MODERN ANALYTICAL JURISPRUDENCE AND THE LIMITS OF ITS USEFULNESS

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In 1953, Professor Herbert Hart, the present holder of the Regius Chair for Jurisprudence at the University of Oxford, delivered his inaugural address under the title *Definition and Theory in Jurisprudence.*[1] In this paper, Professor Hart undertook the task of re-examining certain questions which have always stood in the forefront of the interest of those jurisprudential scholars who customarily are classified as "analytical jurists." These questions—to use Professor Hart's own words—may be characterized as "requests for definitions"; typical examples are: "What is law?" "What is a state?" "What is a right?" "What is possession?" "What is a corporation?" [2]

Professor Hart takes the view in his address that the mode of defining these terms which was common in analytical jurisprudence of the past must be considered inadequate and that it should be supplanted by a "new look," a method apt to yield more satisfactory results. It is not necessary, Professor Hart believes, to enter into a "forbidding jungle of philosophical argument" to accomplish this re-orientation in analytical jurisprudence. He also expresses doubts as to why it should be essential for the pursuit of this objective to divorce jurisprudence from "the study of law at work." He cannot see any justification for the rise of whole schools of jurisprudence combating each other for no better purpose than to answer a few "innocent" questions which, in his opinion, can be handled easily by a developed legal system without assuming this "incubus of theory." [3] Also, he does not advocate going outside the boundaries of pure legal reasoning, apparently believing that law is a self-contained science which does not need the assistance of other social disciplines for its proper functioning.[4]

Professor Hart sees the main drawback of the older analytic approach in the attempt to supply dictionary-like definitions of funda-

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1. Hart, *Definition and Theory in Jurisprudence,* 70 L.Q. REV. 37 (1954).

2. *Id.* at 37, 39.

3. *Id.* at 39.

4. *Id.* at 37: "[L]egal notions . . . can be elucidated by methods properly adapted to their special character." See also *id.* at 57.

mental legal conceptions in abstraction from the specific context in which the defined words are used. The difficulty with legal definitions, according to his diagnosis, lies in the fact that they do not have the straight-forward connection with counterparts in the world of reality which most non-legal, ordinary words have. The factual relations and events which these terms describe, he points out, are never the exact equivalent of the legal words; metaphorically expressed, legal concepts tend to have their heads in the clouds.[5]

The alternative proposed by Professor Hart is a mode of analysis under which legal words are elucidated by "considering the conditions under which statements in which they have their characteristic use are true." [6] Mere *paraphrasing* of legal terms instead of defining them, as Bentham had suggested, does not go far enough, he says.[7] The clarification of the term "legal right" is offered as an example. The *Restatement of Property,* characteristic of the older approach criticized by Professor Hart, uses the following brief definition: "A right . . . is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act." [8] Professor Hart would use the following more elaborate description of the term:

> "(1) A statement of the form 'X has a right' is true if the following conditions are satisfied: (a) There is in existence a legal system. (b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action. (c) This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively only until X (or such person) chooses otherwise. (2) A statement of the form 'X has a right' is used to draw a conclusion of law in a particular case which falls under such rules." [9]

Judging from this example, the novelty of Professor Hart's approach appears to consist in a plea to replace *definitions* by (more elaborate) *explanations, i.e.,* to describe legal terms in three or four sentences rather than one brief phrase. I propose to raise the question later whether Professor Hart, notwithstanding the example which I have just recited, does not in reality have something more basic and

5. *Id.* at 38, 40.
6. *Id.* at 60.
7. *Id.* at 41, 48.
8. RESTATEMENT, PROPERTY § 1 (1936).
9. Hart, *supra* note 1, at 49.

original in mind than merely substituting a Columbia Encyclopedia of legal terms for a Webster Dictionary of legal definitions.

I find myself in full agreement with Professor Hart when he berates the deficiencies of what might be called "a jurisprudence of definitions." The danger of this type of jurisprudence was recognized even in Roman times, among others by the jurist Javolenus, who was the author of the often quoted phrase "omnis definitio in iure ciuili periculosa est." [10] The leading jurists of the classical period of Roman law heeded the warning for the most part and were wary of excessive reliance on dogmatically defined terms.[11] The shortcomings of the opposite attitude were effectively demonstrated during the period when a jurisprudence of conceptions and a super-logical scholasticism dominated judicial thinking in Germany and produced many decisions unresponsive to social need and justice.[12] The highly technical concepts and rules of the now defunct Anglo-American system of common law pleading, which were often handled by the courts like mathematical propositions without regard to practical consequences, are an exemplification of the same unfruitful approach.

I submit, however, that the method of amplification in the elucidation of legal concepts which Professor Hart appears to favor would not result in a measurable improvement of our legal methodology. Let us revert back to his description of the term "legal right." Professor Hart's formula is very similar to that of Wesley Hohfeld,[13] whose classifications of legal concepts have never been adopted by the courts.[14] It would seem that Professor Hart's description of "legal right" would scarcely suffice to embrace all the instances in which a statement to

10. DIGEST 50.17.202. (Every definition in civil law is dangerous.)

11. *Cf.* SCHULZ, PRINCIPLES OF ROMAN LAW 43-48 (1936).

12. See BODENHEIMER, JURISPRUDENCE 178 (1940); Rumelin, *Developments in Legal Theory and Teaching During My Lifetime,* in THE JURISPRUDENCE OF INTERESTS 7-10 (Schoch ed. 1948).

13. See, *e.g.,* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36-65 (1923); Corbin, *Legal Analysis and Terminology,* 29 YALE L.J. 163, 167 (1919).

14. The term "right" is frequently used where it does not denote an enforceable claim accompanied by a corresponding duty of another person. The courts speak of a "right to kill in self defense," see *e.g.,* State v. Cox, 138 Me. 151, 166, 23 A.2d 634, 642 (1941); a "right to rescue," see *e.g.,* Weller v. Chicago N.W.R.R., 244 Iowa 149, 55 N.W.2d 720 (1952); a "right to inherit property," see *e.g.,* Fulcher v. Carter, 212 S.W.2d 503 (Tex. Civ. App. 1948). Some cases declare—squarely in defiance of Hohfeldian terminology—that the term "right" includes power, privilege and immunity. See Pinkham v. Mercer, 227 N.C. 72, 78, 40 S.E.2d 690, 695 (1946); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 546, 27 S.E.2d 538, 545 (1943). The other Hohfeldian concepts have fared no better. See United States v. Murray, 48 F. Supp. 920 (E.D. Ark. 1943) and Owens v. Owens, 193 S.C. 260, 8 S.E.2d 339 (1940) for a non-Hohfeldian interpretation of "privilege." See also Union Oil Co. v. Basalt Rock Co., 30 Cal. App. 2d 317, 319, 86 P.2d 139, 141 (1939) and Thomas v. Industrial Comm'n, 243 Wis. 231, 238-39, 10 N.W.2d 206, 209 (1943) for a consistent use of the term "liability" in a different sense than that suggested by Hohfeld. See also Pound, *Legal Rights,* 26 INT. J. OF ETH. 92, 97 (1916).

the effect that "*A* has a right" might be held legally meaningful.[15] It is very likely that a corresponding brief description of other fundamental words, *e.g.*, "state," "possession," "corporation," would suffer from a similar lack of adequacy in correctly depicting the manifold and often inconsistent uses of these terms in the different legal contexts in which they play a part.

It should by no means be denied that an elucidation of the role of legal concepts and of the function of classification in law is a proper subject of jurisprudential inquiry. The study of law cannot dispense with conceptual aids.[16] Legal concepts and generalizations represent approximations to the patterns and uniformities which exist in nature and human social life and are indispensable instruments of legal stability and justice. They assist us in the formulation of external standards in the absence of which reasonable men would be reluctant to submit their controversies to the courts. It lies in the nature of a concept, however, that it is fixed and definite only in its kernel or core, and that it becomes blurred and indistinct as we move from the center toward the periphery.[17] This affords a handle to the judge by which he can either widen or reduce the "corona" around the solid part in response to social necessity or the requirements of justice. It is in this outer, penumbral area that the law inevitably intersects with ethics, economics, social policy and other factors considered "extraneous" by the radical positivist. For this reason, a purely legal "elucidation" or "explanation" of concepts, unaccompanied by a thorough consideration of the social factors which may justify an expansion, contraction or re-formulation of the concept, cannot be regarded as a great step forward from bare definition.

While Professor Hart's approach to legal concepts does not encompass such "extra-legal" considerations—which he would in all probability reject—a close reading of his article leaves one with the impression that he is well aware of the fact that an Encyclopedia of legal terms will not satisfactorily dispose of the problem which the legal Webster failed to solve. At one point in his address, for instance, he

15. Hart admits that the term "legal right" is being used in various differing senses in our legal order. Hart, *supra* note 1, at 49 n.15. We might, then, raise the question of the practicability of his own description of the notion, except for purposes of terminological reform.

16. See in this connection Rheinstein, *Education for Legal Craftsmanship*, 30 IOWA L. REV. 408, 414 (1945).

17. See COHEN, A PREFACE TO LOGIC 67 (1944); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 188 (1943); Williams, *Language and the Law*, 61 L.Q. REV. 191 (1945); Wurzel, *Methods of Juridical Thinking*, in SCIENCE OF LEGAL METHOD 286, 342 (1917). On Wurzel, see FRANK, LAW AND THE MODERN MIND 229-31 (1930) and Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. REV. 545, 592-95 (1951).

compliments the compilers of Justinian's *Digest* for avoiding the "fruitless" question, "What is possession?" [18] At another place he points out that "if we characterise adequately the distinctive manner in which expressions for corporate bodies are used in a legal system then there is no residual question of the form 'What is a corporation?' " [19] We might just as well put aside this question, he proposes, and ask instead a more illuminating one, such as "Under what types of conditions does the law ascribe liabilities to corporations?" [20]

Is Professor Hart perhaps subtly suggesting that the whole inquiry into the meaning of general legal terms should be abandoned? Is it his view that in order to ascertain the conditions under which a legal concept becomes significant, all normative situations involving the use of the concept must be ascertained? It would hardly be possible, it seems, to determine the cases in which corporations are held liable without a detailed scrutiny of the whole branch of the positive law of corporations.

That Professor Hart, by his explanatory and descriptive approach to legal concepts, is drawn into an exposition of large parts of the positive law is exemplified also by his discussion of the concept of contract. In another article,[21] he states that "it is usually not possible to define a legal concept such as 'trespass' or 'contract' by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others, and such concepts can only be explained with the aid of a list of exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form." He then gives a long list of possible defenses that might defeat a contract, such as fraudulent misrepresentation, duress, undue influence, lunacy, intoxication, illegality and lapse of time, concluding that "no adequate characterization of the legal concept of a contract could be made without reference to these extremely heterogeneous defences." [22] Because of the "composite character" of concepts,[23] he sees no other way apparently but a rather detailed discussion of the positive rules of law.

Implicit in Professor Hart's criticism of definitional jurisprudence is an admission that it has created abstractions incapable of meeting

18. Hart, *supra* note 1, at 59.

19. *Id.* at 55.

20. *Id.* at 56.

21. Hart, *The Ascription of Responsibility and Rights,* in ESSAYS ON LOGIC AND LANGUAGE 145, 148 (Flew ed. 1951).

22. *Id.* at 150. Similar comments on the "defeasible character of concepts" are made with respect to crimes. *Id.* at 152.

23. *Id.* at 154.

the problem of semantic ambiguity. We have to accept the consequence that this position seriously impairs the utility of analytical jurisprudence as a separate legal discipline. The most celebrated English protagonist of this branch of jurisprudence, John Austin, regarded it as a science aiming at the exposition and analysis of general notions, principles and classifications common to developed legal systems.[24] He emphasized that such an exposition was impossible unless the meaning of the leading terms such as Right, Obligation, Injury, Sanction, Person, Thing, Act, Forbearance was accurately determined.[25] In the light of Professor Hart's thesis that a general analysis of the distinctive vocabulary of the law will not suffice for a scientific treatment of the law, there is much good reason to regard his inaugural address as a sort of swan song of analytical jurisprudence. If the meaning of general legal notions can be elucidated only by consideration of the positive instances in which the courts have ascribed legal significance to the concept, analytical jurisprudence becomes in fact fused —or almost fused—with the positive law. There may still be a need for an explanation of the hard core of legal words of art, as a starting point for the comprehension of their functional significance within the normative system. But it is hard to see why a separate branch of the law and a special course in the legal curriculum of a university should be devoted to a task which can just as appropriately be handled within the framework of the special disciplines of the law.

This raises the final question. If we agree with Hart that we have to discard analytical jurisprudence as it has been traditionally conceived and taught, then would it be possible to convert jurisprudential inquiry to some use other than the analysis and classification of general concepts? Professor Hart gives us little encouragement with regard to the possibilities of a profitable rededication. He tells us—without bemoaning the fact—that English jurisprudence will remain predominantly analytical in temper, in the universities at least, and that sociological jurisprudence will not be a serious rival. He would continue to make "analysis of fundamental legal concepts and distinctions" the main subject of jurisprudential inquiry and teaching.[26]

It is not possible to follow Professor Hart along this barren path. There are many rewarding tasks other than formal analysis that jurisprudence is called upon to perform for the benefit of the law. There is the eternal problem of justice. There is the intriguing inquiry into

24. AUSTIN, LECTURES ON JURISPRUDENCE 1072-73 (5th ed., Campbell 1885).

25. *Id.* at 1075.

26. Hart, *Philosophy of Law and Jurisprudence in Britain (1945-1952)*, 2 AM. J. COMP. L. 355, 363-64 (1953).

the non-positive sources (*e.g.*, morality, custom, community attitudes, economic patterns) which may legitimately be considered in the work of adjudication. The impact of other social disciplines on the law is closely related to this inquiry. As Huntingdon Cairns points out in a recent article, "Legal phenomena yield so reluctantly to rational analysis that any attempt to interpret them needs the assistance of all relevant disciplines." [27] Then there looms large the important issue as to the relative roles of logic and policy in the judicial process. We have to come to grips with the difficult question, highlighted by the opposing views of Austin and Ehrlich, as to whether government or society is the true author of the law, and we have to consider the factual and normative consequences of a wide disparity between governmental law and the community's sense of fair dealing and justice. There is the whole tremendous and controversial area of evaluation of precedents and interpretative techniques. In fact, the range of meaningful and fascinating problems for the jurisprudential scholar is so great that he will perhaps rejoice in the thought that he can economize on some of the questions to which a number of legal thinkers of the past devoted their exclusive attention.

27. Cairns, *Legal Theory*, 9 RUTGERS L. REV. 388, 389 (1954).

(*Professor Hart will reply in a later issue.*)