CHAPTER VI

LANGUAGE AS A METHOD

1. The Need for Methodology

WITHOUT some knowledge of the methodology and the general theory of law, it is much more difficult, if not impossible, to understand the differences between different works[1], which can lead to pointless disputes. In this Chapter, we are going to reconsider some aspects of general legal theory that we regard essential in the study and application of law[2].

Without a clear point of departure about what *a legal definition* is, we might start by saying that it is the relationship between words or designations used around the world that convey the supposed "*nature*" or "*essence*" of a legal institution. In reality, then, only a work devoted to the struggle between words can be written in this arena, which winds up calling into question problems of economic and social valorization, as well as the problem of power and authority in relation to freedom.

2. The Open Structure of Ordinary and Legal Language[3]

As HOSPERS[4] states, words are no more than labels to designate things. We designate things so that we can talk about them and, as such, words do

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[1] The reader will be able to find some information about this subject in the analysis of the "*caso de los exploradores de cavernas*" that we published in our book *Derechos Humanos*, Buenos Aires, FDA, 1999, 5th ed., Annex II to chapter IV; likewise in the cases "*el deber de no fumar en público*", Annex III to the same chapter IV, *Cine Callao*, Annex to chapter VI and *E.*, *F.E.*, chapter VIII, case I.

[2] This dichotomy is mistaken. See the *Epilogue* and our book *El método en derecho. Aprender, enseñar, escribir, hacer*, Madrid, Civitas, 1988, 3rd reprint, 2001.

[3] Extend in CARRIÓ, GENARO R., *Notas sobre derecho y lenguaje,* Buenos Aires, Abeledo-Perrot, 1965, 3rd ed., pp. 63 et seq., where an extensive bibliography can be found; ROBINSON, RICHARD, *Definition*, Oxford, 1972.

not have any further relationship with those things. However, bottle labels, for example, continue to have a relationship with the "thing" in question, *i.e.*, the bottle itself. "Any label is convenient, as long as we agree about it and we use it consequently. The bottle will contain the same substance even though we stamp a different label on it, and the 'thing' would still be the same even though we use a different word to designate it."[5]

3. Common Usage

Language would not be usable if there were not some conventions concerning which labels designate which things. This is, in fact, the reason why common usage exists. Common usage is not, however, that useful, since, generally, it lacks enough precision. It is affected by vagueness and ambiguity, which means that the same words can be used often with many different meanings. Sometimes speakers are not even aware of which meaning they are conveying at a particular moment, nor which sense the listener is attributing[6]. Common usage not only applies to ordinary language, but also to the so-called technical and scientific language.

4. The Open Structure of Language[7]

It is impossible to overcome that difficulty, since natural language has, as usual, an open structure. The only way to solve this problem would be to build an artificial language[8]. That is, in fact, what exact sciences have done, and that is what law has not been able to do until now. For this reason, law cannot achieve the precision of the exact sciences[9].

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[4] In this point we will follow HOSPERS, JOHN, *Introducción al análisis filosófico*, vol. I, Buenos Aires, Macchi, 1965, chapter I.

[5] HOSPERS, *op. cit.*, p. 22; ROSS, ALF, *Tû-Tû*, Buenos Aires, Abeledo-Perrot, 1961, p. 32 and *Sobre el derecho y la justicia*, Buenos Aires, EUDEBA, 1963, pp. 109-110.

[6] CARRIÓ, *Notas...*, *op. cit.*, pp. 23-35, 67-69.

[7] HOSPERS, *op. cit.*, pp. 48-58.

[8] Extend in HART, H. L. A., *Derecho y moral*, Buenos Aires, 1962, pp. 24 et seq.; COPI, IRVING M. / GOULD, JAMES A., *Contemporary Readings in Logical Theory*, New York, 1967, pp. 93 et seq.; ROSS, ALF, *op. cit*., pp. 110-111.

[9] CARRIÓ, *Notas...*, *op. cit.*, pp. 37-39.

Nonetheless, the application of symbolic logic to the law[10] has allowed avoiding invalid[11] arguments. However, this has not given a solution to the imprecise nature of language and of the legal terms used as a starting point[12]. Nor has it given us a solution to the axiological problems that we must take into account in the interpretation and application of law[13].

As POPPER says, "In science, we care about the assertions we make, never depend on the meaning of our expressions […]. That is why our expressions trouble us so little. We do not overload them, we try to give them as little importance as possible. We do not take their "meaning" too seriously. We are always aware that our expressions are somewhat imprecise (given that we have learned to use them only in practical applications) and we reach precision without reducing their shadow of vagueness. On the contrary, we remain immersed in it."[14]

5. Common Usage and Freedom of Stipulation

There is no obligation to depend upon common usage, but "whenever we *use* a word in a way different from the common one, we must inform our audience about the meaning we are giving to it. Inversely, when we do not inform our audience about the sense in which we are using the word, they have all the right to believe that we are using it in a conventional sense; in other words, that we are following the common usage." Expressed in an-

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[10] See KLUG, ULRICH, *Lógica jurídica*, Caracas, 1961, pp. 41 et seq.; WEINBERGER, OTA, *Rechtslogik*, Vienna, Springer, 1970, pp. 189 et seq.

[11] AYER, ALFRED JULES, *Lenguaje, verdad y lógica*, Buenos Aires, year 1965, p. 77, says that "the Introduction of symbols that denote logic constructions is an artifice that allows us to pronounce complicated propositions regarding the elements of said constructions, in a relatively simple way."

[12] In a similar sense HART, *op. cit.*, p. 31; of course, the symbolic logic has even clear advantages: BLANCHÉ, *op. cit.*, pp. 15 et seq. Compare GOLDSCHMIDT, WERNER, *Introducción al derecho*, Buenos Aires, 1967, 3rd ed., pp. 332-333.

[13] We explain some of them in the *Tratado de derecho administrativo*, vol. 1, *Parte general*, Buenos Aires, FDA, 2000, reprint of 5th ed., chapter III, "Bases políticas, constitucionales y sociales del derecho administrativo."

[14] POPPER, KARL, *Popper Selections*, texts selected by DAVID MILLER, Princeton University Press, Princeton, New Jersey, 1985, p. 97; POPPER, KARL L., *La lógica de la investigación científica*, Madrid, Tecnos, 1973, *op. cit.*, pp. 260-261; *The Open Universe. An Argument for Indeterminism*, London, Routledge, 1991; *El desarrollo del conocimiento científico. Conjeturas y refutaciones*, Buenos Aires, Paidós, 1967; *Unended Quest*, Open Court, 1976, etc.

other way, "Anyone can use whichever noise he wants to refer to anything, as long as he makes clear what that noise in question is referring to."[15]

It is clear that it is not always convenient to stray from common usage, since we run the risk of not being understood or being misunderstood. The rule regarding the freedom of stipulation is applicable, mainly: *a)* when there is no word to designate the thing we wish to talk about; *b)* when the thing we wish to talk about *already* has a word that represents it properly, but the common usage uses *another* word to designate it, and this other word leads to confusion; *c)* most importantly, when the word has conventionally "such a vagueness and imprecision that to keep using that word following the common usage becomes unsatisfactory."[16] Under such circumstances, if "we consider that to keep using the word according to the common usage is a constant source of confusion, we can try to do one of two things: *1)* abandon the word completely[17]; or *2)* keep using the same word *but try to purify it by means of using it in a more special and limited sense, in general restricting it to some specific part of the huge reach it has*."[18]

6. Defining Legal Words as a Methodological Problem

It is settled that the definition of legal words will be, most of the time, a matter of freedom of stipulation. However, this does not mean that it lacks importance, or that it can be done too arbitrarily. It is important because according to the usage we give to the expression, we will have to deal with all further legal consequences afterwards. The clarity of the stipulated concept is a prerequisite to everything that will be later said about the subject. Thus, we must avoid, from the beginning, falling into what POPPER calls "one of the prejudices that we owe ARISTOTLE, the prejudice that

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[15] HOSPERS, *op. cit.*, pp. 14-15; ROSS, ALF, *op. cit.*, p. 110.

[16] HOSPERS, *op. cit.*, p. 17.

[17] It is what we have done with the words "*policía*" and "*poder de policía*": see the vol. 2 of our *Tratado…*, *op. cit.*, *La defensa del usuario y del administrado*, 2000, 4th ed., chapter V: "El poder de policía". Everything is reduced to the clearness *test*: if we can explain the problems regarding the pertinent legal system without using such words nor incurring in darkness or imprecision. Or if, on the contrary, the ones using it achieve greater clearness of exposition. In the first case we would have done the right thing to omit them, in the second case the one who keeps using them will be right.

[18] HOSPERS, *op. cit.*, pp. 17-18 (emphasis added); HAYAKAWA, S.I., *Language in Thought and Action*, London, 1970, 2nd ed., pp. 214 et seq.

language can be made more precise by the use of definitions"; "A definition cannot fix the meaning of an expression […] due to many reasons, these will possibly be as vague and confusing as the terms we started with […] all the terms that we really need are indefinite."[19] Of course, it is not about finding out the "nature" or "essence" of the things or institutions. For instance, ALF ROSS has noted that we have had to ask questions about what something "really is," which is connected to "the belief that words objectively represent certain concepts or ideas whose meaning must be discovered and described."[20] This, in turn, refers back to ARISTOTLE's definition that "the philosopher wonders what 'truth,' 'beauty,' 'kindness,' etc., 'really are,' and he thinks it is possible to fix real definitions."[21] "It is not a question of whether a stipulating definition is as 'good' as any other, but whether it is comparable. In this way, stipulative definitions are arbitrary only in the specified sense. However, whether they are clear or dark, or advantageous or disadvantageous, is a factual matter"[22], by which the convenience or inconvenience of the proposed stipulating definition[23] should be deduced.

So, with good reason, it is best to avoid dogmatic definitions in which "The idea […] responds to an irrepressible tendency of the mind, namely, the search for the unconditioned. In this case, the aim is to find a unique, unlimited and supreme source of every legal rule and of every legal justification. Such source, if there is one, is beyond our knowledge and expression possibilities."[24]

When a stipulating definition is made, we must look for a list of the characteristics regarding the thing in question, without which the word could not be applied to it. These will be the defining characteristics of the

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[19] *Popper Selections*, *op. cit.*, pp. 95-97.

[20] *Op. cit.*, p. 109, note 3.

[21] *Op. loc. cit.*

[22] COPI, IRVING, *Introducción a la lógica*, Buenos Aires, EUDEBA, 1962, p. 103.

[23] Well, of course, a stipulating definition "is not true nor false, but it must be considered as a proposal or a decision to use the definiendum so that it means definiens, or as a request or order. In this aspect, a stipulating definition has a directive character more than an informative one" (COPI, *op. cit.*, p. 102).

[24] CARRIÓ, *Sobre los límites del lenguaje normativo*, Buenos Aires, Astrea, 1973, p. 57.

word, so the denotation must not be too wide[25] or too restricted[26], although this danger will always exist[27].

7. Elements to Be Considered in Stipulating Definitions

The foregoing begs the question: By which criterion will we define particular words? It must be reiterated that this is not a dogmatic question with great legal principles at stake, but is rather a methodological, pragmatic question. General legal theory and scientific methodology[28] agree on this aspect, which is echoed, for example, by certain authors of administrative law[29].

The first fundamental point, then, is whether it is thought that there is only one possible definition for the term in question. If one thinks it is necessarily valid and that everyone who does not agree with it is making a *mistake*, one is very much misguided[30]. In such a case, communication becomes a "dead end street" and "building a monument to sterility", as CARRIÓ said[31].

Therefore, what becomes important above all else is which objects we are going to talk about, and which we will group under one definition or several. That is to say, we need to determine our linguistic reality. Starting from this reality (and not from a presupposed definition), we will have to decide what legal system is applicable to that reality, in order to investi-

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[25] COPI, *op. cit.*, p. 121; HOSPERS, *op. cit.*, p. 36; GOLDSCHMIDT, WERNER, *Introducción al derecho*, *op. cit.*, p. 326.

[26] COPI, *op. cit.*; HOSPERS, *op. loc. cit.*; GOLDSCHMIDT, *op. loc. cit.*; "it is rarely illuminating to receive a definition as a brief and concise assertion": STEBBING, L. S., *Introducción a la lógica moderna*, Mexico, 1965, p. 195.

[27] HOSPERS, *op. cit.*, p. 37; further definition requirements in COPI, *op. cit.*, pp. 120 et seq.; STEBBING, *op. cit.*, pp. 199 et seq.

[28] *E.g.*, CARRIÓ, *op. cit.*, pp. 66-71.

[29] FORSTHOFF, ERNST, *Tratado de derecho administrativo*, Madrid, 1958, p. 280; VON HIPPEL, ERNST, *Untersuchungen zum problem des fehlerhaften Staatsakts. Beitrag zur Methode einer teleologischen Rechtsauslegung*, Berlin, Springer, 1960, 2nd ed., pp. 2 et seq.; ANTONIOLLI, WALTER, *Allgemeines Verwaltungsrecht*, Vienna, Manzsche, 1954, p. 195.

[30] As HEMPEL says, *op. cit.*, p. 5, "according to traditional logic, a 'real' definition […] (is) the formulation of 'essential nature' or of 'essential attributes' of some entity. However, the notion of essential nature is so vague that turns this characterization useless concerning the severe investigation."

[31] CARRIÓ, *op. cit.*, p. 69.

gate which things receive the same legal treatment and which receive a different one. If a group of questions are dealt with similarly by the same legal system, then it will be convenient to group them under the same definition.

This last aspect encompasses the main thrust of the discussion, which is to determine which group of facts basically receives equal treatment under the law. While this is what the jurist is trained to do, once an agreement is reached in this regard, grouping them under certain definition will always be convenient, useful, clearer.

8. Definition and Classification

It can even be asserted that the definition can only be the result of a previous classification of objects. Let us see, then, what a classification is, scientifically speaking:

"When we use class words, we group many things under the same denomination (we give the same label printed on many bottles) on the basis of the characteristics that these things have in common. On using the same word to refer to many things, we treat these (at least for the moment) as if they were all the same and we ignore their differences. The advantages and disadvantages of class words lie on this fact."

It is likely that there are not two things in the universe that are exactly the same in every aspect. Therefore, as similar as two things may be, we can use the characteristics that differentiate them to place them under different classes: "We can choose a criterion so detailed and specific to make it belong to a class, that there would be no more than one member of that class in the whole universe. We do not do it in practice, because language would be as uncomfortable as it would be if all the words were proper nouns. What we do is use words of wide class, and then, if it is necessary, we set up differences within the class as a basis for subsequent distinctions, dividing the main class into as many subclasses as we deem convenient."

It is more than likely that there are not two things in the universe so different from each other that they do not have some characteristics in common. In this way, they present a basis for being placed within the same class[32]. Nonetheless, the common characteristics we adopt in the usage of

[32] HOSPERS, *op. cit.*, pp. 25 and 27.

a class word is a matter of convenience. Our classifications depend on our interests and our need to recognize the similarities, as well as the differences, between things. Many different classifications can be equally valid. "There are so many possible classes in the world with common characteristics or combinations of these that can be considered as foundation for a classification." "The method that we adopt in each case depends greatly on what we consider most important: the similarities or the differences". "There is not a correct or incorrect way to classify things, as well as there is not a correct or incorrect way to address things."[33]

Each word does not have a function other than to order and systematize the knowledge, to transmit it from its more general principles to its more detailed notions. Depending on the breadth we give to a particular definition, it will be more or less useful, depending on the case, but never "true" or "false."[34] This is the reason why "words do not have another meaning than the one *given* to them (by the person who uses it or by the community linguistic conventions). Therefore, there are no 'intrinsic,' 'true,' or 'real' meanings within every definite stipulation or accepted linguistic usage."[35]

Of course, the same goes for *all of science* and not only to scientific language. Again, in POPPER's words, "Science never follows the illusory aim to make its answers definitive, or even probable, but […] to incessantly discover new, deeper and more general problems and to subject our answers (always temporary) to continuously renewed and more rigid contrasts"[36], "in the logic of the science that I have drawn up, it is possible to avoid using the concepts of true and false: […] there is no need for us to say that a theory is false, we can only say that a group of basically accepted statements contradicts it." "Therefore, corroboration is not a 'true value.'"[37]

CARRIÓ agrees, stating that "classifications are not true or false, they are *useful or useless.* The advantages or disadvantages of such classifications are subjected to the interests guiding the person who formulates them, and to the fecundity for presenting a field of knowledge in a more comprehensible manner or richer in desirable practical consequences."[38] He continues, "There are always multiple ways to group or classify a field of rela-

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[33] HOSPERS, *op. cit.*, pp. 28 and 30.

[34] CARRIÓ, *op. cit.*, p. 65.

[35] CARRIÓ, *op. cit.*, pp. 66-67.

[36] *La lógica de la investigación científica*, *op. cit.*, p. 262; *The Open Universe. An Argument for Indeterminism*, London, Routledge, 1991.

[37] *Op. ult. cit.*, pp. 256-257.

[38] CARRIÓ, *op. cit.*, pp. 72-73.

tions or phenomena; the criterion to take one of them comes under scientific, didactic or practical considerations. Making up one's mind in favor of one classification is not like preferring an accurate map instead of one that it is not […] it is more like choosing the metric system instead of the English system."[39]

Everything we mentioned is aimed to remove dogmatism from discussions about definitions and classifications and focus the analysis and discussion on the specific legal system that shall rule each institution. This system and its interpretation is what matters, not the definitions and classifications within it; otherwise they lead to confusion or are an attempt to sacrifice freedom facing the power.

Classifications that lack a demonstrable usefulness or convenience and do not explain anything about the legal system are not only incomprehensible but also harmful. For this reason, the reader must wonder every time he reads a classification: What is it for? And if he does not get a satisfactory answer, he should clear his way towards other directions, since the world of knowledge is too wide to take dead end streets.

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[39] CARRIÓ, *op. cit.*, pp. 72-73. "If the first one is preferable to the second one it is not because that is true and this is false, but because the first is more convenient, easier to handle and more suitable to satisfy certain human needs or conveniences with less effort."