antecedent Rights (primary rights)
- (1) *In rem*
- (a) Personal Safety
- (b) Society and Control of Family Dependents
- (c) Property
- (1) Real
- (2) Personal
- (d) Freedom of Locomotion
- (e) Reputation
- (f) Immunity from Fraud
- (g) Advantages open to Community
- (h) Privacy
- (2) *In personam*
- (a) Contracts
- (b) Quasi Contracts
- (c) Trusts
- (d) Bailments
- (e) Public Callings
- (f) Other Fiduciary Relations
- (b) Remedial Rights (secondary rights) in *personam*
- (1) Preventive
- (a) Injunction
- (b) Prohibition
- (c) Exemplary Damages
- (2) Redressive
- (a) Restorative
- (1) Reformation
- (2) Rescission
- (3) Specific Performance
- (4) Ejectment
- (5) Replevin
- (6) Mandamus
- (7) Habeas Corpus
- (8) Quo Warranto
- (b) Compensatory—Damages
- | | | |
|-----------------------|---|---------------|
| (1) Ex contractu | { | Nominal |
| (a) Debt | { | Substantial |
| (b) Covenant | { | Direct |
| (c) Special Assumpsit | { | Consequential |
| (d) General Assumpsit | { | |
- (2) Ex delicto
- (a) Trespass
- (b) Case
- (c) Trover

¹³ Holland on Jurisprudence, 160 *et seq.*

