DEFINITION IN LEGAL LANGUAGE

ALF ROSS

1. *Delimitation of the Assignment*

The title « Définition in Legal Language » (« la definition en droit ») loosely refers to what can be said about definitions, as far as they occur in legal language, without posing any definite theme of inquiry. I feel, however, that it will be of no interest to recapitulate the general theory of definition stating what legal definitions have in common with other definitions. The assignment, in my opinion, must be understood as a request to inquire into what is *peculiar* to legal definitions. In this way the problem also has been approached by my corapporteur, Professor Uberto Scarpelli. Taking his point of departure in the general theory of definition as elaborated by Carnap, he has raised several questions as to the extent to which it is possible to apply this theory also to legal definitions.

With short notice I have been asked to act as a substitute for my eminent colleague, Professor H.L.A. Hart. To do this is, indeed, a difficult job. In his well-known inaugural lecture (1) Professor Hart has presented original and ingenious views on our subject and he, far more than I, would have been the right man to stimulate a discussion. Under these circumstances I believe that the best way to tackle my task will be to *compare and confront the views* of the first rapporteur with those of the designated corapporteur, Professor Hart, whose spirit, even if he is absent in body, no doubt will be hovering among us.

In broad outlines I see the relation between Hart and Scarpelli in this way. Hart has drawn the attention to a peculiarity in the definition of some legal terms such as the terms « a right » and « a corporate body ». His thesis is that these terms cannot be defined in the way of substitution (explicitly), that is, by answering the questions, «What is a right? », «What is a corporate body? », and substituting the answer for the terms. The only way possible to precise the meaning of those terms is to take the point of departure, not in the term itself but in sentences in which the term occurs — e.g. the sentence « A has a right » — and indicate the conditions necessary for the truth of such sentence. If this is correct it is of eminent importance for legal theory. With one stroke it clears away as futile and empty a great lot of subtle speculations as to the « nature » of a right or a corporate body. Hart, however, has stuck to examples and not tried to indicate generally to what *kind* of terms this pecularity belongs, that is, to indicate what is the characteristic feature of

(1) H. L. A. Hart, *Definition and Theory in Jurisprudence* (Oxford 1953).

such terms; which explains the pecularity as to their definitions. Here, however, Scarpelli steps into the picture. What he has done is exactly an attempt to generalize and systematize the issue raised by Hart and to incorporate it in a more comprehensive theory, dealing also with other peculiarities and problems in relation to legal definitions. The question whether or not he has succeeded is one of the issues to discuss today. Just because of the more abstract and generalized character of the report by Scarpelli, skipping specific examples of problems of definition, it is, however, often not easy to see to what extent he agrees or disagrees with Hart.

The following remarks in no way pretend to give a systematic or exhaustive survey of the problems. I simply pick up a number of issues which to me seem to be of special interest.

2. *The question whether the empiristic postulate applies also to definition of terms used in legal language*

By the empiristic postulate I mean the postulate that the indefinables, through which any (non-logical) term in last analysis is defined, must be qualities pointed out by ostentation (direct observation). Professor Scarpelli raises the question whether this postulate applies also to the definition of terms used in legal language. He seems, however, to ascribe importance to this question only in relation to the legal language with normative function — the directives issued by the legislator or others competent to establish binding rules. In my opinion the really burning aspect of the problem arises in relation to the legal language with theoretical function — the language of the science of law in propositions stating the existence of some norms as valid within a certain system. I shall deal with each of the two aspects.

a) Let us consider the directive « Shut the door ! ». It seems obvious that if this directive shall possess meaning as an invitation to act in a certain manner, the terms « shut » and « door » must — with a certain degree of preciseness — be definable in terms of observable facts. If not it will be impossible to know how to act and whether the directive has been complied with or not. So far I agree with Scarpelli (referring to Hare) in the assertion that the empiristic postulate of reduction to observable qualities is valid also in relation to prescriptive language. Another matter is that the demand for the highest degree of preciseness is not, in the prescriptive language as in the descriptive language, to be presupposed as a matter of course. It may be that the director exactly wants to leave a certain measure of discretion to the acting person. This is to a high degree the case in the directives issued by the legislator and this is the cause why terms used in statutes often are not defined as precisely as possible but left in the sphere of vagueness characterising colloquial terms. I shall return to this point later (point 5).

b) It is a fundamental issue in the theory of law whether or not the em-

piristic postulate is valid in relation to the theoretical propositions of the science of law stating that a certain legal rule exists, that is, is part of the law in force in a certain country. It is a widely held view that to maintain that a legal rule exists is the same as to maintain that it possesses a quality of « *validity* » *which is not definable in terms of observable facts.* This view, therefore, implies a denial of the empiristic postulate. Legal cognition is not based (exclusively) on observable facts but presuppose an idea of validity, which elevates the law above the realm of facts. In the natural law philosophy the validity of law is derived from evident principles *a priori*, the eternal principles of justice. In the « pure theory of law » (Kelsen) the validity is derived from a postulate implied in the so-called basic norm (*Grundnorm*) and accepted by the science of law as inherent in « juristic thinking ».

According to another school of thought, what is called the « validity » of law means nothing but its *social effectiveness definable in terms of social facts* — even if opinions differ as to the way in which propositions about valid law can be reduced to propositions about observable, social facts. This view, therefore, implies that the empiristic postulate is accepted also in the field of legal cognition. For my own part I belong to this school. In a number of publications, most elaborate in a book « On Law and Justice » (2), I have tried to work out a consistent theory on this basis. It would, of course, take us too far, to enter in this connection into this theory of verification of the propositions of the science of law. But I believe that, because of the eminent position occupied by Kelsen in the theory of law and the challenge to all empiristic philosophy implied in his conception of legal cognition, it will be appropriate to present some critical remarks as to his notion of validity.

The fundamental question is the question about the meaning of the statement that a legal norm « exists », that is, that it is part of the law in force of a certain country. Kelsen rightly declares that this meaning is determined by the method through which its « existence » is demonstrated, the statement verified (3). Now, according to Kelsen, the « existence » of a norm is its « validity »; and that a norm possesses validity means « that the individuals ought to behave as the norm stipulates » (4). This, however, is nothing that can be verified by experience. Kelsen admits that the empirical fact which can be verified through observation and which is decisive for the « validity » of a norm is the effectiveness of the legal order and nothing else (5). He tries to save the idea of validity by saying that the existence of a norm is *not identical* with the social facts of effectiveness, but *only conditioned* by these facts by

(2) *Om Ret og Retfaerdighed* (Copenhagen 1953), to appear shortly in English.

(3) Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science. Collected Essays*, (1957,) 212.

(4) *Id.*, 214.

(5) *Id.*, 224.

which the « existence » can be verified ([6]). However, when these facts are the necessary and sufficient condition for the « existence » of the norm, and when the method of verification is determining the meaning of the statement that a norm exists, then the existence of a norm is simply the effectiveness of the order to which it belongs, and nothing else. The idea of « validity » is superfluous.

Further the idea of « validity » is without any logical meaning. «Validity», says Kelsen, « means that the individuals ought to behave as the norm stipulates ». But the norm itself, according to its immediate content, expresses what the individuals ought to do. What is the meaning of saying, that individuals ought to do what they ought to do? Kelsen explains the meaning to be that the subjective meaning of the norm is objective as well, ([7]) which is the same as saying that the norm expresses a true demand : the individuals « really », « in truth », « objectively » ought to do as claimed by the norm. But the idea of a true norm or demand is a logical absurdity, the fallacy implied in all ethical absolutism ». The idea of the « validity » or the « binding force » of law has no place in empirical science. It is nothing but the pseudo-rationalization of certain psychological experiences, certain feelings and attitudes toward the legal « authorities » and the legal order.

3. *Some legal terms cannot be defined by substitution (explicitly). Why is this the case, and in what other manner can they be defined?*

As mentioned in my introduction Hart has demonstrated that some legal terms, e.g. the terms « a right » and « a corporate body », cannot be defined by substitution but only by indicating the conditions under which sentences in which the term occurs are true. The position of Professor Scarpelli in relation to Hart may be indicated under the following points :

(1) He agrees with Hart in the negative statement that such terms cannot be defined by substitution (explicitely);

(2) I am not able to decide whether he agrees with Hart in his positive description of the way in which such terms are definable but it seems to me as if his ideas are somewhat different. I expect this point to be elucidated in the discussion;

(3) Scarpelli has generalized the views of Hart stating that this peculiarity belongs to all legal terms not designating simple facts, that is, facts not qualified by norms. He distinguishes between two categories of such terms : (1) terms designating facts qualified by norms and terms designating qualifications of facts by norms; and (2) terms designating norms or systems of norms, or their elements and aspects.

([6]) *Id.*, 225, 227, 268. 361.
([7]) *Id.*, 257.

For my own part I am inclined to believe that this generalization is too sweeping and wipes out some important differences as to the definition of terms included in these categories. Take, e.g., the term « punishable ». To say that an act is (legally) punishable means that the act falls under a valid legal rule placing the commitment of the act under a certain punishment. This again, in my opinion, is reducible to the factual statement, that if such an act is committed it is — under certain conditions — probable that it will be punished. So the term « punishable » may be defined by substitution as « likely — under certain conditions — to be punished ». The definition of the term « punishable » does not, in my view, offer other or greater difficulties than the definition of a purely factual term as, e.g., « dangerous ». To say that an act is dangerous also is reducible to a proposition of probability. At any rate, whether or not you agree in the proposed definition, it seems obvious that the term « « punishable » does not present the same definitorial problems as, e.g., the term « a right ». To make this clear it will be necessary to point out the peculiar function of this term.

A legal rule in last analysis must be interpreted as a directive to the judge and can therefore be restated in the formula :

D (if F, then C)

symbolizing a directive to the judge that when F exists his judgment shall be C. If all legal rules were formulated in accordance with this simple pattern we would have to operate with a number of rules as the following :

D_1 : if a person has lawfully acquired a thing by purchase, judgment for recovery shall be given in favour of the purchaser against other persons retaining the thing in their possession;

D_2 : if a person has inherited a thing, judgment for damages shall be given in favour of the heir against other persons who culpably damage the thing;

D_3 : if a person by prescription has acquired a thing and raised a loan that is not repaid at the proper time, the creditor shall be given judgment for satisfaction out of the thing;

D_4 : if a person has occupied a res nullius and by legacy bequeathed it to another person, judgment shall be given in favour of the legatee against the testator's estate for the surrender of the thing;

D_5 : if a person has acquired a thing by means of execution as a creditor and the object subsequently is appropriated by another person, the latter shall be punished for theft; and so on, bearing in mind, of course, that in each case the formula might be far more complicated.

Such a formulation and presentation of the law in force would, however, be so unwieldly to make it practically worthless. It is the task of legal thinking to conceptualise the legal rules in such a way that they are reduced to systematic order and by this means to give an account of the law in force as plain

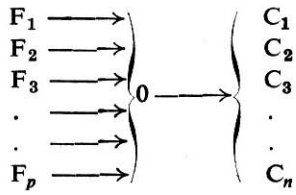
and convenient as possible. This can be achieved with the aid of the following technique of presentation.

From a large number of legal rules on the lines indicated a certain group can be detected that can be arranged in the following way :

$$
\begin{array}{l}
F_1 - C_1,\ F_2 - C_1,\ F_3 - C_1 \ldots F_p - C_1 \\
F_1 - C_2,\ F_2 - C_2,\ F_3 - C_2 \ldots F_p - C_2 \\
F_1 - C_3,\ F_2 - C_3,\ F_3 - C_3 \ldots F_p - C_3 \\
\quad . \qquad\quad . \qquad\quad . \\
\quad . \qquad\quad . \qquad\quad . \\
\quad . \qquad\quad . \qquad\quad . \\
F_1 - C_n,\ F_2 - C_n,\ F_3 - C_n, \ldots F_p - C_n
\end{array}
$$

(Read : the conditioning fact F_1 is connected with the legal consequence C_1, etc.), which means that each single one of a certain totality of conditioning facts ($F_1 - F_p$) is connected with each single one of a certain group of legal consequences ($C_1 - C_n$); or that it is true of each single F that it is connected with the same group of legal consequences ($C_1 + C_2 \ldots + C_n$), or that a cumulative plurality of legal consequences is connected to a disjunctive plurality of conditioning facts.

These $n \times p$ individual legal rules can be stated more simply and more manageably in the figure :



where 0 (ownership) merely stands for the systematic connection that F_1, as well as $F_2, F_3 \ldots F_p$ entail the totality of legal consequences $C_1, C_2, C_3 \ldots C_n$ As a technique of presentation this is expressed then by stating in one series of rules the facts that « create ownership », and in another series the legal consequences that « ownership entails ».

It will be clear from this that the « ownership » inserted between the conditioning facts and the conditioned consequences is in reality a *word without any semantic reference whatever, serving solely as a tool in presentation.* We talk as if « ownership » were a causal link between F and C, an effect occasioned or « created » by every F, and which in its turn is the cause of a totality of legal consequences. We say, for exemple, that :

(1) If A has lawfully purchased an object (F_2) ownership of the object is thereby created for him.

(2) If A is the owner for an object, he has (among other things) the right of recovery (C_1).

It is clear, however, that (1) + (2) is only a rephrasing of one of the presupposed norms ($F_2 - C_1$), namely that purchase as a conditioning fact entails the possibility of recovery as a legal consequence. The notion that between purchase and access to recovery something was « created » that can be designated as « ownership » is nonsense. Nothing is « created » as the result of A and B exchanging a few sentences legally interpreted as « contract of purchase ». All that has occurred is that the judge will now take this fact into consideration and give judgment for the purchaser in an action for recovery ([8]).

This analysis, I believe, explains the peculiar function of a term as « ownership » (and other terms designating subjective rights) : It is a *systematic* or *logical* term serving to designate no fact, no quality, relation, event or process whatsoever but exclusively the systematic correlation between a disjunctive plurality of conditioning facts and a cumulative plurality of legal consequences as indicated. If this view is correct it further explains why such a term cannot be defined by substitution, why the question « What is ownership? » cannot be answered. A systematic term does not stand for anything, it does not point to anything in the observable world. Its function is purely logical. For this reason it can, *as other logical terms, be defined only by indicating the rules for its use*, that is by indicating the conditions under which sentences in which the term occurs are true.

If we do not understand that the systematic terms do not stand for anything but, misled by the grammatical structure of language, ask what « a right » or « a body corporate » really is, and try to answer this question in a definition by substitution, we land in futile speculations and fallacies. The sentences « Peter has built a house » and « the state has built a railway » are grammatically analogous but logically of a quite different structure. Whereas « Peter » stands for an acting subject which might be pointed out, « the state » does not so. All we can do is to indicate the conditions under which an action (undertaken by Peter or Paul) is ascribed to « the state » and why we use this way of speaking. Any question as to what the state « really is » is senseless.

To sum up my observations under this point : I believe that the generalization undertaken by Professor Scarpelli is untenable and wipes out what is really important. The deciding factor explaining the peculiarity of some legal terms is not that the terms designate facts qualified by norms but that they are systematic terms.

4. *The sinister impact of essentialism on the definition of legal terms*

Of course I whole-heartedly agree with the first rapporteur in his criticism of essentialism. By « essentialism » I understand the belief that it is possible

([8]) For a more elaborate presentation of this analysis, see my article « Tû-tû », *Harw. Law. Rev.* 70 (1957), 812 *et seq.*

by a combination of observation and intellectual intuition to penetrate to and grasp the « hidden essence » of a thing; and that it is the task of science to determine the essence of things — for example, what it is that makes a cat a cat — and to set down the characteristics of the essence in a definition.

According to this view a definition is not a stipulation or convention (or a proposal for a convention) as to the use of a term but a true (or false) proposition revealing the « innermost nature » of a thing.

It should not, in my opinion, be necessary to use many words to refute this Aristotelian conception of the essence of a thing as completely empty and devoid of meaning. As far as I know essentialism does not play any role in natural scientific thinking of today.

The reason to mention essentialism in this connection is the distressing fact that essentialism still, in several respects, dominates legal thinking, degrading what ought to be a reasonable discussion of the most convenient use of a term into a senseless, ideologically tinted dispute about the « true nature » of things, indicating at the same time its immanent standard of value. This trend toward essentialism reveals itself especially in two fields.

First in relation to the definition of the term « law » itself. It is still not unusal to debate such questions as whether international law really is law, or whether the ordinances issued by Hitler really constituted a legal order, not as questions of terminology but as questions about the true nature of law. The assumption is, then, that the « essence » of law is its « validity » or « binding force » and that a factual order which violates fundamental principles of justice for this reason is no legal order. In this way the definition of the term « law » — a purely terminological question — is converted into an ideological fight for or against certain principles.

Second, in what is called conceptual jurisprudence (Begriffsjurisprudenz). This style of legal reasoning is characterized by the belief in the existence of a limited number of « rights » whose « essence » is determined in definitions; and by the assumption that it is possible from these concepts to deduce legal rules and legal decisions. As, however, the systematic concepts are nothing but labels for the systematic unity of a number of legal rules such a reasoning is obviously an inversion or a *petitio principii* : It is impossible to deduce anything from the concepts which is not already included in them.

5. *The role of definitions in statutes and codes*

Professor Scarpelli in his report embarks on the question of the role of definitions in legislation. The background for his observations is an alleged difference in the usage and doctrine in the common law countries on the one hand and the countries of codified law on the other hand. He is of the opinion that whereas the legislator in the Anglo-Saxon countries currently resorts to definitions, the prevailing idea in the civil law countries is that definitions

are not a task due to the legislator and possess no binding force as legal rules. I doubt whether this distinction corresponds with facts. If you take the *Code Civil* you will find throughout it a great number of definitions (e.g. Art. 544 definition of « propriété »; Art. 578 « usufruit »; Art. 637 « servitude »; Art. 1101 « contract » etc. etc.). The same is true about the German B.G.B. On the other hand you will hardly find definitions of terms of this kind in Anglo-Saxon statutes. Perhaps we get nearer to facts if we state the difference in this way : The big codifications to a high degree resort to definitions of systematic concepts whereas definitions of such concepts are not usual in the common law countries. It is the other way round as to definitions of not-systematic concepts used in ordinary statutes. It is well-known that the British legislator, because of a certain hostility from the side of the courts in the interpretation of statutes, often drafts a statute in precisely defined terms whereas this is not to the same degree usual in the civil law countries because of a more friendly co-operation between legislation and the administration of justice.

The question whether or not it is the « task » of the legislator to make definitions is ambiguous. It may be understood at least in two different ways.

a) First it may be understood as a question concerning good legislative policy. Is it, in the light of various practical considerations, advisable that the legislator set up definitions of terms used in statutes or codes? Obviously, this question cannot be answered with a simple Yes or No. In several ways the answer will vary with circumstances and preferences. Without going into details I want to submit some general observations suitable, perhaps, to throw some light on the problem.

If it should be assumed that for the sake of the highest degree of preciseness it must, so far, always be desirable that statutes and codes are drafted in precisely defined terms this assumption would be a fallacy. For two reasons. First because in prescriptive language the highest degree of preciseness is not always a *desideratum*. The legislator often deliberately couches his directives in vague and undefined terms leaving considerable leeway to the discretion of the judge. This is especially the case in spheres of life in which the value of an equitable solution is felt to prevail over the value of predictability. Second, because even if the highest degree of preciseness is aimed at, definition of terms is not always the most suitable means to this end. It is a prejudice to believe that any term can be made more precise through definition (9). Without going deeper into this matter let me just give an example. With respect to the concept of qualified arson the term « Wohnhaus » was once in German law defined in the following way : « Ein Wohnhaus ist ein durch Wände, welche fest wenn auch nur durch eigne Schwere mit dem Erdboden verbunden sind, und ein Dach abgegrenzter Luftraum, der Menschen zur Wohnung

(9) *Cp.* K.R. Popper, *The Open Society and its Enemies* II (London 1945), 15 *et seq.*

zu dienen bestimmt ist » ([10]). It seems very doubtful whether any preciseness is achieved by a definition as this which hardly says anything which would not be assumed without saying it, and which in no way eliminates the vagueness of the term (e.g., what does it mean that the house « der Menschen zur Wohnung zu dienen bestimmt ist ?»). Taken literally it is even misleading. A living house is defined as a special kind of air space — but you can hardly set an air space on fire.

From this example we may perhaps induce the general rule that *grammatical definitions*, that is, definitions aiming at establishing the current meaning of a colloquial term, are of no use, or even dangerous. The definitions found in statutes are usually not of this character but *technical definitions*, that is, definitions by which a specific, non-current meaning is attached to a colloquial term, expressed by criteria, preferable quantitative ones, suitable to make the application more precise. So, for example, if the term « wood » is defined as « any area of the size of at least 1 acre covered by trees of a height of at least 2 yards ».

We may conclude : In so far as preciseness is desirable (what often is not the case) technical definitions may be a suitable instrument to this end. This instrument, because of the lacking friendly co-operation between legislator and judge, is used more frequently by the British legislator than by the Continental.

The definition of *systematic terms*, as usual in the codifications, makes a chapter of its own. As an example we may take the pronouncement in Art. 544 Code Civil : « La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements ». Pronouncements of this type, however, are not really definitions — they do not aim at indicating the meaning of a term, the conditions under which the term is applicable. According to the analysis given under point 3 above the systematic concept functions as a tool for the formulation of legal rules. Art. 544 is only a fragment. Taken together with the rules concerning acquisition of ownership and the rules concerning the protection of rights, a great number of legal rules connecting facts and legal consequences will appear. What these so-called definitions represent is therefore really a *special technique of legislation* — a technique characterised by a high level of abstraction and systematization integrating conceptually a great number of atomar legal rules in highly complicated molecular formations.

Whether such a technique is commendable or not can hardly be discussed objectively but is to a high degree dependent on preferences rooted in the cultural tradition and national spirit of a country. It is the old issue of codification case law.

([10]) The example is taken from Theodor Geiger, *Vorstudien zu einer Soziologie des Rechts* (Copenhagen 1947), 192.

b) The question whether or not it is the « task » of the legislator to make definitions may, secondly, be understood as a question about the « binding force » of such definitions : Do definitions fall inside the power of the legislator to give authoritatively binding directions? The question is hardly of interest regarding the technical definitions of colloquial terms often occurring in statutes. If, e.g., the term « wood » in a statute on taxation has been defined in a specific technical manner it goes without saying that this definitorial prescription must and will be taken into account in the application and interpretation of the statute.

In principle the same is valid also regarding the « definition » of systematical concepts in codifications. These represent, as mentioned, a special technique of legislation and what is expressed in this technique must in principle be just as « binding » as other legislative prescriptions. However, because of the highly abstract level of such definitions it may easily occur that the systematization is defective in so far as the definition is in conflict with other, more elementary legal rules given elsewhere by the legislator or presupposed by him. It is, then, a matter of interpretation to reconcile the conflicting norms, and the outcome will naturally be that the « definition » of the systematic term is set aside as defective or insufficient.

The legislative « definitions » of systematic concepts cannot, of course, claim any authority in relation to the way the same terms are used by writers.

(Reçu le 12 juillet 1958)