DOI:10.5235/2050-8840.2.2.145

'A BIRD IS KNOWN BY ITS FEATHERS'- ON THE IMPORTANCE AND COMPLEXITIES OF DEFINITIONS IN LEGISLATION

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> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master — that's all."

(Lewis Carroll, Through the Looking Glass)

Abstract

This article deals with legislative definitions. It discusses the purpose and characteristics of legislative definitions which act, inter alia, as a mechanism for creating legal certainty with regard to ambiguous terms, and to prevent cumbrous draftsmanship of legislation. The importance of legislative definitions is that from them, usually, the incidence of law is inferred. Legislative definitions not only determine the legal meaning of a term, rather they coercively determine the sole way by which a term should be used in certain factual circumstances. By that, the law becomes the main source through which language is used as a mechanism for social control. In other words, legislative definitions, contrary to dictionaries' definitions, are authoritative. The article continues to elaborate on the relationship between definitions and the principles of the rule of law and separation of powers, and between definitions and statutory interpretation. Finally, the article focuses on several difficulties attached to the use of legislative

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definitions, especially when a term is given an entirely different meaning than the common one. The basic claim underpinning the article is that while legislative definitions seem prima facie interpretive rules of secondary importance to the substantive rules, definitions can have as much impact as new and direct substantive rules, and they have similar consequences. Therefore, legislative definitions are a complex and powerful tool which must be used carefully.

Keywords

Definitions; legislation; legisprudence; legislative drafting; statutory interpretation; law and language.

A. INTRODUCTION

Law is in essence a linguistic discipline. Law uses language. In order to study law, we must study something about the essence of language.[1] The academic interest in the relationship between language and law is by no means novel.[2] With regard to this relationship between law and language, the text of statutes carries special importance. The language of legislation is the language of law. In contrast with other areas, in which the text is utilized as a means for conveying knowledge, with legislation, knowledge and text are inseparable. The text of the statute is the message itself. It is an independent source from which legal rules are drawn, hence its enormous significance.[3] Legislation's use of language is a universal feature of legal systems.[4] Regarding the language of the written law—whose different terms may have different meanings and whose vagueness[5] may lead to a misunderstanding of legal terms and to an erroneous classification of legal norms—definitions constitute a central anchor.

When we think about definitions, we immediately think about dictionaries. But definitions also appear in legal drafting, mainly in legislation, due to the desire to draft legislation in a relatively accurate and short manner. Condignly for

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[1] J.N. Levi, 'Introduction: What Is Meaning in a Legal Text?' (1995) 73 *Washington University Law Quarterly* 771.
[2] See e.g. G. Williams, 'Language and the Law' (1945-1946) 61 *Law Quarterly Review* 71, 179, 293, 384 and 62 *Law Quarterly Review* 387; 'Symposium, The Language of Law' (1958) 9 *The Case Western Reserve University Law Review* 115; D. Mellinkoff, *The Language of the Law* (Little, Brown Book Group Limited, 1963); T.A.O. Endicott, 'Law and Language' in J. Coleman and S.J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford 2004) 935; A. Marmor and S. Soames (eds.), *Philosophical Foundations of Language in the Law* (Oxford University Press, Oxford 2011); L. Solan and P. Tiersma, *The Oxford Handbook of Language and Law* (Oxford University Press, Oxford 2012).
[3] J. Bing, 'Let there be Lite: a Brief History of Legal Information Retrieval' (2010) 1(1) *European Journal of Law and Technology* 21 <http://zaguan.unizar.es/record/4530/files/ART--2010-008.pdf>
[4] Endicott (n 2) 937.
[5] T. Endicott, 'Law is Necessarily Vague' (2001) 7 *Legal Theory* 379.

an article which deals with definitions, I shall begin with Aristotle's a definition of "definition":

> A 'definition' is a phrase signifying a thing's essence. It is rendered in the form either of a phrase in lieu of a term, or of a phrase in lieu of another phrase; for it is sometimes possible to define the meaning of a phrase as well.[6]

According to this definition, laws are definitions. A criminal statute, for example, can define what murder is; it uses a classic format of a definition by stipulating the necessary conditions for determining whether or not a person committed the offense of murder. A murderer, for instance, can be defined as "someone who intentionally causes another person's death." Nevertheless, I do not refer to definitions in this wider sense but in the more narrow sense of definition provisions in legislation. This is the method according to which a legal document—and, in our case, a statute—defines an institution, an act, or a term. It is in fact a glossary which appears in many legislative acts, in which one can find the definitions of important terms that appear within the statute. These provisions are usually termed "definition provisions" or "interpretation provisions," and they often raise complicated issues, on which I elaborate, *inter alia*, in this article.[7] Since in determining the definition of a term the legislator pretends to place himself as an authority on language, the legal determination, within legislation, of a term is an example that can be used to study the role of language within law and even in wider cultural contexts.[8]

What is it about legislative definitions that justifies research? First, what occurs in the legal field is not just the legal determination of a term's meaning; rather, it is the coercive determination of the exclusive manner by which a term must be understood and used in a set of certain factual circumstances. By so doing, the law becomes the main source through which language is used as a mechanism for social control.[9] In other words, legislative definitions—in contrast to those that appear in dictionaries—are authoritative. Editors of dictionaries cannot guide the public in how to converse, and they certainly cannot force the public to use a certain word in a certain way. However, the legislature has the authority to determine how we understand a legislative term that appears in a statute, if not in the real world then in the word of norms. According to Professor Gabriela Shalev, "The art of terminology is nothing but the art of classification, and the jurist has no more important role than classifying a phenomenon. Classifying a phenomenon, describing it, and determining its

[6] Aristotle, W. A. Pickard-Cambridge trs., *Topics* (Kessinger Publishing 2004) 4.
[7] L.P. Pigeon, *Drafting and Interpreting Legislation* (2nd edn., Carswell, Toronto 1988) 32-33.
[8] K. Duncanson, 'Book Review – Chris Hutton: Language, Meaning and the Law' (2012) 25(2) *International Journal for the Semiotics of Law* 283, 285.
[9] Williams (n 2) 388.

scope of application are the most crucial and decisive aspects of the work of he who engages in law."[10]

Second, definitions have a direct relationship to and connection with, *inter alia*, the basic principles of a legal system, the principle of the rule of law, the principle of separation of powers, and the recognition of legal rights, as I shall further elaborate on in this article. Accordingly, it is important to deal with legislative definitions.

Third, whereas the problem of definitions is relevant to almost all legal areas and appears, for example, in wills and contracts, the jurist has a unique relationship with legislation. As Francis Bennion correctly observed, a man can be a criminal lawyer without any understanding of tax law, or a corporate lawyer without any expertise in property law, or a public lawyer without any expertise in private law, etc. Nevertheless, any lawyer, no matter what his field of expertise, must be a "legislative lawyer," for legislation constitutes the profession's framework.[11]

Finally, the importance of focusing on legislation stems not merely from the growing acknowledgment of legislation as an academic discipline meriting its own unique research, but also from the importance of legislation to our daily lives as citizens. Legal rules in general and legislation in particular play a major role in most areas of life, meaning that legislation is of unique and essential importance to all citizens.[12] Notwithstanding their importance, legislative definitions were rarely treated with academic rigor. The aim of this article, which deals with legislative definitions, is to bridge this gap. It posits that: 1. The definition provision is not merely a technical provision but rather a substantive one which forms one of the most important provisions in any law; 2. The method of using legislative definitions, for all its many advantages, suffers from many difficulties which must be kept in mind; 3. Due to the importance of definitions and the complexities surrounding them, the use of definitions in general, and in legislation in particular, is a serious and complicated matter which must be approached cautiously and advisedly. True, one must be cautious with any legal tools, but all the more so with legal provisions, which seem *prima facie* as incidental or as interpretive rules of secondary importance to the substantive rules. Therefore, it should be clear that legislative definitions are not merely interpretive directives. Although they appear only as a means for interpretation, one must not be misled. Definitions can have as much impact as new and direct substantive rules, and they have similar consequences.

The article progress as follows: section B, which deals with legislative definitions in general, also includes a conceptual analysis of definitions, their characteristics, and their purpose. Section C discusses the need for legislative

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[10] G. Shalev, 'The value and Importance of legal definitions' (2012) A presentation for the Israel Academy for the Hebrew *Language* [Hebrew].

[11] F. Bennion, *Understanding Common Law Legislation – Drafting and Interpretation* (Oxford University Press, Oxford 2009) 7-8.

[12] F. Bennion, *Statute Law* (2nd edn., Longman, London 1983) ix, 8.

definitions. Section D engages with the relationship between definitions and legislative interpretation. Section E examines the problematic situation in which a definition gives a term a meaning that significantly deviates from its common understanding among the public. Section F summarizes the arguments.

B. LEGISLATIVE DEFINITIONS

1. Characteristics

In many jurisdictions, such as Canada, the Commonwealth of Australia, and Israel, the definition provision generally appears in the beginning of a law, in its first article, or, in the event that the statute includes a provision explaining the law's aim or purpose, in the second article. In contrast, in some jurisdictions, like the United Kingdom, definition provisions are placed towards the end of an act.[13] A definition can also appear only in a certain section, paragraph, or article, i.e., when the defined term appears only there or when different definitions to a similar term exist in various sections.[14] Definitions are usually arranged alphabetically, and there are different types of definitions.[15] A definition can determine the way in which a term must be understood for that law, be it in a similar or dissimilar way from the way the term is commonly understood. It can also give a term a broader or narrower meaning than its acceptable meaning. Such definitions are often termed "declarative,"[16] "stipulative,"[17] or "clarifying."[18] Since these definitions assist us in minimizing difficulties which might arise from overly vague and flexible terms, they can make the law more accurate and clear. Some definitions are not declarative but, rather, "shortening." They do not define a term at all; instead, they allow the legislature to transfer parts of the operative sections of the statute and relocate it, in a structural form, to the definition provision.[19] In order to fully understand the operative order, the reader must locate the definition and "incorporate" it into the operative text. A definition may be exhaustive or inclusive. An inclusive definition does not determine that the meaning of "x" is "y"; rather, it includes a list of items

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[13] B.H. Simamba, 'The Placing and Other Handling of Definitions' (2006) 27(2) *Statute Law Review* 73, 74.

[14] Ibid 79-80.

[15] F. Bennion, *Statute Law* (3rd edn., Longman, London 1990) 131-135; Bennion (n 11) 59-62.

[16] P.M. Tiersma, *Legal Language* (University of Chicago Press, Chicago 1999).

[17] C. Hutton, Language, *Meaning and the Law* (Edinburgh University Press, Edinburgh 2007); R. Harris and C. Hutton, *Definition in Theory and Practice: Language, Lexicography and the Law* (Continuum, Bloomsbury 2009).

[18] Bennion (n 11) 58-59.

[19] For example, Article 16(1) of the Crime and Courts Act 2013, defines "local policing body" as — "(a) a police and crime commissioner; (b) the Mayor's Office for Policing and Crime; (c) the Common Council of the City of London as police authority for the City of London police area."

(sometimes only a partial list with words such as “including” and “except for”).[20] Indeed, a term may be defined in various ways, such as by using prototypes, examples, or lists.[21]

Generally, a definition must not include a substantive directive, and it must be a legislative statement in which an adjective clarifies and elaborates on information regarding a certain noun. Nonetheless, definitions that are substantive in their nature do exist. Using the Austrian Civil Code, Karl Wurzel gave an example of such a definition with a law that determines that parents must bequeath part of their property to their children, and that the term “children” includes “adopted children.” According to Wurzel, the addition final clause, which appears as a mere interpretive rule, is in fact a new substantive rule which elaborates on the right of adopted children to inherit property.[22] Perhaps a better example is when definitions stipulate certain conditions by which an action will occur. This is a substantive legislative declaration. I generally agree with the Canadian legislative expert Elmer Driedger: One must avoid determining operative rules within a definition, for this method complicates the law and inhibits our efforts to find operative rules.[23]

2. Different and similar definitions in different laws

Different definitions for the same term will often appear in different laws. Unless stated otherwise, a legislative definition applies only to the statute in which it appears. Different definitions of the same term may even appear in the same statute, within different provisions. Every definition is suitable to the context in which it appears. While there is no presumption that similar terms appearing in different statutes point to a similar meaning, there is a presumption that similar terms which appear in statutes with a similar purpose—*in pari materia*—carry a similar meaning.[24] Therefore, one must not make the mistake of thinking that a similar term will be interpreted in the exact same manner in different statutes. This of course creates certain incoherence with regard to similar terms that appear in different statutes.

In order to avoid such incoherence and in order to create legislative uniformity, a statute is often based upon a definition that appears in a different statute. When this happens, the definition explicitly refers to the statute in which it appears: For example, “x” as defined in statute “y.” Such a reference carries

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[20] P.A. Côté, *The Interpretation of Legislation in Canada* (2nd edn., Carswell, Toronto 1991) 42-43.

[21] See e.g. M.D. Bayles, ‘Definitions in Law’ in J.H. Fetzer et al (eds.), *Definitions and Definability: Philosophical Perspectives* (Kluwer Academic Publishers, Dordrecht 1991) 253, 259-263; F. Macagno, ‘Definitions in Law’ 2010(2) *Bulleting Suisse de Linguistique Appliquee* 199, 203-207

[22] K.G. Wurzel, E. Bruncken and L. Register trans., ‘Methods of Juridical Thinking’ in *Science of Legal Method* (Boston Book, Boston 1917) 286, 308.

[23] E.A. Driedger *The Composition of Legislation* 45-51 (2nd edn., Department of Justice : available from Printing and Pub. Supply and Services Canada, 1976).

[24] A Barak, Interpretation in Law - Statutory Interpretation (Vol. 2, Nevo, Jerusalem 1993) 601-603 [Hebrew].

the risk that later amendments to the referred definition might influence the term that appears in the referring statute, since any change to the definition in the referred statute will be correspondingly incorporated into the referring statute.[25] Therefore, it seems to me that instead of referring to definitions that appear in other statutes, it is better to "copy-paste" the content of the desirable definition from the other statute. By so doing, uniformity will be preserved without creating future risks. The method of referring to other statutes should be limited only to those instances when consistency is required between the statute's text and the referred definition. i.e., only when the legislature desires the same definitions in both statutes, even when the original statute is amended, in order to tie together statutes from a similar area.

As well as definition provisions in individual statutes, there can also be interpretation acts which contain definitions which apply across multiple statutes. In order to simplify legislation's understanding,[26] these acts define various terms, words or phrases and establish the general rules of how to read and interpret legislation. What is the relationship between particular definition provisions and general interpretation acts? Usually, there is no need to define within legislation a term which is already defined in the interpretation act. The definitions that exist in interpretation acts apply, as an interpretive presumption, to all legislation, unless a specific piece of legislation determines otherwise. Put differently, interpretation acts may be overridden by particular pieces of legislation.[27]

3. Purpose

The definition provision has three main purposes: first, definitions assist in minimizing vagueness and uncertainty in statutes, aspiring to avoid ambiguity by creating a lexicon which is not (or at least should not be) ambiguous.[28] Definitions are drafted in a technical language – a legal and financial jargon – which attempts to avoid multiple meanings of words. Accordingly, definitions assist in creating legal certainty and uniformity with regards to terms that can be interpreted in more than one way.

Second, legislative terms often precede ordinary language and ordinary meanings, and a legislative definition can explain the meaning of new,

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[25] Therefore Bennion is of the opinion that the appropriate rule is that unless the amendment states the opposite, it has no influence on the legal meaning of the referring statute. See Bennion (n 15) at 134; Bennion (n 11) 60.

[26] See e.g. R.A. Duperron, 'Interpretation Acts – Impediments to Legal Certainty and Access to the Law' (2005) 26(1) *Statute Law Review* 64.

[27] See e.g. Western Australian Interpretation Act 1984, s. 3 < http://www.austlii.edu.au/au/legis/wa/consol_act/ia1984191/>; How to read legislation, a beginner's guide (1 edn., Parliamentary Counsel's Office, Western Australia, May 2011) 14; compare with Barak (n 24) 137.

[28] A. Aarnio, *On Legal Reasoning* (1977) 75. On the distinction between ambiguity and vagueness see M. Azar, 'Transforming Ambiguity into Vagueness in Legal Interpretation' in A. Wagner et al. (eds.), *Interpretation, Law and the Construction of Meaning* (Springer, Dordrecht 2007) 121-137.

professional or non-ordinary words, e.g., words from technology. A good example of this is legislation regulating human cloning, in which the definition of "human cloning" was essential.[29]

Third, the definition creates a kind of equation between a single word or a short phrase and a long phrase, which without the use of the definition would have appeared many times in the body of the statute. Therefore, instead of repeating the long phrase each time the term appears in the statute, the legislature uses a short term as it appears in the definitions. Accordingly, definitions can be viewed as a linguistic mechanism for finding a relatively short term, which makes for sparse words during the drafting of legal rules and which prevents long and cumbersome legislation.[30]

To conclude, definitions are a useful way to make the law simpler, more readable, more consistent, and clearer.[31] Due to these advantages, the definition provision is a key element in guarding the principle of the rule of law, a basic principle in democracy. This principle is comprised of different aspects: substantive, jurisprudential, and formal.[32] In order to obey the law and to enforce it, and in order for the law to guide human beings and direct human behavior, legislation must be, among other things, known and clear.[33] So, for example, in Lon Fuller's thought, the clarity of laws forms one of the minimum requirements of the rule of law.[34] Moreover, democracy functions well when everyone is talking "in the same language."[35] Definitions assist in maintaining consistency, hence the principle of equality before the law and the application of the law. Finally, definitions have an important role to play in the balance between legal certainties on the one hand and flexibility and adjustability—considering the text of the law, its purpose, and the factual circumstances upon which it is based—on the other.[36]

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[29] See H.T. Greely, 'Banning Human Cloning: A Study in the Difficulty of Defining Science' (1998-1999) 8 *Southern California Interdisciplinary Law Journal* 131.

[30] G. Williams, 'Carelessness, Indifference and Recklessness: Two Replies' (1962) 25(1) *Modern Law Review* 49, 55-56; L. Lindahl, 'Deduction and Justification in the Law. The Role of Legal Terms and Concepts' (2004) 17(2) *Ratio Juris* 182, 186; Simamba (n 13) 75-75.

[31] D.St.L. Kelly, 'Legislative Drafting and Plain English' (1985-1986) 10(4) *Adelaide Law Review* 409, 412; Tiersma (n 16) 115.

[32] See A. Rubinstein, 'The Rule of Law: The Formal and Substantive Concepts' (1966) 22 *Hapraklit Law Review* 453 [Hebrew]; A. Barak, 'The Rule of Law and the Supremacy of the Constitution' (2000) 5 *Mishpat UMimshal* 375 [Hebrew]; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467-87.

[33] G. Bailey, 'The Promulgation of Law' (1941) 35(6) *American Political Science Review* 1059; J. Raz, *The Authority Of Law – Essays on Law and Morality* (Clarendon Press, Oxford 1979) 214; J. Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Maassachusetts 1999) 209.

[34] L.L. Fuller, *The Morality of Law* (Yale University Press, Yale 1964) 63-65.

[35] P.W. Schroth, 'Language and Law' (1998) 46 *The American Journal of Comparative Law Supplement* 17, 32.

[36] Harris & Hutton (n 17) 133.

C. ON THE NECESSITY OF LEGISLATIVE DEFINITIONS

1. A Chair

Let us begin with a skeptical view. During the first year of law school, there is always a student who does not understand why the court is required to interpret legislation. This student will ask, "Why can't the legislator draft his laws in a clear and specific manner?" In order to answer this question, let us begin with an exercise in thought similar to that which the philosopher Ludwig Wittgenstein posed to his readers. Imagine a hypothetical scenario according to which the legislature enacts a law that grants exemption from Value Added Tax to those who purchase a chair. How will the legislature define the term "chair"? This is a simple task at first glance. "Chair" is a term that describes an object. According to the philosopher Hilary Whitehall Putnam, when we use a term such as "chair," we mean to refer to any object that shares the same "nature" with the conventional and acceptable examples of "chairs" in the real world. In other words, all chairs consist of common features.[37] "A piece of furniture that is intended for seating," the definition will state. Is a person who purchases a toilet seat for his home eligible for the exemption? "A piece of furniture that is intended for seating and is not a toilet seat," the legislature will argue. But this definition includes a sofa or an armchair. "A piece of furniture, with four legs, that is intended for seating," the legislature will refine the argument. But this definition precludes certain chairs, such as bar chairs, which have fewer than four legs. "A piece of furniture, with one leg or more, that is intended for seating," the legislature will attempt to argue. This definition includes a stool. "A piece of furniture, with one leg or more and a seat that is intended for seating."

Have we finally found an appropriate definition? If a father buys his child a miniature chair for a doll, is he eligible for an exemption? After all, the purchased toy satisfies the conditions of the definition. We shall refine the definition to "a piece of furniture, with one leg or more and a seat, that is intended for human seating." This exercise in thought is clear.[38] There is a two-fold problem with legislation and definitions: First, the human language is limited. Our vocabulary is not elaborate enough to encircle and reflect the complexity of life and the variety of events taking place. Terms become blurry, especially in marginal cases. Are a stool, an armchair, and a toilet seat kinds of chairs? Different people will answer this question differently.[39] Second, no legislature can predict all future circumstances. The circumstances that concern the law are often so remote from or dissimilar to the typical circumstances that

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[37] H. Putnam, 'The Meaning of "Meaning"' in Mind, Language, and Reality Philosophical Papers (Vol. 2, Cambridge University Press, Cambridge 1975), 215, 242-244

[38] I am indebted to Professor Andrei Marmor, my jurisprudence professor, from whom I heard a version of this "chair example" for the first time, over ten years ago.

[39] L.M. Solan, 'The New Textualists' New Text' (2005) 38 *Loyola of Los Angeles Law Review* 2027, 2041.

led the legislature to regulate the situation by implementing legislation in the first place, so that during the legislation process none of the legislators or drafters thought of them. If they had thought of them, they would have drafted the law differently or created an exception to the general rule within the law.[40]

The classical approach that relates to the definition of a word as a set of conditions that must be met in order to be correctly used corresponds, as I previously stated, to general principles of the rule of law.[41] However, this approach is accompanied by various complications. As the philosopher Jerry Fodor argued, defining a term with conditions that will be both necessary and exhaustive is a very thorny task.[42] As we have seen in the chair example, the task of defining a term—elementary as it may be—in a way that includes all of the term's possibilities, no less and no more, might be complicated and time consuming. It is a Gordian task. As Professor Lawrence Solan remarked, we are simply not good at defining things.[43] Professor H.L.A Hart reminds us of how difficult it is to use terms, to clarify them, and to make distinctions between them: "I can recognize an elephant when I see one but I cannot define it."[44] Therefore, definitions can assist us in drawing the lines which distinguish between types of "things." But is seems that Hart himself objected to the idea of definitions. It would be useless, according to Hart, to classify a term within a generic group in which it exists, and then to enumerate those characteristics that distinguish it from other terms in the same group. That is because there is no logic in striping legal terms of their ordinary context. Those terms can be clarified if they appear in sentences in which they play their ordinary or typical role.[45] In other words, "Hart investigates sentences, not isolated words, to obtain meaning."[46] In a perhaps somewhat similar way, Professor Michael Moore argued that when defining terms within a sentence, one has to give natural terms their true natural meaning: "… [a] word is not to be taken as governed by its legislative definition to the exclusion of the true nature of the natural kind."[47] Therefore, one can claim that we do not necessarily need legislative definitions. In most cases, we use a term successfully even without any definition. Everyone knows what the meaning of a chair or an elephant is even without any accepted definition.

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[40] L.M. Solan, 'Definition/Rules in Legal Language' in K. Brown (chief ed.), *Encyclopedia of Language & Linguistics* (2nd edn, Elsevier, Stygall, Gail, Oxford 2006) 403-409.
[41] Solan (n 39) 2039.
[42] J.A. Fodor et al., 'Against Definitions' (1980) 8 *Cognition* 263-367.
[43] Solan (n 39) 2040.
[44] H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford University Press, Oxford 1994) 14
[45] See H.L.A. Hart, 'A Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37, 41.
[46] R. Birmingham, 'Hart's Definition and Theory in Jurisprudence Again' (1983-1984) 16 *Connecticut Law Review* 775, 789.
[47] M.S. Moore, 'A Natural Law Theory of Interpretation' (1985) 58 *Southern California Law Review* 277, 330-331.

2. A fish

Yet, especially when it comes to legislation, Moore's (and others') approach is not without its flaws. We need definitions. Professor Stephen Munzer's example is illuminating in this regard. Suppose a law limits fishing quotas at sea. A certain fisherman accused of exceeding the quotas and hence of violating the law, claims in his defense that his catch includes whales, and that the quotas do not apply to whales. A whale, as is known, is not a fish but a mammal. Fish and mammals are natural creatures. A legal interpretation according to the scientific definition—Moore's "true nature"' approach—would exclude whales from the scope of the term "fish" and would lead to the accused's acquittal. Nevertheless, suppose that when enacting the law it was the universal belief (and the belief of the legislators themselves) that a whale is a fish. Also, the purpose of the law, as expressed in various documents, was to prevent the extermination of certain aquatic animals, including whales. A purposive interpretation would lead to the accused's conviction. So, should the word "fish" be interpreted to include whales or not? In the absence of an explicit definition this is a challenging question of interpretation with significant implications.

A definition provision, an example of which appears in the Israeli Fishing Order, can assist us in solving this challenge. The Israeli Fishing Order of 1937 states, in general, that fishing is prohibited unless a person was granted a fishing license according to the Order. Does the Order apply to whales? The definition provision of the Fishing Order states that a "fish" means "any aquatic animal, whether it is a fish or not a fish, including sponges, shells, turtles, and aquatic mammals." This definition makes it clear that the Israeli law applies to whales, as they are "aquatic mammals." In the absence of such definition provisions, the process of comprehending the legislation, its complexities, and its applicability becomes harder. True, the format of "whether it is a fish or not a fish" to define a "fish" may lead to mockery or bemusement.[48] Perhaps it would have been wiser to use the format "aquatic animal" instead of "fish." Still, scientific theories and everyday definitions (in this case, of a fish) are less relevant to legal meanings. The legal meaning is what counts.[49] Professor Huntington Cairns argues that definitions are not only desirable but often essential, essential in the sense that basic assumptions are necessary for a logical or systematic study of a subject, and that it is frequently convenient to use definitions as basic assumptions. Similarly, definitions form the basic premise upon which the legislative text is based. That is why Cairns opposed those who claim that definitions are useless.

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[48] See, for example, the Facebook group entitled "fish, including what is not fish": "the most hallucinating provisions in the State of Israel's law book," <http://www.facebook.com/#!/groups/274887336081/> [Hebrew].
[49] S.R. Munzer, 'Realistic Limits on Realist Interpretation' (1985) 58 *Southern California Law Review* 459, 469-470.

For him, such as claim is tantamount to claiming that legal rules in general are useless.[50]

In many cases the incidence of law is drawn from the legal definition. The definition thus controls the scope of a criminal or tort's liability, the administrative authority or the legal or constitutional right. Hence, the legislative definition has tremendous importance

Imposing legal liability cannot be done systematically without the ability to grasp which standards apply to a given set of facts. The process of distinguishing a state of affairs that carries with it legal liability from one that does not necessitates drawing a conceptual boundary. This is where the importance of definitions becomes clear.[51]

D. DEFINTIONS AND STATUTORY INTERPRETATION

1. A simulated interpretive rule

The legislative text is the object of interpretation in law.[52] Hence, there is obviously a clear relationship between legislative drafting and interpretation. According to Professor Aharon Barak, the legislative definition is a "simulated interpretive rule." It determines that "term x means y for that law in question." Legislative definitions do not determine how a term is to be interpreted, but its meaning and content.[53]

One can claim that since definitions aim to make part of the interpretation process redundant, they take away authority from the judicial branch, and therefore contradict the principle of separation of powers.[54] Such an argument has to be rejected on several grounds. Indeed, legislation assists in clarifying the law, and it is clear that the vaguer the language of the law, the greater the court's ability to manoeuvre.[55] Yet, whereas courts are the final interpreters, it is within the legislature's authority to determine future rules of interpretation.[56] According

[50] H. Cairns, 'A Note On Legal Definitions' (1936) 36 *Columbia Law Review* 1099, 1099-1104.
[51] K.T. Jackson, 'Definition in Legal Reasoning' (1984-1985) 25 *Jurimetrics* 377.
[52] A. Barak, Interpretation in Law – General Theory of Interpretation (Vol. 1, Nevo, Jerusalem 1992) 29 [Hebrew].
[53] Barak, ibid, at 35; Barak (n 24) 137-138.
[54] Compare with J.C. Thomas, 'Statutory Construction When Legislation is Viewed as a Legal Institution' (1966) 3 *Harvard Journal on Legislation* 191, 211 (with regard to interpretation acts). See contra B.S. Meyer, 'Some Thoughts on Statutory Interpretation with Special Emphasis on Jurisdiction' (1986-1987) 15(2) *Hofstra Law Review* 167, 178 ("carried to its logical extreme, the Thomas suggestion would invalidate any statutory definition that was not a rote duplication of the term in question as utilized in common speech. Yet statutory definitions of more limited scope are judicially recognized.")
[55] L. Jamróz, 'Legal Definitions - An Outline of The Problem Based On Chosen Examples of Polish Legislation' (2011) 26(39) *Studies in Logic, Grammar and Rhetoric* 117, 134.
[56] J.B. Fordham and J.R. Leach, 'Interpretation of Statutes in Derogation of the Common Law' (1950) 3(3) *Vanderbilt Law Review* 438, 448. For different conceptions of legislative supremacy with

to a different argument, since definitions determine *what the legal interpretation of a term is* and not *how to interpret a term*, they do not infringe the court's interpretative authority.[57] Finally, and, I believe, most importantly, such an argument cannot stand since legislative definitions themselves require interpretation, as I demonstrate below, thereby leaving courts with the ultimate interpretive authority.

2. Interpreting definitions

Definitions supply necessary but inadequate conditions.[58] Consider for instance the example, in legal literature, of the word "bachelor." "Bachelorhood," writes Professor Ronald Dworkin applies to "unmarried men."[59] True, all unmarried adult men are "bachelors." Nonetheless, as the linguistics professor Charles Fillmore stated, we feel uncomfortable calling certain people, such as the Pope, bachelors even if they meet the required conditions.[60] This problem derives, *inter alia*, from the fact that definitions relate solely to external information (recall the chair example) but ignore internal psychological factors. This is why professor of linguistics Anna Wierzbicka offered the following alternative definition: "bachelor—a man who has never married thought of as a man who can marry if he wants to."[61] Words do not contain meaning. The meaning is a social construct, and the relationship between words and meaning is fragile, at best. In contrast, definitions presuppose that words are accompanied by simple meanings, in an almost one-to-one ratio, which helps to explain the law's frequent bluntness. Our terms and the meaning of words that we use to express these terms are multidimensional. They are composed, partially, of classification characteristics and prototype-based information, whether through examples or schemes.[62] If we return to the chair example, the online Merriam-Webster dictionary defines the word "chair" as, "A seat typically having four legs and a back for one person." The classifying characteristic is that it is "a seat." The rest of the definition, "four legs and a back for one person," refers to the word "typically" in a characteristic

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regard to statutory interpretation see generally D.A. Farber, 'Statutory Interpretation and Legislative Supremacy' (1989) 78 *Georgetown Law Journal* 281.

[57] Barak (n 24) 137.

[58] See L.M. Solan, 'Law, Language, and Lenity' (1998) 40 *William and Mary Law Review* 57, 71; Solan (n 39) 2041.

[59] R. Dworkin, *Law's Empire* (Belknap Press, Cambridge 1986) 72

[60] C.J. Fillmore, 'Toward a Descriptive Framework for Spatial Deixis' in R.J. Jarvella and W. Klein (eds.), *Speech, Place, and Action* (Wiley, New York 1982) 31, 34. See also S.L. Winter, 'Frame Semantics and the "Internal Point of View"' in M. Freeman and F. Smith (eds.), Current Legal Issues Colloquium: Law and Language (2012) <http://law.wayne.edu/faculty/winter_-_frame_semantics2.pdf>

[61] A. Wierzbicka, *Semantics: Primes and Universals* (Oxford University Press, Oxford 1996) 150.

[62] P.N. Johnson-Laird, 'The Mental Representation of the Meaning of Words' (1987) 25(1-2) *Cognition* 189-211; E.E. Smith and S.A. Sloman, 'Similarity-Versus Rule-Based Categorization' (1994) 22 *Memory & Cognition* 377-386; S. Sloman, 'The Empirical Case For Two Systems of Reasoning' (1996) 119 *Psychological Bulletin* 3-22.

manner. In the absence of these characteristics, a stool, an armchair, and a toilet seat are chairs. As Professors Solan and Tiersma explain, "Some concepts, including something as basic as a chair, seem to be characterized not by a definition, but by a complicated array of information that includes some definitional features, along with some typical features."[63]

Therefore, even the existence of a definition of a term does not necessarily exempt courts from dealing with a definition, interpreting it, and considering its scope. Words and terms can only be defined by other words and terms, which may be vague and carry multiple meanings.[64] The scope and area of application of those words which comprise a legislative definition can be disputed. It is therefore clear that even legislative definitions require interpretation.[65] The legal definition is in fact a legal rule, and the court is left to determine whether or not a given event falls under the legal rule. Some claim that the process of determining that a term applies to a set of facts, as an appropriate means for achieving the rule's goal, entails an inductive reasoning.[66] Others argue that this is not a process of inference but rather an interpretive process in which the court continues to define the words that appear in the definition.[67] Either way, it is clear that even with sophisticated and detailed definitions, the language of law, and the law itself, cannot always predetermine the results that the law requires, making it necessary for the courts to solve unanswered questions within the law.[68] Even the most accurate definition (such as the chair example) cannot avoid the question of its applicability to all possible facts and circumstances.[69]

3. Interpretation that deviates from the definition provisions

Generally, when a term is defined in law, the definition "controls" the law if it is applicable in the same context,[70] and, as a rule, the term is to be interpreted as having the same meaning wherever it appears.[71] Some scholars, such as Professor John Manning, argue that judges ought to stick to the exact terms of the legislative text without creating ad hoc changes to the language of the law.[72] I take a different stance: If the context is different, i.e. if a mechanical application of the definition throughout the law leads to obvious disharmony or to the

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[63] L.M. Solan and P.M. Tiersma, *Speaking of Crimes: The Language of Criminal Justice* (University of Chicago Press, Chicago 2005) 22.
[64] R.M. Goode, *Commercial Law* (LexisNexis, UK 2004) 21-22; Jamróz (n 55) 134.
[65] Barak, (n 52) 35; Barak (n 24) 138.
[66] Jackson, supra (n 51) 382, 389.
[67] Cairns (n 50) 1103.
[68] Endicott (n 2) 966; B. Flanagan, 'Revisiting the Contribution of Literal Meaning to Legal Meaning' (2010) 30(2) *Oxford Journal of Legal Studies* 255-271.
[69] Jackson (n 51) 378.
[70] Cf., Colautti v. Franklin, 439 U.S. 379, 392 (1979).
[71] Cf., Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992); Ratzlaf v. United States, 510 U.S. 135, 143 (1994); Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).
[72] J.F. Manning, 'The Absurdity Doctrine' (2003) 116(8) *Harvard Law Review* 2387, 2390-2391.

forestallment of the law's clear purpose with regard to a certain rule, then the court may deviate from the definition of the term under dispute.[73]

The definition provision assists us in achieving legal accuracy. However, as Carl Schmitt once wrote, even a judicial decision that deviates from the text of the law can be legally "correct." For Schmitt, "a judicial decision is correct if it foreseeable and predictable. … a decision the offends the meaning of the language and meaning of a statute – and this means a decision contrary to law … is correct under the same premises as every other: namely, if it would have been made the same way by other judge (by the whole judicial practice)."[74] I am not convinced that this reasoning is the best one but I certainly agree with the result at which Schmitt arrives. Although the language of law is indeed the point of departure for legal interpretation, it is only one of its components. In legislative interpretation one has to consider both the objective and subjective aspects of the legal act, i.e. the "legislature's intention" and the basic principles of the legal system which a legislative act in a democratic society seeks to achieve.[75] To clarify: A law must accomplish legal certainty, but legal certainty, as the renowned German jurist Gustav Radbruch stated, is not the only goal the law has to accomplish, and it is certainly not the decisive one. Together with legal certainty stand other principles, such as the purpose of the law and principles of justice.[76]

I have already noted that definitions are compatible with the principle of the rule of law and facilitate its application. However, linguistics and other disciplines have taught us that in non-prototype cases, i.e. cases that go beyond the ordinary or typical example, definitions may fail.[77] In such cases and without negating the principle that legislative interpretations must have an anchoring in the text, the legal system has to find other ways for guidance on how to prevent injustice. Therefore, there is—and should be—a safety valve according to which judges may deviate from a legal definition when a strict literal interpretation would lead to injustice or absurd results.[78] By way of example, imagine Hart's hypothetical law according to which "no vehicles are allowed in the park."[79] For the sake of our discussion, suppose that the term "vehicle" is defined by the law broadly as "a means of transportation which is driven mechanically." Does the

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73 Cf., Lawson v. Suwannee S.S. Co., 336 U.S. 198, 201 (1949). See also D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (3rd edn., Butterworths, Sydney 1988) 141.

74 C. Schmitt, 'Statute and Judgment' in A.J. Jacobson and B. Schlink (eds.), *Weimar – A Jurisprudence of Crisis* (University of California Press, Berkeley 2002) 63, 64-65.

75 See generally A. Barak, Sari Bashi trans., *Purposive Interpretation in Law* (Princeton University Press, Princeton 2011) 125-182.

76 G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26(1) *Oxford Journal of Legal Studies* 1-11.

77 Solan (n 40) 403-409.

78 Ibid; R. Perry, 'The Limits of Judicial Creativity' (2006) 9 *Mishpat UMimshal* 541, 564-566 [Hebrew].

79 H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607.

term include a wheelchair that runs on an engine or an ambulance seeking to enter the park in order to give urgent medical assistance? In applying the legal rules, Hart states that the judge must take responsibility for the decision as to whether or not a certain term covers the supposed cases, with all of the implication involved. Just as important, such decisions are not linguistic or philological. They are the product of judicial decision. As Professor Moshe Azar stated:

> When a judge decides that an ambulance that enters the park due to an emergency does not violate the law, he does not express his linguistic-scientific opinion on the definition of vehicle. He makes a normative judicial decision that touches upon the question as to what extent to bind or give free rein to the law, which necessarily cannot incorporate in its linguistic wording…all the possibilities that life summons.[80]

In other words, even if the law's simple meaning is that an ambulance is included within the definition of the term "vehicle," under the circumstances the law's literal meaning ought not apply or be implemented. The judicial approach coincides with the linguistic one in understanding or comprehending the text, but allows deviations with regards to its application in certain circumstances.[81]

E. DEFINITIONS BETWEEN FACTS AND NORMS

1. The legislator as a lexicographer

When drafting legislation, the legislator acts as a lexicographer, and can create a lexicon utterly different from that which is used in the common language.[82] Whereas it is appropriate for a law to "speak in human language," there are various reasons why deviations from this rule occur. First, in order to avoid ambiguity, there is a need to draw clearer boundaries than those supplied by common or popular language. Second, in legislation there is often the need to use concise language. As already stated, the definition created equalization between a single word or a short phrase and a long formula that without the use of the definition would have repeated itself multiple times throughout the law. All these strongly influence the definition provisions and often necessitate the use of a technical term or one which differs from its ordinary meaning. "The problem put before the drafters of legislation," Meir Sheli wrote six decades ago, "is not what is . . . the word for a certain term… the problem placed before the draftsman is

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[80] M. Azar, *Interpretation that Contradicts Reading Comprehension* (Perlstein Genosar, Tel Aviv 2007) 66 [Hebrew, author's translation].
[81] W.N. Eskridge Jr. and J.N. Levi, 'Regulatory Variables and Statutory Interpretation' (1995) 73 *Washington University Law Quarterly* 1103, 1105.
[82] J. Hall, 'Analytic Philosophy and Jurisprudence' (1966) 77(1) *Ethics* 14, 15.

what is the language he should choose in order to achieve maximum accuracy, clarity, brevity and beauty, and the hierarchy of their value—according to their order."[83] Therefore, while legal terms are often composed of and represented by words that may carry a common or acceptable meaning, one must not presuppose that the meaning is exhaustive of the legal meaning. In such a case, when the legal definition grants a legal term a different meaning from that which is accepted in common language, the definition provision carries a special importance since it gives the public notice of the unique meaning granted to that term. How can this gap between the legal meaning of a term and its common meaning be explained? The words of Justice Mishael Cheshin help to illuminate this:

> …it has been said jokingly that the parliament in Westminster is authorized to enact any law but to make a woman a man, and a man a woman:
> 'It is a fundamental principle with English Lawyers, —that Parliament can do everything but make a woman a man and a man a woman..'
> This statement is imprecise. Obviously, if the intention is only that Parliament is incapable of literally turning a man into a woman, and a woman into a man, it is certainly correct. However, such a reading empties the paragraph of meaning, because by the same token, Parliament is unable to move a pencil from one side of the table to the other because the Parliament as such does not occupy itself in any physical action, and is unable to generate any change in the surrounding physical world. Parliament occupies itself solely with norms and normative actions, and its power and authority lie in this field. If, therefore, the intention is that Parliament is unable – in the normative sense – to turn a man into a woman and a woman into a man, then it is quite simply incorrect. In the wonderful world of norms that is not perceived by our five senses, but which controls our lives, the Knesset is certainly able and authorized to transform a man into a woman and a woman into a man.[84]

In other words, one has to distinguish between the real world and the world of norms.

(a) A bird

With regard to this relationship between definitions in the normative world and those in the real world, see the Canadian legal parody on legislative interpretation in the form of an imaginary judgment entitled *Regina v. Ojibway*.[85]

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[83] M. Sheli, 'Source and Innovation in Legal Drafting' (1953) 10 *Hapraklit Law Review* 343, 346 [Hebrew]. For an important debate on the significance of clarity and precisions see J. Stark, 'Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?' (1994) 15(3) *Statute Law Review* 207-213.

[84] CA 6821/93, United Mizrahi Bank Ltd., v. Migdal Cooperative Village, [1995] IsrLR 1, 360.

[85] 'Note, Judicial Humour - Construction of a Statute' (1965-1966) 8 *Criminal Law Quarterly* 137-139.

The facts are simple: a poor Indian by the name Ojibway pawned the saddle for his pony, and had to ride on a pillow instead. One day, while riding the pony, the pony broke a leg. In order to put him out of his misery, Ojibway shot the pony and killed it. Consequently, he was accused of violating s.2 of the Small Birds Act, according to which, "Anyone who maims, injures or kills small birds is guilty of an offence and is subject to a fine not in excess of two hundred dollars." The main question on which the judgment revolved was whether a pony with a pillow in its back is, according to the law, a bird. The learned judge of the appeals court did not accept the first court's acquittal of Ojibway because he killed a horse and not a bird. According to the court, "In light of the definition section my course is quite clear. Section 1 defines 'bird' as 'a two legged animal covered with feathers.' There can be no doubt that this case is covered by this section." The judge dealt with several arguments: in response to the claim that "the neighing noise emitted by the animal could not possibly be produced by a bird," the judge replied that, "With respect, the sounds emitted by an animal are irrelevant to its nature, for a bird is no less a bird because it is silent." In response to the argument that, "since there was evidence to show the accused had ridden the animal, this pointed to the fact that it could not be a bird but was actually a pony," the judge replied that, "Obviously, this avoids the issue. The issue is not whether the animal was ridden or not, but whether it was shot or not, for to ride a pony or a bird is of no offence at all" adding that, "I believe counsel now sees his mistake." In response to the claim that, "the iron shoes found on the animal decisively disqualify it from being a bird," the judge informed the counsel that, "how an animal dresses is of no concern to this court." Most importantly, in response to an expert's evidence that the animal in question was a horse and not a bird, the judge replied:

> We are not interested in whether the animal in question is a bird or not in fact, but whether it is one in law. Statutory interpretation has forced many a horse to eat birdseed for the rest of its life.

After rejecting other claims and interpreting the "two-legs" requirement that appears in the definition as a minimum requirement, the court stated that if the court intended to include within the law only animals "naturally covered" with feathers, it would have stated so explicitly. The court held that Ojibway had killed a bird, concluding that:

> Different things may take on the same meaning for different purposes . . . Therefore, a horse with feathers on its back must be deemed for the purposes of this Act to be a bird, and a fortiori, a pony with feathers on its back is a small bird. Counsel posed the following rhetorical question: If the pillow had

> been removed prior to the shooting, would the animal still be a bird? To this let me answer rhetorically: Is a bird any less of a bird without its feathers?[86]

This is of course a legal parody and not a real judgment, but it succinctly demonstrates the possible absurd disparity between legal definitions and real-world definitions. Moore states that two important lessons must be learned from this parody: *First*, no matter how hard we try, it is very difficult to escape common language because the definition itself uses terms which themselves possess a certain meaning in the common language. *Second*, a judge must not assume that legislative definitions supply the necessary and sufficient conditions for defining a term. Hence, Moore is of the opinion that natural terms must be defined according to their "true nature."[87] While Moore's claims make sense, we have seen some of the difficulties with his approach in the example of the whale.[88] Therefore, as Professor Michael Bayles states, the approach taken by the judge in the Ojibway parody is generally correct. Correct, I should add, as long as it does not bring about an absurd or abysmal unjust result. A meaning of the term in the real world is not necessarily the meaning of the term in the legal arena. "A bird is known by its feathers", an old Proverb states.[89] However, a bird in reality is not always a bird in the law. This is the grey area between facts and norms. A definition for a certain purpose may be—and often should be—completely different from a definition for a different purpose. The context is therefore of great importance.[90]

(b) A dog

A legislative definition either does or does not match the common and acceptable meaning of the defined term. It can narrow or widen the meaning. Several examples from Israeli laws demonstrate this well: Article I of the Israeli Income Tax Act [New Version] of 1961 includes in its definition of a "person" a "company and a body of persons." Article 5 of the Interpretation Act of 1981 states that, "words in the singular include the plural and vice versa." Article 18(a) of the Railway Order [New Version] of 1972 states that, a "train" includes "steamships and other watercraft," and Article 386(3) of the Criminal Act Order of 1936 [annulled] defined "a cattle" as "any fowl, beast, fish, insect…" These definitions prove that Sir William Dale was correct in his argument that the legislator "seems to have wished to substitute himself for the lexicographer with

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[86] Ibid.
[87] Moore (n 47) 330-331.
[88] See text accompanying supra n 49.
[89] J.R. Stone, *The Routledge Book of World Proverbs* (Routledge, New York 2006) 36; A. Wagner, 'On a new fossil reptile supposed to be furnished with feathers' (1862) 52 *Journal of Natural History Series* 3, 261.
[90] Bayles (n 21) 253-67.

the object of refashioning the language in his way."[91] One can find an extreme example in a 1978 by-law concerning the Israeli cities of Ramat Gan, Bnei Brak and Giv'atayim (Slaughterhouses and Veterinary Supervision; Supervision over Dogs) in which the definition of "a dog" includes "a cat or a monkey." Tragically, one drafting guide gives several examples to what ought not be done in legislation. One example of such a prohibition is not to define a "dog" as to include "a cat." According to the author, such drafting is at the very least confusing and at worst unethical.[92] An older guide written by Driedger in 1951 glosses this issue well: 'Definitions should not be too artificial. For example – "dog" includes a cat is asking too much of the reader; 'animal' means a dog or a cat would be better.'[93.]

To clarify, defining the term "dog" is not an easy task. It requires descriptive features that might exceed our usual descriptive abilities.[94] But defining a dog so as to include cats and monkeys is an exercise in vanity. Surely no serious lexicographer would define a dog in that manner. However, for the purpose of that by-law, the local authority wanted cats and monkeys to be included within its scope. This legislative drafting has tremendous importance; in a possible conflict between the legislative term and the common one—with regard to the normative level—the legislative term takes priority.[95] Therefore, it will be useless for an attorney to claim in a court that based upon the common use, the by-law rules should not apply to monkeys. While the legislature does not have the ability to change the ordinary meaning of "a dog," it does have the ability to define this term for the purpose of legislation. But when words with ordinary meanings are defined in an unusual manner, the definitions can be not only confusing but also abused.[96] The drafting of definitions involves imperative repercussions that must be kept in mind during the drafting of legislation. Language transfers, creates, and increases power. Power creates reality. By so doing, language—especially the legal language—reflects and preserves power relations. It serves for constructing social reality. Hence, language has played (and maybe still does play) a role in the frequent failure of the legal system to act in an equal manner.[97]

Take for example the well-known interpretive rule according to which "words importing the masculine gender include the feminine, and vice versa."

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[91] Sir W. Dale, 'Review Article – Canadian Draftsmanship, and the French Connection' (1984) 5(2) *Statute Law Review* 62, 66.
[92] T.A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (The CapitolNet, Alexandria, 2006) 222.
[93] E.A. Driedger, *Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation* (King's Printer, Ottawa 1951) 10.
[94] J.M. Mandler, 'On The Birth and Growth of Concepts' (2008) 21(2) *Philosophical Psychology* 207, 210.
[95] Macagno (n 21) 199, 201-203.
[96] Tiersma (n 16) 116-119.
[97] See generally J.M. Conley and W.M. O'Barr, *Just Words: Law, Language, and Power* (2nd edn., University of Chicago Press, Chicago 2005).

Although this is a *prima facie* equalitarian interpretive order, it reflects an unequal concept. While it permits the use of feminine nouns for both genders, in practice the casual use is always masculine, and when the law uses a feminine noun it is in cases where the rule applies to women only.[98] More important, as Dr. Marguerite Ritchie claimed with regard to the common law, notwithstanding the interpretive rule stated above, legislation which is drafted only in the masculine for years made women vulnerable to the deprivation of rights which were granted to men.[99] It is interesting to compare this argument with Professor Ruth Halperin-Kaddari's article regarding the patriarchal nature of the language of the Halacha (Jewish religious law), and how the terms of Jewish religious law, which were drafted in a masculine language, had normative implications such as the validation of women's exclusion.[100] To summarize, the language, as Professor Shulamit Almog demonstrated, establishes gender cognition, and the exclusive use of masculine language prevented women from attaining gender equality.[101]

F. CONCLUSION

The definition provision carries great power since it controls the meanings of terms that appear throughout the law, and in the absence of contrary purpose, the meanings of similar terms that appear in other legal documents dealing with the same material. Definitions therefore have enormous influence on the application and interpretation of legal texts.

Legislative definitions are also controversial. "I hate definitions," Benjamin Disraeli wrote in a famous novel.[102] On the one hand, some see them a useful tool for ensuring that the public at which the law is aimed understands the scope and the application of the matter regulated by the law. This is why definitions are so important to the principle of the rule of law. On the other hand, definitions, by their very nature, limit the scope of the area which the legal document seeks to regulate thereby creating the risk that certain circumstances which the legislature sought to regulate might be left outside its scope, if they do not fit the definition accurately.

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[98] O. Kamir, 'What's in a Woman's Name' (1996) 27 *Mishpatim*, 327, 360 [Hebrew].

[99] See M.E. Ritchie, 'Alice Through the Statutes' (1975) 21 *McGill Law Journal* 685, 689-705; see contra E.A. Driedger, 'Are Statutes Written for Men Only?' (1976) 22 *McGill Law Journal* 666, 670-671 (arguing in response that correct English necessitates the use of the masculine pronoun and that said interpretive rule serve solely as a rule of grammar, not of gender).

[100] R. Halperin-Kaddari, 'And Thou Shall Teach Them to your Sons, Not to your Daughters - Inclusion and Exclusion of Women in Halakhic Language' (2002) 18 *Bar-Ilan Law Studies* 353-372 [Hebrew].

[101] S. Almog, 'And These Names are Eternal: Hebrew, Gender and Law' (2002) 18 *Bar-Ilan Law Studies* 373 [Hebrew] (proposes on page 390 that from now on, all legislative acts ought be drafted in a manner relevant to both men and women).

[102] B. Disraeli, *Vivian Grey: a novel* (E.L. Carey and A. Hart, 1837) 33.

It is important to note that in addition to their advantages, definitions provide artificial meanings to terms. They demand that the reader conceptualize, understand, and remember terms which often deviate from their common understanding. Therefore, definitions inflict a challenge upon the reader in understanding the substantial provisions of the law.[103] Moreover, legislative definitions cut off the legislative text and demand that the reader consolidate, in his mind, different parts of the text, complicating the task of comprehending the law. This problem is particularly acute in two cases: when the law refers to definitions in different legislation, and when legislation is published in unconsolidated form (leaving out all but the most recent amendment). Due to the importance of definitions in the application of laws, it is imperative that the publication of legislation be made in a full and consolidated form and that it includes the definition in order to facilitate the understanding of the published legislation.[104]

In light of the above-mentioned arguments, one must not overdo legislative definitions. Law must be specific enough without the need for long and detailed definitions, and, on the other hand, general enough to allow the law to develop with time.[105] It is the ambiguity of legal terms that allow their development through judicial interpretation and the executive's discretion.[106]

Although we have no interest in turning the law into nothing more than a catalog of long definitions, when the principle of legal certainty is concerned, one can apply and implement legislation's orders more precisely when the main terms are defined in the law. Therefore, for the sake of legal clarity, the law is to define the central terms. This is especially true when it encounters a term that, although it has certain possible meanings, is to be understood according to a specific one, or when for the purpose of the law the term's meaning is wider or narrower than the common one. Yet a term should not be given a meaning that is incompatible with the ordinary meaning. One must not undo the relationship between facts and norms. When drafting legislation one has to attempt to give every term its everyday or professional meaning. If there is no other way but to define a term in a way that utterly changes its common meaning, it is wise to consider adopting Dale's proposal to incorporate within the law a precaution that alerts the reader to the fact that the meaning of the term is different than the acceptable one (imagine the dog and cat example); the use of italics or inverted commas could convey this.[107]

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[103] Driedger (n 23) 45-51; G.C. Thornton, *Legislative Drafting* (4th edn., Tottel Publishing, 1996) 144-154.

[104] Cf., Y. Roznai, 'Law "Wants to be Free": Publication of Legislation in the Internet Era' (2013) 52(1) *Hapraklit Law Review* 235 [Hebrew].

[105] D. Brimer and A. Brimer, 'The Devil is in the Definition – Definitions and Their Limited Use in Legal Problem Solving' (2011) 14(7) *Potchefstroom Electronic Law Journal* 174-85.

[106] N. Sitaropoulos, 'The Definition of Refugeehood in The Domestic Fora' (1999) 52 *Revue Hellénique de Droit International* 151, 155.

[107] Dale (n 91) 66. For other suggestions see also Simamba (n 13) 73 ("The array of suggestions on the matter includes the use of distinctive font for words that are defined, a marginal reference

Legislative definitions are instrumental in that they are defined in order to achieve certain aims.[108] Therefore, definitions, and certainly legislative definitions, must not be regarded as nothing more than semantics.[109] Since the definition provision is no less crucial than the law's most important provisions, Brimer and Brimer are certainly right in claiming that if the devil is in the details, then the 'legislation devil' is in the definitions.[110] A celebrated Roman maxim states that *Omnis definitio in lege periculosa* (every definition in law is dangerous). Legislative definitions are a powerful tool which must be used carefully. As we all know, with great power comes great responsibility.

indicating that a term is defined, a symbol next to the defined term indicating that the term is defined, and even a footnote at the end of each section using a defined term.")

[108] Bayles (n 21) 253, 256.

[109] See S. McConnell-Ginet, 'Why Defining is Seldom 'Just Semantics' – Marriage and marriage' in L.R. Horn, B.J. Birner, and G.L. Ward (eds.), *Drawing the Boundaries of Meaning: Neo-Gricean in Pragmatics And Semantics in Honor of Laurance R. Horn. John Benjamins* (2006) 217–240.

[110] Brimer & Brimer (n 105) 174-85.