THE DIALECTICS OF THE OBJECTIVE AND SUBJECTIVE IN THE CONCEPT OF LAW

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INTRODUCTION

From the time of its inception to the present day, bourgeois jurisprudence has been characterised by two basic features: a rejection of dialectics in the materialist sense of the term and, consequently, the inauguration of a fundamental epistemological error which confuses the subjective and the objective elements of congnition. The general manisfestation of this error is the disarmingly simple conception of the relationship between theory and the real world that informs bourgeois jurisprudential thought,[1] and the complete failure to take into account the central importance of the methodological issues concerning the relationship between abstraction and the concrete in the conception of law.

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1. This is especially true of legal positivism, the most representative school of bourgeois jurisprudence.1

In the absence of a clear perception of this relationship, bourgeois legal scholars have variably defined law as 'a rule of moral actions imposing obligation to what is right';[2] 'the art of what is good and equitable';[3] 'that which reason in such sort defines to be good that it must be done';[4] 'the abstract expression of the general will existing in and for itself';[5] or as 'the organic whole of the external conditions of the intellectual life'.[6] Otherwise, law is defined as 'a command issued by a sovereign to his subjects ...backed by the force of sanctions';[7] 'the rule which the courts lay down for the determination of legal rights and duties';[8] 'the prophecies of what the courts will do...';[9] or as 'a coercive order ...the primary norm that stipulates the sanction'.[10]

Without necessarily sharing a common notion of law, all these definitions portray one common characteristic: they bear the ahistorical imprint of idealist philosophy which views law as an 'eternal', 'immutable' category. Of course, some bourgeois schools of jurisprudence (e.g. the sociological school) acknowledge the severe drawback in portraying law in isolation from society. Nevertheless, unable to free themselves from the distorted reflection of reality inherent in idealist epistemology, they, like all other bourgeois jurists, portray law metaphysically, that is, anti-dialectically.

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2. H. Grotius, De Jure Belli Ac Pacis, Bk.I, Ch.I, Sect.IX, trans. F.W. Kelsey., (Oxford University Press, 1925), excerpted in G.C. Christie., Jurisprudence: Text and Readings on the Philosophy of law, (West Publishing Co., St. Paul, Minnesota, 1973) p.81.

3. Celsus, quoted in Christie, op.cit., fn.2 supra, p.605.

4. R. Hooker, The Laws of Ecclesiastical Polity, Bk.I, quoted in Christie, op.cit., fn.2 supra, p.605.

5. Hegel, quoted in Christie, op.cit., fn.2 supra, p.605.

6. Krause, quoted in Christie, op.cit., fn.2 supra, p.605.

7. J. Austin, The Province of Jurisprudence Determined, ed. H.L.A. Hart, (Library of ideas, London, 1954) Lecture V.

8. J.C. Gray, The Nature and SOurces of the law, (Columbia University Press, New York, 1921) p.189.

9. O.W. Holmes 'The path of the Law', in Collected Legal Papers, 1920, p.173.

10. H. Kelsen, General Theory of Law and State, (Russell and Russell, New York, 1945) p.61.

To protect their idealist concepts from critical inquiry, bourgeois jurists errect an idealogical barrier which decrees that the definition of law is purely a matter of arbitrary choice of criteria which can neither be right nor wrong. The position of bourgeois jurisprudence with regard to the definition of law is thus summed upon in the creed that there can be no criterion of truth or objectivity in the definition of law: 'Like such concepts as Truth and Beauty, each to his own definition'.[11]

On the basis of this idealist credo, bourgeois jurists adopt an idealised posture which denies the possibility of obtaining objective knowledge about law and thus dispenses with the need for determining the objective validity of a definition of law. This elevation of the subjective element (i.e. subjectivism) in the process of definition to the point of denying the possibility of attaining objectivity implicitly counterposes the subjective choice of criteria by various authors in their definitions of law to the objective social reality that is represented by law.

In rejecting this idealist credo and its attendant methodology, this paper adopts the position that an indisputable requirement of all philosophical and scientific knowledge is objectivity. The quest for a scientific definition of law, therefore, cannot be divorced from objectivity which the paper contends is the primary and determining element of truth. To substantiate the importance of this dictum, and to illustrate its relevance to a scientific conception of law, this paper intends to critically examine the claims and arguments of bourgeois legal scholars with regard to the possibility or impossibility of obtaining an objective definition of law. This examination will be carried out within the framework of dialectical-materialism whose tenets the paper employs to construct a set of objective criteria as a guide for testing objectivity in the definition of law.

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11. R. Seidman, 'Law and Developemnt: A General Model and Agenda for Research', in R. Seidman, Law and Social Change in Africa, (draft copy produced by Temple University School of Law, Philadelphia, Pa., 1970, ch.IX) p.18.

I. THEORETICAL JUSTIFICATION OF SUBJECTIVISM IN BOURGEOIS JURISPRUDENCE

The history of the development of legal thought throughout the capitalist era shows that, following the faithful adherence to idealist epistemology, no serious attention has been paid to the criterion of truth or the reflection of reality in the definition of law. A concept or definition of law is often accepted as the personal view of the particular author with little or no doubt being cast upon its objective validity, the assumption being that since knowledge is subjective by its very nature, a definition or concept of law cannot transcend the level of subjective truth.[12] So pervasive has this idealist influence been that the question as to whether a definition or concept of law corresponds to objective reality or not is largely ignored in bourgeois jurisprudence. Indeed, the philosophical assumptions subsumed under this idealist approach to the definition of law find theoretical support within all the major brands of bourgeois jurisprudence.

A. ANALYTICAL POSITIVISM

The positivist defence of subjectivism in the definition of law is spear-headed by Glanville Williams[13] who combines agnosti-

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12. The source of this proposition is the idealist theory of agoosticism, defined in fn.14 infra. For a general definition of truth and the meaning of subjective truth, see fn.78 infra.

13. 'International Law and the Controversy Concerning the word 'Law', in Philosophy, Politics and Society, (ed. Laslett, 1956) p.134.

cism[14] he sceptical attitude of the nominalists[15] who were opposed to definitions. As such, Williams does not only deny the possibility of obtaining objective knowledge about law, but also denounces attempts to define law as unnecessary. This is because, in his view, there is no entity called law. To him, law is 'abstract' and 'unspecific'. Absolutising the features of this 'abstract' category and the difficulties associated with its definition, he argued that the variety of opinions expressed in the numerous definitions of law attest to the fact that it is a misconception to suppose that there is a 'single proper meaning' of law. Hence he advocated for the recognition and acceptance of a 'multiple definition' of law which implicitly should discount the requirement of objectivity or truth since the search for the 'essences' or 'fundamental features' of law which he labels as a 'verbal controversy', is, in his view, a futile exercise.[16]

This overt appeal to subjectivism in the definition of law is wholly endorsed by Dias who, without contributing anything original to the issue, agrees that 'the idea that a word must necessarily possess some unique or 'proper' meaning should be abandoned' because law is abstract and it is fruitless to speculate about its 'essence'.[17]

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14. Agnosticism, generally characterised as philosophical (epistemological) scepticism, is a theoretical conception of knowledge which divorces the content of our sensations, perceptions and concepts from objective reality. In other words, it rejects the objective content of all knowledge and maintains that all knowledge is no more than belief or opinion. See I.,Kant, Prelegomena to any Future Metaphysics,Gant, Holmes Beach, Fla, 1923.

15. Nominalism is an idealist concept of definition. Its adherents, known as nominalists (e.g. William of Ockham c.1282-1349) held that ideas are in themselves just arbitrary groupings of objects and the words they express are just empty sounds. They also deny that definitions express any universals or objective reality. Consequently, they declare all definitions to be simply convenient mental fictions that have no existence outside the human mind. For a full account of this concept, see J. Naydler, 'The Regeneration of Realism and The Recovery of a Science of Qualities,'[90] (June 1983 XXIII(2) International Philosophical Quarterly, 154.

16. Williams, op.cit., fn.13 supra, p.156. See also, his other work titled 'Language and the Law', (1945) 61 L.Q.R. 181.

17. R.W.M. Dias, Jurisprudence, (5th ed., Butterworths, London, 1985) p.6.

Hart also defends the subjectivist position. In his earlier writings, he expressed doubt about the specificity of law, arguing that since 'law' does not 'correspond' to nor 'have the straightforward connection with counterparts in the world of fact', it cannot be usefully defined: at best, like the word 'cricket',[18] it could only be defined by reference to the rules of the game. The validity of this position is later undermined by Hart himself when he recognises that 'in searching for and finding... definitions we are looking not merely at words... [but] phenomena.[19] In other words, law then is specific. Notwithstanding this objective realisation, Hart, curiously, still maintains that 'the common mode of definition is ill-adapted to the [definition of] law' and therefore should be abandoned.[20]

In spite of his scepticism towards the usefulness of defining law, it is interesting to observe that Hart expresses reservations about this attitude, acknowledging, correctly, that 'something is wrong with the [idealist] approach to the definition [of law.'[21] The question which he cleverly omits to answer, however, is what is wrong with this approach?

To answer the question for Hart, it may be suggested that the problem with the idealist approach to the definition of law, as Williams demonstrates, is that it confuses the concreteness of law as a social phenomenon with the abstraction of legal ideas. This problem, as will be shown, has its roots in idealist philosophy. To suggest, as Williams and his followers do, that law cannot be objectively defined because it is 'abstract', 'unspecific', and does not 'correspond to... the world of fact' is to completely miss the point. For the specificity of law consists in the fact that it is a social phenomenon - a fact that is conceded even by Hart and other bourgeois jurists as well. If this is so, then the question of the content and relationship of law to objective reality must also be addressed.

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18. H.L.A. Hart, 'Definition and Theory in Jurisprudence', (1954) 70 L.Q.R., 38.

19. H.L.A. Hart, Concept of law (Oxford Univerity Press, Oxford, 1961) p.4, (emphasis added).

20. H.L.A. Hart, Essays in Jurisprudence and Philosophy, (Clarendon Press, Oxford, 1985) p.21. This theoretical position is given practical application by the conspicuous absence of a definition of law in his book The Concept of Law.

21. H.L.A. Hart, op.cit., fn.18 supra, p.39.

Law, as Marx explains,[22] refers to certain concrete and definite social relationships and events. The concreteness of law also entails expression, in the process of cognition, of the relationships and events reflected by it. This process is carried on with the aid of a set of concepts, categories, theories, definitions, principles, judgments, etc. Hence even though legal ideas, as reflections of the essence of law may, on one level, be considered as abstract legal categories, in the final analysis, they form part of the concreteness of law. In this sense, to adapt Lenin's proposition characterising the objective basis of the unity of universality and concreteness in cognition, law is both concrete and abstract, both phenomenon and essence.

This unity of the concreteness and the abstract on the one hand, and of the phenomenon and the essence on the other, underpins the fact that the variety and multiplicity of accounts about law are also part of the reality about the social phenomenon termed law. Consequently, although the accounts are expressed in verbal form, it should be clear that the controversy about what is law is not merely a 'verbal controversy' as Williams and his followers claim. Indeed, as Hart points out, quoting Austin, the search for definitions does not merely entail juggling with words; it involves reality. As he expressed it, '... We are using a sharpened awareness to sharpen our perception of the phenomena'.[23] Definitions of law, therefore, represent an attempt to formulate an 'agreed-upon referrant' of law which can only be done on the basis of a full understanding of law, its essence, content and form.

The point must also be emphasised that, apart from providing theoretical knowledge about law, definitions also have significant practical value. Definitions are part of the cognitive superstruc -ture of man's ideas about the world. This superstructural background tends to reflect the practical experience and changing material conditions and socio-economic attitudes which are enriched and, in turn, influenced by the cognition and comprehension of social phenomena like law. For example, definitions of law reflect the political and legal practices existing at a particular stage of the development of a state. Conversely, the political and legal activity of that state is based upon a corresponding understanding of law and its essence developed through definitions.

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22. See K. Marx, 'Preface to A Contribution to the Critique of Political Economy', in K. Marx, and F. Engels, Selected Works, (Progress Publishers, Moscow, 1969). See also, K. Marx, The Grundisse, (Penguim, Harmondsworth, 1974).

23. H.L.A. Hart, op.cit., fn.19 supra, p.4. Cf. R. Wolheim, 'The Nature of Law', (1954) 2 Political Studies, 128-138.

Furthermore, law, it should be noted, reflects and represents part of the world outlook of some or other classes in society. As such, it embodies a class notion of what is just or unjust and shapes the present and future social order. From both the theoretical as well as practical points of view, therefore, a continuous attempt to define law is not only necessary but also imperative.

If the point is accepted that definitions do have an important value, then the question must be posed as to the real reason why Williams and his followers deny the need for defining law. Certainly, it would be naive to assume that they are unaware of this fact, especially when their aversion to definitions seems to cor-respond with the interests of the ruling classes in capitalist societies and is supported by these classes. The real reason behind these jurists' aversion to definition therefore, it is submitted, must be sought not in their spurious subjective theoretical arguments but in the objective conditions of capitalist sociology.

As Marx reveals from his very perceptive study of the sociology of capitalism,[24] after consolidating their power, the ruling classes in capitalist society have always shown an interest in ensuring that the development of scientific cognition does not undermine bourgeois philosophical conceptions. The need to preserve these conceptions is reinforced by agnosticism and other idealist theoretical formulations.

The aversion to definitions is, therefore, viewed objectively, an ideological response to the practical needs of capitalism. From this objective perspective, it represents a practical manifestation of the denial of the possibility of knowing or discovering the essence of social phenomena (i.e. agnosticism). If the definition of law is unnecessary because it is impossible to discover its essence, then the jurist's task is reduced from the elucidation or dissemination of knowledge to merely the description, ordering, and classification of empirical facts. A classic example of this approach is Hart's Concept of Law[25] which he apologetically refers to as 'an essay in descriptive sociology'.[26]

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24. See T.B. Bottomore, M. Rubel, Karl Marx: Selected Writings in Sociology and Social Philosophy, (Penguim, Harmondsworth, 1964).

25. Op.cit., fn.19 supra.

26. Id., preface, (Emphasis added).

Furthermore, by dispensing with the principle of objectivity in the definition of law, the analysis of empirical facts solely from the subjective viewpoint of the defenders of the capitalist system is legitimized. The door is thus left wide open for the propagation of idealist obscurantist views about law which attempt to shield the capitalist system and its oppressive laws from any critical attack.[27]

B. LEGAL REALISM

Within the school of legal realism, Woodman's and Seidman's views typify the general trend. Woodman, for example, endorses Williams' views. In addition, he suggests that even though a definition of law may be an individual author's personal opinion, the subjective truth of the definition must reveal itself in the usefulness of the definition for a particular purpose. Accordingly, he argues that since 'one universally helpful definition cannot be found', in order 'not to involve us in barren terminological dispute', the issue of determining the truth or falsehood of a definition should be resolved by reference to the 'purpose of analysis'. This functional/teleological approach would require that 'each [definition] must give up any pretension to exclusive validity' and be judged only on the basis of how 'helpful [or] suitable it is for a particular purpose'.[28]

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27. Ref. the policy approach to the study of law led by McDougal, and the theory of social engineering led by Pound - both of which subjectively presuppose the existence of law based upon bourgeois-accepted notions of law.

28. G. Woodman, 'Some Realism about Customary Law - The West African Experience', [1969] Wisconsin Law Review,. 128 The Utilitarian views expressed here are reminiscent of Austin's assertion that the fundamental precept of natural law is to do what is useful and to avoid what is not useful, this being the only way that God's will, which is that men should enjoy the highest possible degree of happiness, can be realised. See J. Austin, Lectures on Jurisprudence, (Library of Ideas edition, 1954) p.129.

In practical terms, according to Woodman, this means that 'For the practicing lawyer, [in order to] serve his client properly, the best working definition of law still seems to be that of Holmes' which requires the lawyer to look primarily to the courts in order to determine the law. On the other hand, it is considered better for the sociologist to 'look at the behaviour of ordinary members of society' in order to find 'his' law.[29] This, in Woodman's view, is what lends 'some realism' to the definition of law.

This attempt to create, as 'distinct entities', two categories of law - one for the lawyer based exclusively on judicial pronouncements and court practices and another for the social scientist based solely on community practices - is, to say the least, a contradictio in adjecto. It is true that law, theoretically, is separable from and may be contrasted with the social facts that form the basis of the social scientist's 'law'. This is borne out by the theoretical abstraction of the normative as opposed to the descriptive aspects of law in the process of analysis. Nevertheless, from the practical point of view, it becomes entirely artificial and mystifying to attempt to separate law from social facts as this raises law only to the level of mental activity without any basis in objective material reality.

The danger in Woodman's approach, apart from the subjective criterion of truth that may be inferred from it (viz. that truth is anything that justifies itself in practice and helps to achieve a required aim, i.e. pragmatism) is that it fragments the distinctive features of law, thereby denying the unity of the multiple foundations of law, as if the different parts were independent of each other. Of course, this classification of law according to different disciplines is not merely for an academic purpose. It also serves an ideological purpose. As Woodman himself admits, it presupposes the validity of idealist epistemology which proclaims that 'definition is a question of choice, not of abstract logic a recognition of what is most helpful, not a discrimination between truth and error.'[30] Woodman's 'realism', on close analysis, thus emerges as a shamefaced bourgeois ideology masked behind the guise of pragmatism.

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29. G. Woodman, op.cit., fn. 28 supra, p.138.

30. Id., p.140.

Seidman also attempts to use pragmatism as a criterion for justifying subjectivism in the definition of law. According to his theory of 'utilitarian pragmatism', since any attempted definition of law is 'at best... merely this writer's arbitrary statement of what he proposes to mean by the use of the word', the only test that can properly be applied to such a definition is whether it is 'useful for the purposes to which it is proposed to put the word.[31] In other words, for Seidman too, true ideas are those that work and are 'useful'. Curiously enough, Seidman himself was careful to point out that a definition of law guided by his unprincipled pragmatism cannot stand the test of objectivity.[32] For, as he probably realised, it leaves unanswered the fundamental questions about objective reality and its reflection in the consciousness of the subject.

C. SOCIOLOGICAL JURISPRUDENCE

The prototype of the theoretical support for subjectivism in the definition of law within the sociological school of jurisprudence is substantiated by reference to the idealist principle of relativism.[33] On the basis of an alleged limited capability of man to cognise the world, this principle rejects objective truth[34] as an expression not only of the individual author's opinion, but also as the product of the age to which he belongs. As is often queried, if social orders (i.e. laws) are different at different times and among different peoples, then what is the common element that justifies the application of the word 'law' to all of them?

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31. R. Seidman, op.cit., fn.11 supra., p.18.

32. Id., p.20.

33. Relativism is the principle that treats all human knowledge as relative and void of any particle of the absolute. Relativists consider that only absolute truth is truth, and since human knowledge cannot be absolute because it keeps changing with different times, they conclude that all human knowledge is unrealiable and cannot be described as true or false. See A. Spirkin, Dialectical Materialism, (Progress Publishers, Moscow, 1983) p.196.

34. Defined in fn.78 infra.

From this objectively expressed question, however, mistaken conclusions are drawn to the effect that it is impossible to obtain objective, generally significant historical knowledge about law. Following the principle of relativism which renounces the principle of historicism of social objects in their equilibrium, bourgeois jurists circumvent the fact that it is still possible, within historical limits, to reflect objectivity in the definition of law. The tendency among bourgeois authors is therefore to ignore the internal contradictions of law, the struggle between these contradictions, the dialectical negation of the old by the new, the transitions of quantitative into qualitative change, and the revolutionary transformation of the old into the new.,[35]

From example, the denial of the historical basis of law by the Pandectists on the assumption that the objective historical foundations of law are negated by changing historical circumstances attests to the historical bankruptcy of the sociological school. Similarly, Pound's emphasis on changing values as the basis of his theory of social interests (what Friedman aptly refers to as 'sociological idealism')[36] also illustrates the relativist perception of knowledge that informs the sociological school. So also do Durkheim's typology of societal cohesion which is rooted in *a priori* reasoning,[37] d' Entreve's historical survey of natural law[38] which counterposes the notion of an 'historical function' to that of a 'permanent value', and Hart's *Concept of Law*[39] which, on account of its hegemonic role in bourgeois jurisprudence, calls for some comment.

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35. This forms the basis of the formulation of the ideals of law (justice) as relative to civilisation by sociological legal philosophers. For a justification of the approach, see R.W.M. Dias, 'A Temporal Approach to Natural Law', [1970] *C.L.J.*, 75.

36. See R. Pound, *Interpretations of Legal History*, (Grant, Holmes Beach, Fla.), 1923.

37. See E. Durkheim, *The Division of Labour in Society*, (Glencoe, Ill., 1964). For a commentary on Durkheim's approach, See A. Giddens, 'Four Myths in the History of Social Thought', (1972) 1 *Economy and Society*, 357.

38. See H.A.P. D' Entreves, *Natural Law: An Historical Survey*, (Hutchison University Library, 1951).

39. *Op.cit.*, fn.19 *supra*.

Hart's Concept of Law[40] proposes, as one of its major premises, that the application of the word 'law' to the rules that emanate from certain societies is a misnomer because such societies are 'primitive', 'pre-legal' and therefore should be dubbed as 'regime[s] of primary rules'.[41] Legal rules, according to this theory, can be found only in 'developed societies'.[42] In the spirit of relativism, this attempt to portray the qualitative distinction between capitalist and pre-capitalist forms of law, in Hart's own words, 'consciously disregard[s] the historical order in which [law] has developed.[43] However, on the basis of this ahistorical conception of society, Hart attempted to down-grade the legal character of the rules emanating from the former and existing British colonies in order to impose the hegemony of capitalist legal culture upon them. This imperialist ideological ploy must therefore be recognised for what it really stands for a systematic attempt to provide legal justification for colonialism and neocolonialism.[44]

A recent American movement under the gradiose name of 'law and development' (whose jurisprudential roots lie in the sociological school) also adopts the relativist approach to defend subjectivism in the definition of law. Assuming that law is 'culture-free' and 'value-neutral', this movement has portrayed the customs and laws of the newly-independent third world countries as antithetical to development. Consequently, law, as metaphysically conceived by Pound,[45] is regarded as a kind of 'technology' which, once exported to these economically backward societies, will lead to 'modernisation' and 'development'.[46]

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40. Ibid.

41. Id., pp.89-96.

42. Id., p.92.

43. Id., p.16.

44. For a detailed critique of this theory, see M.A. Ntumy 'Neo-Naturalism: Tailoring Legal Philosophy for Capitalism and Neocolonialism', (1985) 1 International Review of Contemporary Law, 55.

45. Ref. the concept of law as a tool for social engineering in R. Pound, My Philosophy of Law, (West Publishing Co., 1941).

46. In practice, this often translates into a legal model that prescribes legislating development by promulgating rules to affect the activity of therole occupants. For an elaboration of this model, see R. Seidman, (1972) 6 Law and Society Review, 316.

The bankruptcy of this thesis is now well established.[47] However, some of the havoc it has wrecked in the third world is painfully reflected by Ogwurike's Concept of Law in English-Speaking Africa.[48] This author, the unsuspecting victim of the idealist aberrations of the 'law and development' movement, seems to explain the impossibility of reflecting objectivity in the definition of law by the fact that 'legal philosophers are the products of their time and society'.[49] In other words, because of the societal influence and constantly changing historical circumstances, legal philosophers cannot be expected to formulate a definition of law 'that holds true at all times and in all places'.[50] Subjectivism in the definition of law is thus justified as an index of a pseudo-historical reasoning which, paradoxically, denies the historical character of law.

The obvious fallacy in this reasoning, of course, is the assumption that the content of knowledge (the essence of law) is not determined by the object of cognition (law as a social phenomenon), but is constantly tranformed by the process of cognition (e.g. definition, which is the subjective idea of the individual), and thus becoming subjective. This idealist fallacy turns in upon itself: it is not possible to use the process of cognition to impugn the reality and independence of law as a social phenomenon. For the process of cognition itself presupposes and relies upon the reality and independence of law as a social phenomenon. It is, therefore, only by some occult idealistic reasoning that cognition can be used to locate law inside the mind of the legal philosopher.

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47. For a critique of the thesis, see M.A. Ntumy, 'The Conceptual Relationship Between law and Development and Its Implications for Development in Africa', (April 1982) 2(1) The Nigerian Journal of Development Studies, 11.

48. N.O.K., New York, 1979.

49. Id., p.170.

50. Ibid.

Furthermore, the reflection of specific historical foundations in law, if anything at all, should make us forcefully aware that law as an idea and the relations which it expresses are not eternal but transitory, a historical product of society at a given particular time. A recognition of this point makes it necessary not merely to express in a definition the historical character of law, but also to accurately reflect the specific production relations expressed by law.[51] For the substance of law, as Marx has shown,[52] is the social relations expressed in it, and these always have an objective content which is independent of the mind of the legal philosopher.

Of course, the point is acknowledged that it is sometimes justifiable (e.g. for purposes of theoretical analysis) to study law as it operates in this or that legal system in its relative, constant and stable state. However, when this relative stability is turned into an absolute, that is, when law is lifted out of the stream of time, and its development is totally ignored (because it is impossible to formulate a definition of law 'that holds true at all times and in all places'), the consequent analysis of law then, in isolation, as something static, completely rules out the chance of discovering its essence.

These subtle attempts to suppress the historical foundations of law in capitalist society, it must be pointed out, do serve a useful ideological purpose. To a large extent, they enable the system to conceal the fact that the exploitative social relations expressed by bourgeois laws are historically created and therefore susceptible to change through the practical revolutionary activity of the oppressed masses. This conservative strategy is not new in history.

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51. Cf. the integral interpretation of the legal form of the economy of class society put forward by L.S. Jawitsch, in his book The General Theory of Law, (Progress Publishers, Moscow, 1981) pp.105-116.

52. See K. Marx, Capital, (Vol.I, Lawrence Wishart, London, 1970).

Its historical antecedents date back to the classical Greek and Roman slave-owning societies which emphasised the ideal expression of law as a form of 'absolute' and 'eternal' justice.[53] With the aid of this idealist concept of law, the legality of slavery was justified.[54] During the feudal era, the projection of law as if it has a basis in divinity, that is, as if it is the product of a metaphysical order (God), performed the same ideological function. It helped to create a normative framework out of Catholic theology and moral philosophy into which all were expected to fit and adapt as part of the naturally-ordained social order bestowed upon men by God.[55]

Hence, in spite of their appeal to history as the basis for subjectivism in definition of law, history itself does not support the idealist position of these bourgeois sociological jurists. On the contrary, it shows up the inadequacy of idealist epistemology as a theoretical framework for the scientific inquiry about law, and points to the need for a concrete dialectical-historical-materialist approach to the study of law.

Such an approach to the study of law would require the expression of the specific class character and concrete historical conditions reflected by law. Also, it would demand the correct application of the concept of reflection, the interconnection of phenomena, their contradictoriness, changeability, and the trans-

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53. For example, ref Aristotle's concept of law in early Greek philosophy (see A.W.J. Harper, 'The Concept of law in Greek Philosophy', Second Order, Vol.III, No.2 July 1974, p.90); and Cicero's definition of law in Roman jurisprudence (see Cicero's Republic in G.H. Sabine, A History of Political Theory, (George G. Harrap & Co., London, 1937) p.164 ff).

54. For an analysis of the connection between slavery and classical legal forms, see Sabine, op.cit., fn.53 supra, p.170 ff.

55. The most notable exposition of this view is that of St. Thomas Aquinas. See E.J. Damich, 'The Essence of Law According to Thomas Aquinas' (1955) 30 The American Journal of Jurisprudence, 87.

formation of the contradictions into new theses.[56] For the dialectical-materialist conception of law has always postulated that law is a product of objective social relations. Consequently, it requires that the cognition of law must be based upon the principle of objectivity[57] as the primary and determining element of truth.

The universality of the principle of objectivity and its fundamental importance in determining the very essence and truth of all scientific concepts and definitions clearly presents subjectivism as the negation of objective truth. And yet, the cognition of law, as we are all aware, is an aggregate of subjective forms, that is, subjective images of the objective world. How then is it possible to obtain objective knowledge about law? In other words, how are the subjective forms ultimately determined by objective material conditions, and how can objective knowledge be distilled from the subjective forms?

Among all bourgeois scholars, it is only Kelsen who, to date, has made any notable effort to grapple with these important questions. A brief look at his approach, in spite of its failure to successfully clarify the problems raised by the issues, is therefore still highly instructive.

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56. Cf. the approahes of Soviet authors such as Jawitsch, op. cit., fn.51 supra; O.S. Ioffe, and M.D. Shargorodskii, 'The Significance of General Definitions in the Study of Problems of Law and Socialist Legality', in (1963) 2(2) Soviet Law and Government, 3 ff.; and V.A. Tumanov, Contemporary Bourgeois Legal Thought, (Progress Publishers, Moscow, 1974).

57. Objectivity in dialectical materialist terms is defined as 'a necessary condition, a determining characteristic of truth, signifying reflection in cognitive forms of the essence; properties and relationships of objects of the material world, signifying that the content of knowledge confirmed by practice is independent of man and mankind. See G.A Kursanov, 'The Problem of Truth in the Philosophy of Marxism', in Philosophy in the U.S.S.R.: Problems of Dialectical Materialism, (Progress Publishers, Moscow, 1977) p.208.

D. KELSEN'S PURE THEORY OF LAW

In his book, General Theory of Law and State, [58] Kelsen contended that the scientific study of law as an objective phenomenon should exclude any element of value judgments because these are purely subjective. In the interest of objectivity, he urged that such moral criteria as 'justice' and 'natural law metaphysics' which, according to him, are 'nothing but an attempt to justify existing law, and give sanctity to the property system enshrined by it'[59] should be entirely expurgated from the study of law. In addition, Kelsen also argued for the divestment of legal theory of all 'ideology', and called for the postulation of law as a hierarchy of norms - all by way of ensuring a 'pure theory' of law.[60] The focal point of these contentions was ostensibly an opposition to a priori propositions rooted precisely in idealist epistemology. Kelsen's theory, therefore, purported to emphatically reject subjectivism in the definition of law.

Kelsen, in opposition to the historical school of jurisprudence, had earlier rejected custom in favour of legislation as the main source of law.[61] But then legislation, as he himself noted, entails a fiction which regards the act of law-making as an act of human will (i.e. subjective judgment). This, therefore, posed the problem of explaining how a seemingly act of human will can lead to law as an objective phenomenon. As he aptly expressed it, the problem is: 'How is it possible to interpret without recourse to metalegal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law.?'[62]

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58. Op.cit., fn.10 supra.

59. Quoted in Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed. Stevens, London) p.282.

60. The Pure Theory of Law bases its analysis of law on a rigid distinction between analytical (logical-normative) and synthetic (factual-empirical) aspects of law.

61. Kelsen, op.cit., fn.10 supra, pp.33-34.

62. Id., p.202.

To solve this problem, Kelsen suggested, at first, along Kantian lines, that the transformation of subjective human will to objective law is the result of a 'norm [which] functions as the scheme of interpretation.'[63] Realising, however, that this is still a reversion to another act of human will (since the scheme of normative interpretation is itself the product of human will), he resorted to the concept of the 'basic norm' as a 'transcendental-logical presupposition'. With the aid of this concept, Kelsen tried to avoid the infinite regress inherent in his hierarchy of norms and to sustain the basis of objective validity for positive law.

The 'basic norm', which bears a close functional resemblance to Hegel's 'absolute idea' is, in Kelsen's own words, a 'fiction', postulated as 'an initial hypothesis [in] juristic thinking'[64] only, and its function is to serve as a mental construct of service to discoursive thought.[65] Indeed, the 'basic norm', as many critics correctly point out, is not only arbitrarily contrived, but is also 'an ideal construct... derived from the mind rather than reality.'[66] It is, therefore, not surprising that it cannot adequately account for the origin of the ideal essences of law and how they are connected with the material entities and phenomena of reality. Nevetheless, the reasons why the 'pure theory' fails to provide a satisfactory explanation of the interconnection between the individual and the general in objective reality and in consciousness are very significant.

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63. H. Kelsen, The Pure Theory of Law (University of California Press, 1967) p.20.

64. Id., p.193.

65. Cf. J. Finnis, 'Reason, Authority and Friendship in Law and Morals', in H.L.A. Hart, ed., Oxford Essays in Jurisprudence, (Oxford University Press, 1973) p.72 who disavows Kelsen's notion of a special 'pure theory' of law with 'theoretical purposes' of its own.

66. Id. See also T. Tsikata, 'The Marxist Theory of Law and Its Critique of Idealist Legal Theory (Part II', (1978-81) 15 University of Ghana Law Journal, 113.

In the first place, Kelsen failed because he, like all other normativists, was operating under the illusion that law is derived from its constituent norms and nothing else.[67] Hence, he conceived of law as an independent relation, a category apart, that is completely autonomous of all material constraints. This 'juridical illusion' blinded him to the fact that law is a superstructural element of society. As such, even though it can influence the economic structure of society, it remains largely a reflection of the general socio-economic relations within society, and these relations are the real foundations upon which law and the other forms of ideological superstructure arise.[68]

Secondly, Kelsen failed to explain the objective basis of law because, by adopting the Kantian explanation of the nature of categories,[69] he viewed reality only from the idealist viewpoint, regarding it as the result of the reflection of the ideal world in the mind. As a result, he failed to realise that the subjective ideas in the mind are determined by the objective material reality which is transformed in consciousness.

Finally, in his desire to grasp the specific normative features of law, Kelsen overshot his mark and absolutised the logical content and normativity of law. Consequently, he neglected its connection with social reality, thereby denying the very objectivity that he purportedly set out to demonstrate. In fact, Kelsen's belated attempt to salvage the 'pure theory' with the principle of effectiveness is, by itself, insturctive and symptomatic. It testifies to a certain reflection of the Marxist conception of objective reality in bourgeois legal thought. Nevertheless, this objective consideration of socio-economic reality as the objective basis of the normative system, as it turns out, is nothing but a flirtation with the principle of objectivity. For it conceals a denial of Marxism as a whole, its dialectical method, and its fundamental assessments and conclusions.

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67. Cf. Hart, whose concept of law suggests that law derives from and consists mainly of a system of rules. See his Concept of Law, op.cit., fn.19 supra.

68. See the variety of the formulations of the theory of the 'relative autonomy' of the superstructure by Marx and particularly, Engels excepted in M. Cain, and A. Hunt, Marx and Engels on Law, (Academic Press, London 1979).

69. Kelsen's Kantian background and definite leaning towards the Kantian approach to the theory of knowledge is widely acknowledged; see Harris, [1971] C.L.J., 103, 115-116.

Thus, rather than explain the relationship between the subjective and objective elements of law, the 'pure theory' of law merely succeeds in abstracting law from social reality. This it does by reducing law to idealist normativist constructions of pure thought and by viewing it merely as the product of reasoning carried out in an independent sphere of rationality. Interestingly enough, this idealist abstraction of law is surreptitiously done in such a way as to enable Kelsen ('the legal politician') to choose which ideological and political preferences to include in or exclude from this 'pure theory' while proclaiming simultaneously that the study of law should be purified from all 'ideology'. 'Purity and objectivity then', as Tsikata reveals, 'provide a mask for the liberal Kelsen's rabid anti-communism.'[70]

Kelsen's 'pure theory', like all other idealist legal theories, fails to explain the relationship between the objective and subjective elements of law because it lacks a scientific conception of cognition and, consequently, an adequate understanding of the relationship between the objective and subjective in the process of cognition. To understand this relationship and its significance for truth and objectivity in the definition of law, we now turn to the dialectical-materialist philosophy of Marxism-Leninism and its concept of the dialectics of subject and object.

II. THE DIALECTIC OF SUBJECT AND OBJECT IN MARXIST-LENINIST PHILOSOPHY

The dialectical-materialist approach to the analysis of human cognition maintains that the whole process is carried out on the basis of objective practical interaction between the subject and object. Hence, the Marxist understanding of this process uses the concept of the dialectic of subject and object which is based upon the recognition of the need to consider all forms of cognitive activity in the context of social practice, and explains the position of the cognising subject in the structure of reality and the activity of the subject in relation to the object being cognised. It is beyond the scope of this article to consider in detail the

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70. *Op.cit.*, fn.65 *supra*, p.115.

methodological problems connected with the subject's cognition and such specific forms of his life activity as consciousness, mentality and the ideal.[71] However, for our limited purpose of understanding the relationship between the subject and object in definitions and its relevance to the conception of law, we sketch below the outlines of the concept of the dialectic of subject and object.

The starting point, according to this concept, of man's relationship with the world is located not in cognition but in practice, where man is 'actually doing something with objective reality.' Cognition, therefore, is understood as part of man's practical activity - an attempt to become aware of reality (i.e. an object as a 'thing in itself') so as to 'connect all the known fragments of reality... into a unified objective system...'[72]

To achieve this goal, Marxists insist that the subject must be aware of his place in the system of objective reality, because, as Lenin explained,[73] the subject is not simply consciousness, nor is he simply a separate 'corporeal' individual. On the other hand, he is a real and acting person which 'becomes a subject, doers, knower, only to the extent that he has mastered the modes of activity evolved by society.'[74] At the same time, it must be remembered that the object, too, is not simply objective reality, but part of what has become the target of the practical or cognitive activity of the subject through singling out the object (which is part of objective reality) from objective reality in the process of cognition.

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71. For a fuller discussion of some of the theoretical issues associated with the problematic of the subject/object in cognition, see V.A. Lektorsky, 'The Dialectic of Subject and Object and some Problems of the Methodology of Science', in Philosophy in the U.S.S.R.: Problems of Dialectical Materialism, p.100; and A.N. Leontyev, 'Acitivity and Consciousness', also in the same volume p.180.

72. Lektorsky, op.cit., fn.70 supra, pp.101-102.

73. See V.I. Lenin, Materialism and Empirio-Criticism, Progress Publishers, Moscow, 1977).

74. Lektorsky, op.cit., fn.70 supra, p.101.

On account of this, the objectivity of knowledge in dialectical-materialist philosophy presupposes not simply the subject's passive assimilation of content that is externally given. On the other hand, it implies 'purposive activity on the part of the subject, activity that also includes a certain degree of self-reflection, that is to say, the subject's awareness both of his place in the objective world and also of the character of his activity in relation to objects.'[75] In the production of objective knowledge, therefore, the subject must be conscious of the object characteristics that have figuratively 'grown together' with him either because they are immediately connected with his physical body or because, as Marx put it, they express his 'inorganic body'. For the subject, as Lektorsky points out,[76] can know himself only to the extent that he clarifies his place in objective reality. Only then can the subject unite the various aspects of the object (which appear at various angles as fragments) and detect the special features of the 'thing in itself'.

It is important to note that the concept of the dialectic of subject and object which explains the dialectical-materialist approach to understanding the process of cognition does not deny the role of the subject. On the contrary, what it does is show the significance of this factor in relation to what constitutes the real essence of human cognition - the interaction of the subject and object in the process of practical activity. This interaction is interpreted and explained on the basis of the acknowledgment of the materiality of nature and society, the dialectics of objective reality, and the reflection of the latter in consciousness.[77]

At the same time, the concept takes into account the principle of the social character of cognition which regards both the thought and practical activity of man as determined by laws of objective reality. Consequently, subjective activity is not considered as absolute, arbitrary, nor as the product of individual will (as is done by idealists). Rather, it is regarded as ultimately determined by external reality, by objective dialectics. This means that in the process of cognition, the subject is understood to create forms of thought which do not only reproduce but, in the final analysis, are determined by the properties and laws of the

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75. _Id.,_ p.110.

76. _Ibid._

77. See Leontyev, _op.cit.,_ fn.70 _supra,_ p.188 ff.

given object, thus making the content of knowledge objective. This interpretation of the cognitive process proves the inadmissibility of an idealist counterposing of the subjective and objective elements of a definition and forms the basis of the principle of the unity of the objectivity and subjectivity of truth.[78]

As a fundamental principle and proposition of the theory of truth in Marxist-Leninist philosophy, the dialectical unity of the objectivity and subjectivity of truth 'manifests itself in all true cognition of the world, has a specific historical character, continually changes and develops, becoming more and more profound and comprehensive.'[79] Its process of change is characterised by the passing of the subjective and the objective into one another, reflecting the uneven development of knowledge, until knowledge which, at one point, is subjective in relation to another becomes more accurate, more comprehensive and finally objective. In addition, rather than exclude the speci.ics and relative autonomy of the objective and subjective components of knowledge and truth, this unity actually presupposes them on the basis that 'The development of knowledge is movement from the subjective to the objective, the constant overcoming of subjectivity, the 'pouring' of the subjective into the objective, the raising of the degree of objectivity of knowledge.[80]

Hence, objective truth, in dialectical-materialist terms, expresses the dialectics of subject and object. In other words, truth, on one hand, is considered to be subjective because it is a form of human activity; on the other hand, it is at the same time regarded as objective because its source (material reality) is independent of man's consciousness and of the cognition of that reality.

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78. Truth, in dialectical materialist terms, is generally regarded as that which corresponds to reality. To clarify this broad definition, dialectical materialism distinguishes between objective truth which means that knowledge whose content does not depend on a subject, an individual or on mankind as a whole and subjective truth which means that knowledge whose content is variable depending upon the subject. A further distinction is made between absolute truth which implies the notion of complete and ultimate knowledge of the world as a whole and relative truth which portends relativity of knowledge. For a detailed philosphical analysis of the problem of truth, see F.V. Konstantinov, et al., The Fundamentals of Marxist-Leninist Philosophy (Progress Publishers, Moscow, 1982) pp.161-165.3

79. Id., p.211.

80. Lektorsky, op.cit., fn.70 supra, p.106.

The principle of the objectivity of truth therefore, by its very nature, excludes 'subjectivism of cognition' which is characterised by the 'primacy of the subjective element that becomes dominant and leads to the ignoring and denial of the decisive meaning of the objective content of the cognitive forms of the reflection of material reality,'[81] and also the subsectivism of truth. In its dialectical content, however, this principle, as we have shown, is in unity with the 'subjectivity of truth', for this merely expresses the fact that 'it is man as a cognising subject who creates and develops the scientific picture of the world, evolves concepts, categories, scientific theories and introduces ideas and principles into the cognitive process, crowning all this with the formulation of definitions in corresponding linguistic or mathematical terms.'[82]

III. OBJECTIVITY AND THE DEFINITION OF LAW

When applied to the definition of law, the concept of the dialectic of subject and object teaches us that an examination of the objectivity of a definition of law requires, as a matter of necessity, an analysis of the subjective as well as objective components of the process of definition. Accordingly, the objective social relations that form the material basis of law should be given due consideration while acknowledging the active role of human reason in the process of defining law.

Generally, the subjective component of a definition of law - the shaping of the necessary terms to express thoughts about the attributes and properties of law - tends to appear as an autonomous activity, independent of material reality. On occasions when the ideal expression of the subject does not coincide with the essence of the phenomenon defined or even distorts it, this subjective component may even appear as a contradiction of the objective component. In spite of this, the verbal terminological expression of law should not be viewed as autonomous. For it is not merely an expression of the subjective thoughts of the author but, on the contrary, is the concentrated expression, in the most laconic form possible, of the essence of law distilled from the author's observation of actual objective social relations.

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81. Kursanov, op.cit., fn.57 supra, p.210.

82. Ibid.

In the light of the above, it should be understood that definitions are based upon the existence of objective social relations. In other words, definitions represent an ideal reproduction of objective reality which exists independently of the consciousness of the author. It follows, therefore, that the form of a definition does not possess in itself a meaningful concrete cognitive content. But, from the general epistemological point of view, any verbal expression about law necessarily presupposes the objective reality of a particular type of social relationship which is reflected in the consciousness of the author by means of diverse cognitive forms and categories. Consequently, all definitions should be subject to verification for the purpose of determining the extent to which they accurately reflect the essence of the objective reality called law (i.e. objective truth).

The case for testing a definition of law for objectivity is thus premised upon the understanding that law as a social phenomenon (i.e. objective reality) may be viewed by the cognising subject from various angles and in various aspects. However, it is the task of the legal scientist to reproduce the various aspects of law 'as it is' (i.e. objectively) and not in its relationship to this or that legal philosopher's (subjective) point of view. This is because the very basis of law consists of material content (objective social relations) which does not depend on a subject, a human being or humanity. A major requirement of an objective definition of law therefore is that the definition must be independent of its author on the basis of the principle that 'knowledge acquires the significance of objective truth as a result of its being tested and confirmed in social practice and thus becomes independent of the opinion of individuals or even groups, independent of their evaluations of this knowledge and so on.'[83]

Since practice, understood as the 'socio-historical activity of people: activity in the sphere of material production, in the sphere of the class struggle and social relations, in the sphere of scientific observations and scientific experiments, which depend on the corresponding level of material technology',[84] is the medium through which objectivity is realised, it also assumes a signifi-

83. Ibid.

84. Id., .226.

cant role in the test for objectivity. For it allows us to establish the objective truth of scientific theories and views and also the absoluteness of truth as an actual moment in the development of knowledge. In dialectical-materialist terms, therefore, it is considered as an absolute condition of the criterion of true or objective knowledge. As Lenin expressed it: 'Practice is higher than (theoretical) knowledge, for it has not only the merit of universality but also of immediate actuality.'[85]

Where, however, the relative character of practice sufficiently militates against an adequate determination of the objectivity of a definition, making it impossible to directly confirm its objectivity in practice,[86] the alternative mode of confirming the objectivity of a theoretical proposition - the application of the rules of logic and logical relations - may be employed. The principle of objectivity therefore also requires that an objective definition of law must have a logical content based upon the two complementary notions of logic: formal and dialectical logic. The former requires the non-contradictoriness of thought while the latter demands:

(i) an examination of all facets of the object being cognised;

(ii) an examination of the object in its 'development in self-movement';

(iii) the inclusion of the whole of human experience in a full definition; and

(iv) the expression of truth in concrete as opposed to abstract form.[87]

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85. V.I. Lenin, Collected Works, Vol.38, (Progress Publishers, Moscow, 1975) p.213.

86. This may occur as a result of the historical limitations in the development of knowledge at a particular point in time, thus making it necessary for some theoretical propositions to await confirmation by future human activity.

87. Formulated by V.I. Lenin, in 'Once Again on the Trade Unions, the Current Situation and the Mistakes of Trotsky and Bukharin', 32 Collected Works, p.94.

CONCLUSIONS

In summary, we may formulate, as the core of the test for the objective validity of a definition of law, the following set of objective criteria.

Firstly, a scientific (i.e. objective) definition of law must portray law as a social phenomenon, establish its role in the process of social life, and locate its specific place within the total organization of society. In a word, the definition must adequately bring out the sociological basis of law.

Secondly, objectivity requires that a definition of law must relate to the particular mode of production whose social relations are reflected in the law (i.e. bring out the historical character of law).

Thirdly, the definition must also show the connection of law with related social phenomena such as the economy, politics, morality and the state and objectively justify the delimiation of boundaries between law and these other phenomena.

Fourthly, a scientific definition of law must be capable of submitting to its jurisdiction every useful field of analysis and be generally applicable to all societies at the same or similar level of historical development. That is to say, it must be universally applicable.

Fifthly, an objective definition of law must be based upon a solid theoretical framework which is logically coherent.

Finally, the definition must have a rational basis in social practice and in the comprehension of this practice. In other words, it must be practical.