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**THE LAW AND THE LANGUAGE  
IN THE PHILOSOPHY OF THOMAS HOBBS  
AND H. L. A. HART**

Law and language are notions which are closely interconnected and language is a natural tool of law since it renders its manifestation possible. Law is 'at anchor' in language; it is a conveyor of notions and legal institutions and therefore it became a subject of a clear-sighted analysis of the theory of law. The study of language in which law is expressed can not only aim at extracting the 'real' meaning of words from a specific text, at understanding the communiqué carried by a specific legal text but it can also contribute to formulation of general statements concerning the nature of law, statements from the field of philosophy of law. That is exactly the analysis of legal notions that became for H. L. A. Hart the starting point to answer the most fundamental question: 'what is the law?' and what are the ways of cognising it in his work 'The Concept of Law'<sup>1</sup> (1961).

One of the first thinkers whose output concerning the language is connected indissolubly to considerations on legal subjects is Thomas Hobbes. He is the precursor of modern philosophers-lawyers who became aware of the meaning of the first rank of language in explaining the basic problems of jurisprudence and in defining the very notion of law.

The aim of the present study is to compare the remarks of T. Hobbes and H. L. A. Hart concerning theories of language, the emphasis of the role of linguistic questions in the ideological systems of the two philosophers; demonstrating that their views on the language are considerably related to considerations concerning the law. Presentation of Hart's beliefs regarding the law and language in the context of Hobbes' achievements is to show that despite 300 years separating the two thinkers, there is one timeless idea that

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<sup>1</sup> This work gained the name of the 'bible of the modern positivism' and became the most frequently quoted position in legal philosophy literature of the 20<sup>th</sup> century.

connects them: they both try to reach the essence of law through analysis of linguistic locutions.

In this article I want also to demonstrate Hobbes' contribution to the development of law and emphasise the adherence of the philosopher to the trend of legal thought called today legal positivism<sup>2</sup> (the excellent representative of which proved to be H. L. A. Hart).

Hobbes is the thinker who is quite commonly credited with the name of precursor of legal positivism<sup>3</sup> (though there are many statements connecting his concepts with the natural law<sup>4</sup>). Thoughts related to the nature of law occupy a lot of place in his most important works in the field of political philosophy: *The Elements of Law, Natural and Politic*, *De Cive* and *Leviathan*, they are present in *Dialogue between a Philosopher and a Student of the Common Laws of England* and appear in other works. The notion of laws of nature was the starting point of Hobbes' considerations on the subject of state law, which he defines as unchangeable and eternal commands of reason. The founders of philosophy before Hobbes recognized the laws of nature as rules of unique importance which condition the recognition of the state law and which have priority in case of conflict with the norms of positive law. While according to the philosopher, the laws of nature, even though they are obvious demand to be incorporated to the law order by the sovereign in order to operate.

The most important of Hobbes' statements on the subject of the character of positive law is: law is a command. '*Civil law is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of that is contrary and what is not contrary to the rule*'<sup>5</sup> – he writes in *Leviathan*, a similar definition he formulates in *Dialogue*.<sup>6</sup> In the light of the above mentioned statement Hobbes appears

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<sup>2</sup> See M. M. Goldsmith, *Hobbes on law*, in: *The Cambridge Companion to Hobbes*, ed. T. Sorell, Cambridge 1996, p. 276.

<sup>3</sup> Precursors of legal positivism were ancient sophists who first separated proclaimed law (nomos), valid independently of its moral value, Wilhelm of Okham may be given this name as well, see J. Woleński, *Wprowadzenie*, in: H. L. A. Hart, *Pojęcie prawa*, translated by J. Woleński, Warszawa 1998, p. XX, see also K. Doliwa, *Wilhelm z Ockham i Tomasz Hobbes o naturze pojęć ogólnych*, in: *Filozofia i myśl społeczna XVII wieku*, ed. J. Kopania, H. Święczkowska, Białystok 2006, p. 5.

<sup>4</sup> Compare L. Strauss, *Natural Law and History*, University of Chicago Press, 1971, and N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, Chicago 1993.

<sup>5</sup> T. Hobbes, *Leviathan*, displayed at <http://darkwing.uoregon.edu/~rbear/hobbes/leviathan2.html>.

<sup>6</sup> T. Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England*, displayed at: [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php%3Ftitle=770&layout=html](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=770&layout=html).

as a pioneer of the order law theory and of legal positivism, but it should be emphasised that the conception he proposes differs from later theories in numerous details.<sup>7</sup>

It is possible to ascribe the two philosophers to this trend of thinking about the law since understanding of the term 'legal positivism' is extensive enough.<sup>8</sup> According to Hart himself it is applied in Anglo-Saxon literature with reference to one or more of the following statements: 1) human laws are orders, 2) the lack of necessary relation between law and morality or the law as it is and the law as it should be, 3) studies on legal notions are a question fundamental in character and are different from historical sociological studies and from critical estimation of law from the point of view of morality or social goals 4) legal system is a closed logical system and a given decision can be derived from it on the strength of the rules previously defined and with help of logical tools, 5) moral convictions can be established on the basis of rational argumentation, evidence.<sup>9</sup> Continental positivists supplemented this list with the following statements: 6) legal order is the order of the statute law, 7) a bill is the only source of the law, 8) a bill is the expression of unlimited will of sovereign, 9) a lawyer is subject to the bill unconditionally.<sup>10</sup> Depending on which of the above-mentioned thesis a given theory propagates we can speak about hard or moderate positivism. J. Boyle proposes a definition which is wide enough to include Hobbes as well as Hart among positivists, and so a positivist is everyone who when referring to the notion of law, minimises, denies or disregards the role of religion whereas emphasises the role of state and its authorised representatives.<sup>11</sup> The positivist propagated that the law is in force independently from its substance also moral. It is though a doctrine aimed against ideas of the laws of nature according to which the importance of law depends on its fulfilment of basic moral norms. Defenders of the law of nature reproach the positivists with tolerating each, even an immoral law whereas the last-mentioned referring to multitude of moral systems, point out the uselessness of moral laws in estimation of state law.

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<sup>7</sup> See M. M. Goldsmith, *Hobbes on law*, publisher qtd., p. 275–298.

<sup>8</sup> See L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999, p. 15–18.

<sup>9</sup> H. L. A. Hart, *Pojęcie prawa*, ed. qtd., p. 399–400.

<sup>10</sup> See J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1999, p. 23–24.

<sup>11</sup> J. Boyle, *Thomas Hobbes and the invented tradition of positivism: reflections on language, power, and essentialism*, displayed at: <http://www.law.duke.edu/boylesite/hobbes.htm>.

I will hereunder try to make a thorough study of how did Hobbes, who observed and emphasised the role of definition in reasoning and scientific cognition, get to explain the nature of law by creating in the 17<sup>th</sup> century the fundamentals of legal positivism, the theory which flourished thanks to John Austin – the Hart's master only in the 19<sup>th</sup> century.

Questions concerning the language appear in the works of T. Hobbes early<sup>12</sup> and come back repeatedly. The invention of language called speech constituted for the philosopher the subject of detailed reflection; Hobbes devotes much space to explaining the genesis and the nature of words basing himself on conventionalism.<sup>13</sup> According to the philosopher *the first truths of all arose from the wills of those who first imposed names on things, or accepted names imposed by others*,<sup>14</sup> they are though characterised by arbitrariness of a certain kind. These 'have a function of' namely initial premises of reasoning which by virtue of the fact that they established arbitrarily are not subject to evidence.<sup>15</sup>

After having determined the origins of language and first definitions Hobbes tried to present a method which enabled to create a cohesive and uniform scientific system, a method which has, it seems, a specific application also in relation to his 'social philosophy' that is to say to the theory of law among others. Fascinated by Euclid's geometry he arrived at the conclusion that the method of defining mathematical terms consisting in explaining designations is the only one that is just, universal and should apply in all fields of science. Rejecting Aristotle's conception of definition understood as revealing the essence of the defined thing Hobbes judged defining as a manipulation executed on language, concerning words.<sup>16</sup> The term 'definition' means in his opinion designation of the sense of words.

The fundamental role of definition in science is elimination of ambiguities and vagueness – precise determination of significance of the defined name (word).<sup>17</sup> The name, clarified from all significances different from the one of the definiens becomes entirely clear and intelligible – *clearly presents the idea of the thing considered* and can fulfil a function of *principium* in

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<sup>12</sup> Linguistic questions are dealt in logics manual prepared from yet 1636 – *Computatio sive logica*, published only in 1655 as first part of the first section of philosophy entitled *De Corpore*.

<sup>13</sup> T. Hobbes, *On body*, displayed at: <http://www.philosophy.leeds.ac.uk/GMR/hmp/texts/modern/hobbes/decorpore/decorp1.html#top>.

<sup>14</sup> *Ibidem*.

<sup>15</sup> *Ibidem*.

<sup>16</sup> See T. Hobbes, *On body*, publisher quid.

<sup>17</sup> *Ibidem*.

argumentation. Definitions of denominations are a measure enabling to reveal the falseness of an utterance.<sup>18</sup> In Hobbes' philosophy argumentation and science appear to be consequences of definition.<sup>19</sup>

According to Hobbes, language in a way constitutes reason and has a role of the initial condition for the development of science, for cultivating it and transferring its achievements to posterity. Apart from this extremely important role or function of language another one, equally essential, can be mentioned: for Hobbes language is also a necessary condition to the birth of a state. Men who have a command of language and are guided by the voice of reason aim at leaving an extremely uncomfortable state of nature in which they remained to date and at passing to guarantying peace state conditions even though artificial.

One of the fundamental conditions of people's leaving the state of nature according to Hobbes is to enter a community contract specifically understood. The philosopher writes about the nature of this contract surprisingly little; what is known about it is that every man agrees to pass the authorisation to dispose of one's own person to the sovereign under one condition: that every future member of a given community will do exactly the same.<sup>20</sup>

The aim of the community contract is to constitute a state and the aim of the state is to ensure the security of its citizens. The basic guarantor of security is settlement of uniform moral principles binding everyone. Then a sovereign appointed by virtue of the community contract introduces binding differentiation of moral and immoral actions and distinguishes the right and the wrong. In the state of nature, previous to state conditions, the objective criterion of the right and the wrong did not exist, what was right for one might have been wrong for another. Everyone wanted to be the 'source' of moral judgement and everyone wanted to give the words 'right' and 'wrong' a different meaning. *For these words of good, evil, and contemptible are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil to be taken from the nature of the objects themselves (...).*<sup>21</sup> In the state of nature there exist an enormous number of particular laws, each devoid of attribute and even relative durability. The one undoubtedly worth seeing

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<sup>18</sup> See *ibidem*.

<sup>19</sup> St. Kamiński, *Hobbesa pojęcie definicji*, (in:) *Metoda i język. Studia z semiotyki i metodologii nauk*, Lublin 1994, p. 47. Acceptance of a given appellation with definite significance in one of the sections of philosophy does not exclude the possibility of a different definition in a different domain of science.

<sup>20</sup> T. Hobbes, *Leviathan*, publisher *quid*.

<sup>21</sup> *Ibidem*.

is the question of how a sovereign establishes common norms concerning moral problems. It seems that here as well Hobbes' philosophy of language is in close relation with his social and political philosophy.

A sovereign chosen by the will of citizens and acting on their behalf executes more than a simple expression of his opinion in moral questions. His declaration may be called, according to the theory of speech acts of J. L. Austin, a performative utterance.<sup>22</sup> A distinctive feature of performative utterances is the fact that they are connected to execution of a given action. Saying given words only in specific conditions and by chosen persons decides that a given action takes place. Specific character of performative utterances makes impossible to attribute to them a category of truth or falseness – they do not describe the reality but they form it.<sup>23</sup>

Giving names to certain actions by a sovereign constitutes a legislative act, a point of reference for estimation of future behaviour of citizens. This operation resembles extraordinarily the process of defining – and so it is indeed. Since, as it was observed before, the defining process is characterized by arbitrariness then it characterizes legislative acts of the sovereign as well. And since a correctly, even if arbitrarily formulated definition should not excite controversy or discussion, legislative acts of a sovereign should not become subjects of public dispute.<sup>24</sup> Similarly to correct definitions giving birth to reasoning and building of a system of scientific knowledge legislative acts forming a legal system – laws in which sovereign denominates what is good and lawful and what is wrong and beyond the law order – constitute a fundament of a secure state. Questioning these acts by citizens is subversive and highly dangerous for the state order, though every critic of law laid down by a sovereign is excluded in Hobbes' system. There is no room for it also because Hobbes propagated a positivist credo: he excludes possibility that an established law was unjust or faulty.<sup>25</sup> Just as first definitions (the first truths), basic legislative acts of a sovereign are not subject to argumentation and should be recognized as a fundament for creation of a system of norms.

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<sup>22</sup> See J. W. N. Watkins, *Hobbes's system of ideas*, London 1965, p. 153.

<sup>23</sup> See J. L. Austin, *Jak działać słowami*, (in:) *Mówienie i poznawanie*, translated by B. Chwedeńczuk, Warszawa 1993. John L. Austin, to the views of whom I'm referring while reporting Hobbes' ideas is the major representative of the philosophy of colloquial language, a friend of H. L. A. Hart having a decisive influence on formation of his philosophy of law, see J. Woleński, *Wprowadzenie*, (in:) H. L. A. Hart, *Pojęcie prawa*, publisher qutd., p. XVII.

<sup>24</sup> See T. Hobbes, *Lewiatan*, publisher qutd.

<sup>25</sup> See ibidem. See also J. W. N. Watkins, *Hobbes's system of ideas*, publisher qutd., pp. 153–157.

It can be judged from Hobbes opinions about the nature of language, from the role of definition in scientific cognition and construction of unquestioned, uniform knowledge systems and the genesis of law that he would be partisan of a conception formulated by positivist lawyers of the 19<sup>th</sup> century which emphasized the importance of formulation of definition in explaining legal notions.

A loyal disciple of Hobbes appeared to be professor John Austin (1790–1859) commonly known as creator of legal positivism<sup>26</sup> and the author of command theory of law. Desirous to arrange English law terminology he decided to analyse basic notions of British legal science. This ambitious intention he preceded with a question about what exactly is law, how it should be defined and he answered it as follows: *‘Every Law (properly so called) is an express or tacit, a direct or circuitous Command. By every command, an Obligation is imposed upon the party to whom it is addressed or intimated. Or (changing the expression) it obliges the party by virtue of the corresponding sanction.’*<sup>27</sup> It should be added as a supplement to this definition that the rule is an order of a sovereign for the subjects, though the law may be understood as a set of orders of a ruler. It is essential that Austin takes the sociological understanding of a sovereign – it is a person who commands obedience and who rules on a given territory, and not the one who was given the title by the law regulations. Such an understanding implies primordially of a sovereign authority as related to the law<sup>28</sup> and generated a number of problems connected with indication of a sovereign.<sup>29</sup>

Austin deserves the credit for the attempt to define the notion of law precisely and for a purposeful separation of metaphysical enunciations on law from scientific in character settlements. His methodology is based on assumptions of British analytical philosophy and consists of an analysis of law notions by means of logical tools. Just as Hobbes did earlier Austin

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<sup>26</sup> The name of ‘the father of legal positivism’ was given to Austin despite of the fact that basic thesis of this theory were formulated by Jeremy Bentham, Austin’s teacher. Bentham’s works lay in manuscript for over 100 years and were published only in 1945 under the title *The Limits of Jurisprudence Defined* when Austin’s lectures being its repetition or a creative development had already been known to everybody, see J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, publisher qutd., p. 25.

<sup>27</sup> J. Austin, *The Province of Jurisprudence Determined*, London 1977, p. 5.

<sup>28</sup> J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, publisher qutd., pp. 25–32.

<sup>29</sup> When indicating the way of appointing the sovereign, Austin writes, he should be given hearing from the great part of the society according to custom – such definition is not precise and such expressions as ‘according to custom’ or ‘the great part’ make it difficult to unequivocally recognise a given subject a sovereign, J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, publisher qutd., p. 30.

also created definitions of notions seeking to create a uniform and coherent system.

The continuator of Austin's thoughts and also a constructive critic proved to be Herbert Lionel Adolphus Hart. Hart was presented in philosophy of law manuals as an ideological successor of J. Austin and J. Bentham and revised comprehensively the conceptions of his predecessors. A fundamental reproach he made to Austin's theory concerned the omission of an essential differentiation between usage of a given behaviour and a rule. It was the analysis of the notion of rule (norm) Hart recognized as a key one in relation to the answer for the question 'what is law?'. What differentiates legal rules from other rules is the fact that the first ones impose an obligation of a certain behaviour and thus are necessary to proper functioning of a society. A feature which makes it possible to distinguish legal rules among moral norms is their connection to an intense social pressure and physical sanctions.

Another Hart's reformatory suggestion was an observation that next to the norms imposing an obligation of a given behaviour, the norms of secondary nature should be singled out, that is rules of change which name the rules of change of primary norms, rules of decision giving the tools of analysis of significance or of the way a given norm should be applied and rules of recognition which permit to establish whether a given rule belongs to the law at all. Only by uniting the primary rules and the secondary ones creates a coherent legal system – 'the law' by Hart. The system functions if the rules of primary nature are actually observed and secondary rules are treated as a model of behaviour by authorised state representatives.<sup>30</sup>

Another characteristic of Hart's theory is expression 'minimum content of the law of nature' – because law and morality regulate the same domain of human activity and have common goals, each legal system should include certain conditions resulting from the human nature and should respect rules protecting health and life of an individual, property and ensuring functioning of a given society.<sup>31</sup>

As far as the method of philosophising is concerned Hart is a representative of the so-called 'Oxford philosophy' or in other words 'philosophy of

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<sup>30</sup> H. L. A. Hart, *Pojęcie prawa*, publisher qud., pp. 114–139.

<sup>31</sup> Ibidem, pp. 261–269. Similar understanding of this problem is visible in Hobbes: the philosopher admittedly assumes that sovereign acting in agreement with the orders of reason will include laws of nature within the sphere of legal order, however a decisive importance in the process of proclaiming the law is actually sovereign's will connected to his power. Hobbes cognitive nominalist universalism current also on the grounds of state science created by him assumes multitude of possibilities of 'right' legal orders.

colloquial language' a trend started by J. L. Austin<sup>32</sup> which developed in opposition to analytical philosophy which was to be a remedy to a crisis in philosophy in general.

Creators of analytical philosophy recommended either philosophising in accordance with common sense<sup>33</sup> or in accordance with requirements of formal logics (B. Russell). Even though methods proposed by them were decidedly different they were connected in terms of perceiving a particular role of language and notions in the process of coming to the truth in philosophy, emphasising that this process has a vital linguistic aspect. Hard formalism appeared to be the winning current for a moment – philosophers, especially those assembled in the so-called Vienna Circle believed that it is possible to discover world's structure through cognising the logical structure of language.

Suppressing the supremacy of analytical philosophy is connected with late works of Ludwig Wittgenstein who having abandoned his previous beliefs proved that a real cognition of significations of expressions is possible only through study of individual contexts in which they appear. The cognition of the significance does not equate the cognition of definition but the acquiring of a skill of adequate use of significance in various linguistic situations. To describe the operation Wittgenstein created a notion of 'linguistic game'. According to the philosopher the significance of expressions consists of its use. There is no one and unique universal language the analysis of which gives a complete knowledge about reality, there are many coexisting and intertwining languages – that is 'linguistic games'.<sup>34</sup> What is important is that even if a linguistic game is located in language we have to take into consideration the extra linguistic factor – factual situations where the 'player' is situated – when using it. The topical meaning of a given expression is determined only when a specific field of functioning of the expression, the so-called usage family<sup>35</sup> is set.

The reception of a very popular conception of 'linguistic games' on the ground of philosophy of law was done by Hart giving another uncovering of informal language analysis. Hart after his master J. L. Austin, thought that

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<sup>32</sup> Two thinkers who the most influenced Hart have the same surname. The first one whose views were signaled here was John Austin, a lawyer, and the second one – is Hart's contemporary, the philosopher John Langshaw Austin.

<sup>33</sup> Creative development of Moore's conception was done in the United States, where it found a breeding ground and found numerous continuators.

<sup>34</sup> L. Wittgenstein, *Dociekania filozoficzne*, translation and introduction B. Wolniewicz, Warszawa 2000.

<sup>35</sup> Ibidem.

if in the colloquial language the experience of all generations is reflected so it should become the starting point for philosophical analysis. Even if colloquial language does not have to bring a certified knowledge it is where the philosophy is born.

In his work 'Definition and theory in jurisprudence' (1954) Hart rejected the J. Austin's methodology of studying legal phenomena. He recognised that on the grounds of jurisprudence we are not authorised to ask 'what is?' a given notion and to build a definition in answer; such an operation did not take into account the rootedness of legal notions in a specific context.<sup>36</sup> The aim of a philosophical study should be, not as so far construction but – seemingly a thing of lesser importance – the account of an existing status quo. Studying the law based on fixed definitions as e.g. '*per genus proximum et differentiam specificam*' depriving the notion of the context, is creating an artificial 'linguistic game'.

According to Hart it should be investigated with insight how a given notion functions in language (also colloquial) and what are its functions. Only a detailed analysis of a given expression in a specific context gives knowledge about its significance.<sup>37</sup> Hart realised the fact that the significance of legal notions changes depending on the context of their use and that there is lack of sufficient premises to favour a given significance and to ignore others.<sup>38</sup>

The method of studying legal notions worked out by Hart consisted in indicating a model case of application of a given notion and determining the limits of expanding it. A well-known example concerns the study of notion 'international law' where the philosopher considers the question whether the international law is still *law* and recognising internal law of a given country a model case he points out features that make it resemble the state law. Hart observes such similarity in the very structure of international law – it imposes entitlements and obligations on specific subjects and this is enough to recognize international law as ultimate *law*.<sup>39</sup>

Hart would probably agree with Hobbes in the matter concerning performative language use – in his opinion this question is of special importance for the theory of law. As all philosophers of colloquial language, he noticed clearly that performatives were present in law almost always and are a phe-

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<sup>36</sup> H. L. A Hart, *Eseje z filozofii prawa*, translated by J. Woleński, Warszawa 2001, pp. 21–47.

<sup>37</sup> Ibidem, p. 26.

<sup>38</sup> Ibidem, p. 5.

<sup>39</sup> H. L. A Hart, *Pojęcie prawa*, publisher qutd., pp. 286–317.

nomenon that occurs quite often. Hart emphasises that they are present not only in the phase of legislation but also accompany agreements and activities based on law.<sup>40</sup>

Both philosophers that is Hobbes – considered by some a precursor of positivist methodology, and by many the founder of legal positivism and Hart – legal positivist revisionist-minded, have one of the positivist thesis in common: law is proclaimed by man, the only law which is subject to law theory is positive law, both of the philosophers share the conviction about fundamental significance of linguistic research for legal considerations. However, different are their views on how the law should be expressed in linguistic matter and how to ‘extract’ it from linguistic expressions. Hobbes appears as advocate of definition also when it comes to the study of law and emphasises its importance in building a coherent legal system while the method of analysis of legal notions worked out by Hart is genetically anti-definition and is marked by planned lack of trust in definition as a way to explain significance of expressions.

translated by Marta Jastrzębska

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<sup>40</sup> H. L. A Hart, *Eseje z filozofii prawa*, publisher qutd., pp. 88–118.