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### THE SIMPLE AND SWEET VIRTUES OF ANALYSIS. A PLEA FOR HART'S METAPHILOSOPHY OF LAW

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#### **Resumen:**

El capítulo 1 de *El concepto de derecho* plantea una cuarta cuestión fundamental, además de las otras tres bien conocidas: a saber, la cuestión meta-filosófica relacionada con el objeto, materia y método de la teoría jurídica. El propósito de este artículo es exponer la filosofía del derecho hartiana en su mejor versión, mediante la referencia a algunas de sus ventajas teóricas, con el fin de defenderla, en la medida de lo posible, de algunas de las críticas formuladas por los defensores de otros enfoques (Raz, Leiter y Dworkin).

#### **Palabras clave:**

Concepciones de la filosofía del derecho, metafilosofía del derecho, (nueva) jurisprudencia analítica, enfoque hermenéutico, naturalismo, interpretativismo, H. L. A. Hart.

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**Abstract:**

*Chapter I of The Concept of Law raises a fourth, capital, issue, besides the three well-known ones: i.e., the meta-philosophical issue concerning the point, the matter, and the method of legal theory. The paper purports to present Hart's philosophy of jurisprudence in its best light, also by referring to some of its theoretical pay-offs, and to defend it, so far as possible, against a few criticisms by supporters of different outlooks (Raz, Leiter, and Dworkin).*

**Keywords:**

*Conceptions of Jurisprudence, Metaphilosophy of Law, (New) Analytical Jurisprudence, Hermeneutic Approach, Naturalism, Interpretivism, H. L. A. Hart.*

## A PLEA FOR HART'S METAPHILOSOPHY OF LAW

*“nous ne deviendrons pas Philosophes, pour avoir lu tous les raisonnements de Platon et d'Aristote, sans pouvoir porter un jugement solide sur ce qui nous est proposé. Ainsi, en effet, nous semblerions avoir appris, non des sciences, mais des histoires”.*

R. DESCARTES

*“[Analytical philosophy] is suspicious of grand theory if it comes along too soon and obscures valuable distinctions”.*

H. L. A. HART

SUMMARY: I. *The Fourth Issue*. II. *The Model of Ordinary Analysis*. III. *Theoretical Claims*. IV. *Is the Ordinary Analysis Model Inadequate for the Concept of Law?* V. *Is the Ordinary Analysis Model at Odds with Jurisprudential Naturalism?* VI. *Who is the Wiser Hedgehog?* VII. *Concluding Remarks*. VIII. *Bibliography*.

### I. THE FOURTH ISSUE

Chapter I of *The Concept of Law*, “Persistent Questions”, concerns the recurrent problems which puzzle jurisprudential inquiries about the law. As we know, Hart singles out three such issues as foremost, which he considers to be buried together under the elusive question “What is law?”. First, whether, and to what extent, the law is a matter of rules; second, why, and how, the law has to do with coercion; third, whether there is any necessary connection between law and morality.<sup>1</sup>

<sup>1</sup> Hart, H. L. A., *The Concept of Law*, 1961, 2nd. ed., With a Postscript edited by P.A. Bulloch and J. Raz, Oxford, Great Britain, Oxford University Press, 1994, p. 13: «Here then are the three recurrent issues: How does law differ from and how is related to orders backed by threats? How does legal obligation differ from, and how is related to, moral obligation? What are rules and to what extent is law an affair of rules?».

Surely, these are the central issues on which *The Concept of Law* turns in its several chapters.

Nonetheless, the whole book —and indeed, the whole work of Herbert Hart, since its beginnings— appears to be preoccupied with a fourth, paramount, puzzling, persistent issue: namely, with the *meta-philosophical issue*, concerning the point, the matter, and the method of legal theory.<sup>2</sup>

In the province of learning, revolutions are the outcomes of dramatic, comprehensive changes in philosophical outlook and method. Philosophy of law (legal philosophy, jurisprudence) is no exception. Herbert Hart's *The Concept of Law* represents the cornerstone of a revolutionary, analytic-philosophy view concerning the path philosophical inquiries upon the law should take in order to be a socially worthwhile undertaking.

Hart's philosophy of legal theory —and some of its theoretical offsprings— have been contested during Hart's lifetime by several critics, Ronald Dworkin being perhaps the most radical one. After Hart's death, further criticisms appeared, suggesting the whole enterprise Hart advocated since the early 1950s to be either outfashioned, or, from its very outset, a wrong "new" detour from older, safer, and more valuable philosophical approaches.

My purpose in this paper is vindicating, so far as possible, Hart's view about the proper point, matter, and method of legal theory as still valuable *here and now*, on the benchmark both of the way of *posing questions* it suggests, and of the *sort of answers* it promotes.

In the first part of my paper, I will provide a survey of the central tenets of the Hartian model of analytical legal theory (§ 2) and recall some of the theoretical claims Hart makes

<sup>2</sup> The point is set out with crystal-clear determination since the *incipit* of Hart's 1953 inaugural lecture: «In law as elsewhere, we can know and yet not understand. Shadows often obscure our knowledge, which not only vary in intensity but are cast by different obstacles to light. These cannot all be removed by the same methods, and till the precise character of our perplexity is determined we cannot tell what tools shall we need» (Hart, H. L. A., "Definition and Theory in Jurisprudence", 1953, in Hart, H. L. A., *Essays in Jurisprudence and Philosophy*, Oxford, Great Britain, Clarendon Press, 1983, p. 21).

by applying it (§ 3). In the second part, I will consider in turn a few criticism to the Hartian model, set forth by the supporters of hermeneutical conceptual analysis (Raz), naturalized jurisprudence (Leiter), and interpretivism (Dworkin), and suggest that they may be overcome (§§ 4-7).

## II. THE MODEL OF ORDINARY ANALYSIS

Hart's philosophy of legal theory —Hart's view about the point, matter, and method of legal theory— may be recounted in terms of five central tenets: 1) the *Clarification Principle*, 2) the *Conceptual Analysis Principle*, 3) the *Not-Upon-Other-Books Principle*; 4) the *No-Mystery Principle*; 5) the *Soft-Tone* or *Nirvana Principle*.

The first tenet concerns the purpose and basic features of *legal theory*: the core, so to speak, of its disciplinary character. The latter four tenets complement the former by identifying the tools and standpoints legal theory must adopt in its inquiries. Together, the five principles build up a model of general expository jurisprudence, within the joint tradition of Bentham's and Austin's analytical jurisprudence and Oxbridge's ordinary language philosophy. In the following, I will refer to this model as the *Ordinary Analysis Model*.

### 2.1 *The Clarification Principle*

According to the Clarification Principle —the first tenet of Hart's Model of Ordinary Analysis— the purpose of legal theory should be the clarification of the general framework of legal thought, by focussing on its central piece, represented by the concept of *law*, but also on other related concepts such as the concepts of *legal obligation*, *legal right*, *legal power*, *legal rule*, *legal validity*, *legal sanction*, *nullity*, etc., in their connections with the concepts of *rule*, *existence of a rule*, *having an obligation*, *being obliged*, *coercion*, *morality*, *moral obligation*, etc.

*Legal theory* —in Hart’s view— does not exhaust *jurisprudence* as a general, uncompromised, label for the philosophical study of law. It is just one branch of it, side by side to *legal policy*, which is concerned instead with the criticism of law.

So conceived, legal theory and legal policy (critical jurisprudence) are in turn complementary enterprises to *legal science* (doctrinal study of law), *legal history* (historical jurisprudence), and *legal sociology* (sociological jurisprudence, descriptive sociology of law).

*Legal policy* is a *normative* venture, the Hartian version of Bentham’s Censorial Jurisprudence and Austin’s Science of Legislation. It purports to evaluate existing legal systems, or some parts thereof, surely from the standpoint of some previously selected moral or political philosophy (Utilitarianism, Liberalism, Moral-Majority Perfectionism, Free-Market Darwinism, Catholic Fundamentalism, etc.), but also from the standpoint of instrumental rationality and efficiency. Indeed, as Hart makes clear, the criticism of law does not *necessarily* amount to the *moral* criticism of law.

Contrariwise, *legal theory* should stick to three basic standards: *generality*, *structure*, and *description*.<sup>3</sup>

First, legal theory should be *general*: it should be about, and elucidate, the law in general, namely, law as a widespread social and historical phenomenon.

Second, legal theory should be a *structural* inquiry about the law: namely, it should be concerned with the conceptual apparatus and institutional arrangement common to developed legal systems and legal cultures («the general *framework* of legal thought», «the distinctive *structure* of a municipal legal system»), not with the peculiar *contents* of the legal rules of this or that legal system —which is the matter of the doctrinal study of law.

Third, legal theory should be *descriptive*. Hart entertains a complex view about the standard of *description*, which embraces both a *negative* and a *positive* characterization.

<sup>3</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. v, 17, 239 ff.

*On the negative side*, legal theory is *descriptive* if, but only if, it is *not* a *justificatory*, morally *value-laden*, morally *committed*, enterprise. Accordingly, legal theory should stick instead to Max Weber's ideal of scientific *Wertfreiheit* which requires: on the one hand, a transparent commitment to certain *epistemic values* (truth, clarity, evidence, logical and terminological consistency, empiricism); on the other hand, the programmatic refusal to pass any —open or undercover— judgment whatsoever upon positive law on the basis of *normative-ethical values* (justice, freedom, equality, might makes right, etc.). In this way, as Hart suggests, legal theory may work as the clear and honest prologue to any reasonably informed (*rational*) criticism of law.

*On the positive side*, legal theory is *descriptive* if, but only if, it is a philosophical investigation upon the law along the lines of P. F. Strawson's *descriptive metaphysics*. Indeed, it must be a venture of *explanatory elucidation* (in Hart's own terms) of the conceptual apparatus in the field of law, where *analysis in a narrow sense*, with its *therapeutic* and *constructive (systematic)* sides, combines with thought experiments in the way of philosophical *imagination*, with its *explanatory* and *inventive* sides (on which I will say a few more words below).

Descriptive metaphysics bears a two-ways, mutual dependence, relationship with *cultural sociology*, or, in Hartian terms, *descriptive sociology*. On the one hand, descriptive sociology provides descriptive metaphysics with the rough data to be explained (the *explicanda*). On the other hand, descriptive metaphysics provides descriptive sociology with an elucidated framework of concepts and tools (the *explicata*) to be used for fresh sociological inquiries.<sup>4</sup>

The Clarification Principle provides a clear view not only about the *point*, but also about the *matter*, of legal theory. In a truistic, tautological sense, the matter of legal theory can be nothing else but law, whatever the law is and/or we

<sup>4</sup> See Sugarman, D., "Hart Interviewed: H. L. A. Hart in Conversation with David Sugarman", in *Journal of Law and Society*, 32, 2005, pp. 267-293, at pp. 289 ff.

mean by that. Going beyond truism and tautology, however, the Clarification Principle suggests to regard the law as a *linguistic phenomenon*: if not strictly speaking, at least in the looser sense of law being, in the main, a matter of sentences, words and concepts. Such a linguistic conception of law—which is fully in tune with Hart’s double philosophical allegiance: to Bentham’s analytical jurisprudence, on the one side; to the Oxbridge ordinary language philosophy, on the other side—opens the way to the second tenet of the Hartian Model of Ordinary Analysis: the Conceptual Analysis Principle, to which I turn now.

## 2.2 *The Conceptual Analysis Principle*

According to the Conceptual Analysis Principle, clarification of the general framework of legal thought, so as to provide an «improved analysis» of the distinctive structure of municipal legal systems, requires a careful analysis of the law-talk. This requires in turn philosophical definitions and explanatory elucidations that must be brought about not only by the plain, lexicographic, record of linguistic conventions, but also, as I said before, by means of a reconstructive approach including thought experiments in the way of philosophical imagination.

The several tools Hart singles out for his Ordinary Analysis Model of legal theory are well-known. Nonetheless, they make up a tool-box that is so sophisticated in kind and number, to be worth of a survey.

The tools of the Hartian Model of Ordinary Analysis fall, very roughly speaking, into three main groups of related and conspiring items: 1) *Linguistic tools*; 2) *Hermeneutic tools*; 3) *Philosophical tools*. In fact, from a genealogical standpoint, all these tools are *philosophical*: they are all the outputs of (mostly) analytical forms of philosophizing. Accordingly, the distinction I draw holds, *in the main*, from the standpoint of their respective *use*: the analysis of natural languages and natural discourses in view of therapeutic

and systematic goals; the analysis of law-talk and other sorts of norms- or rules-talks in a society; the working out of insightful explanations connecting our conceptual apparatus, as identified and tentatively established by means of linguistic and hermeneutical tools, to structural, persistent, features of the human condition.

Keeping this warning in mind, let's have a look at the tools.

### *Linguistic Tools*

Linguistic tools mirror Hart's familiarity with the major achievements of Oxbridge, post WWII, ordinary language philosophy combined with his early-bird awareness of the powerful insights that Jeremy Bentham embodied in the very heart of his program for a new, revolutionary, jurisprudence. They encompass three basic elements: *a*) a theory of natural languages; *b*) a theory of definition; *c*) a theory of concepts.

Hart's *theory of natural languages*—the building-blocks of which are such ideas as meaning-as-use, the variety of linguistic uses or functions (with a special focus on the operative, prescriptive, and justificatory functions), the criticism of the descriptivist, objectivist, and deductivist fallacies, language-levels, etc.—has its core in the claim that natural languages are fairly, but not thoroughly, efficient tools of human communication, provided their words and sentences are characterized by a physiological fringe of indeterminacy in the forms of vagueness (from ordinary—gradual, combinatory, analogical, etc.—vagueness to open texture) and ambiguity.

Hart's *theory of definition*—along the lines of Bentham's path-breaking theorizing about fictitious entities and the method of paraphrasis—turns upon three ideas: first, the *variety* of definitions; second, the *double-instructive* virtue of definitions; third, the *limits* of definitions. The first idea—the *variety of definitions*—emphasizes that definition by

genus and specific difference (*per genus et differentiam specificam*) needs to be complemented by further, different, forms of definition, to wit, by *contextual definition* and *central-case definition*, that are more suitable to *definienda* for which either no clear genus, or no closed set of necessary and sufficient properties, common to all the referred items, is available. The second idea —the *double-instructive virtue* of definitions— is meant to contrast the view according to which definitions are “just about words”. This is done, following J. L. Austin, by pointing to the fact that a (good) definition of a term does provide useful instruction not only about the ways the term is or may be used, but also about the very things it does refer to. The third idea —the *limits of definition*, for which a clear statement may be found in John Austin’s *On the Uses of the Study of Jurisprudence*, a work Hart edited in 1954 as an appendix to *The Province of Jurisprudence Determined*— is tantamount to the rejection of what may be called the *definitional fallacy*: the methodological blunder which consists in the pretence of solving some complex theoretical problem by way, and in the short space, of the few sentences making up the definition of a phrase.<sup>5</sup> Surely, theories have at their heart some definition of their key-terms;<sup>6</sup> but they cannot be altogether superseded by definitions.

Finally, Hart’s *theory of concepts* is likewise characterized by three backbone ideas. *First*, concepts are either a matter of *convention*, or a matter of *stipulation*. There are no true concepts outside of the realm of the ordinary uses of words. There are no true concepts in some rarefied dimension of

<sup>5</sup> Austin, J., “The Uses of the Study of Jurisprudence”, in Id., *The Province of Jurisprudence Determined*, 1832, with an Introduction by H. L. A. Hart, New York, The Noonday Press, 1954, pp. 370-371; Hart, H. L. A., “Definition and Theory in Jurisprudence”, 1953, in Hart, H. L. A., *op. cit.*, n. 2, pp. 25-26, 26 ff., 47 fn 28.

<sup>6</sup> According to Hart, adequate descriptive theories of social phenomena like law are made by three basic ingredients: definitions; empirical statements about passing features of the world («ordinary statements of fact»); empirical statement about constant features of human beings and their world (statements «the truth of which is contingent on human beings and the world they live in retaining the salient characteristics they have»). Hart, H. L. A., *op. cit.*, n. 1, pp. 199-200.

real essences, as legal conceptualists, like the great German jurist Rudolph von Jhering (in his first period), maintained.<sup>7</sup> *Second*, stipulative concepts are neither true, nor false, but only liable to *pragmatic justification*. Their value, if any, depends on the goal(s) they are meant to serve, and on how they have been worked out in view of those goals. *Third*, theoretical concepts, like those worked out by legal theory, are *stipulative concepts* informed by an overall explanatory goal.<sup>8</sup>

### *Hermeneutic Tools*

Hermeneutic tools mirror Hart's interest not only for sociology, but also, I may venture to say, for anthropological philosophy and philosophical anthropology.<sup>9</sup> The former deems it worthwhile making use of anthropologists' (supposed) tools and perspectives for philosophizing. The latter assumes philosophy may help in the working out and sharpening of tools for anthropological inquiries. At this crossroad of perspectives and suggestions, fueled by the perennial fascination educated men feel for their primitive fellows, Hart lays down the well-known distinction between the *internal* and the *external* point of view as to the normative system(s) of any given society. In so doing, he is careful to reject a purely behaviouristic conception of the external standpoint, in favour of an *hermeneutic external standpoint*, where the observer does not only record the participants' *non-linguistic* behaviours, but also takes into account participants' own *norms-talk*, and, what is more, puts herself in participants' shoes to see *their* norms and their actual

<sup>7</sup> Hart, H. L. A., "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence", 1970, in Id., *op. cit.*, n. 2, pp. 265-277.

<sup>8</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. 213-214.

<sup>9</sup> See Hart, H. L. A., *op. cit.*, n. 1, p. 289, where, besides P. Winch, Hart also quotes an essay by R. Piddington on B. Malinowski's theory of needs, and p. 291, where works by Malinowski, A.S. Diamond, K.N. Llewellyn and W. Hoebel are quoted.

working as *they* do see them.<sup>10</sup> The observer/user distinction is connected in turn to the key-difference, the theory of natural languages made somehow easier to perceive, between statements *about* a normative system (*external statements*), on the one hand, and statements *using* a normative system to *do things* like making or rejecting claims, ascribing rights, duties and responsibilities, evaluating, judging, criticizing and justifying behaviours (*internal statements*), on the other.<sup>11</sup> In this way, the observer/user distinction points to, and emphasizes, the epistemic *value of awareness*, for it prompts each of us, who are most of the time *both* users *and* observers of normative systems, to ask at any circumstance the capital questions: “*What am I doing now?*”, “*What is she doing there?*”.

### *Philosophical Tools*

Philosophical tools, the last set in the present survey of Hart’s jurisprudential tool-box, mirror his deep commitment to refounding jurisprudence as a worthwhile, sophisticated, genuinely philosophical enterprise, not confined to the writing down some of tiresome linguistic *spicilèges*, but providing useful elucidations of the structure of legal thought and legal institutions. Here, we find three leading ideas: the principle of methodical ignorance; the antireductionism principle; the method of philosophical imagination.

<sup>10</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. 88 ff., 239 ff.; see also Id., “Theory and Definition in Jurisprudence”, in *Proceedings of the Aristotelian Society*, 29, 1955, pp. 247-249; Id., *Essays on Bentham. Jurisprudence and Political Theory*, Oxford, Great Britain, Clarendon Press, 1982, pp. 106-161; Id., “Introduction”, in Hart, H. L. A., *op. cit.*, n. 2, pp. 13 ff. In his *Pragmatische Antropologie*, Immanuel Kant draws a like distinction between «knowing the world» and «having use of the world»: the former amounts to the «knowledge of a game to which we assist»; the latter amounts instead to «participating to the game» (Kant, I., “Antropologia dal punto di vista pragmatico”, in Id., *Critica della ragion pratica e altri scritti morali*, ed. by P. Chiodi, Torino, Italia, Utet, 1970, p. 542).

<sup>11</sup> Hart, H. L. A., *op. cit.*, n. 10, p. 248: «We can contrast the “external” standpoint of the observer of a legal system who is thinking about its rules and their present and future operation with the “internal” standpoint of one who is using the rules of the system either as an official or private person in various ways»; see also Id., “Definition and Theory in Jurisprudence”, 1953, in Hart, H. L. A., *op. cit.*, n. 2, p. 27.

The *principle of methodical ignorance* —advocated as a basic methodological tenet for jurisprudence by Bentham and Austin— is a safety device against knowledge by acquaintance. Familiarity with words and objects, far from providing deep and reliable knowledge about social phenomena, is rather likely to lead to confusion and delusion. Accordingly, jurisprudence must be the art of systematically ignoring what people at large (pretend to) know, starting from people's linguistic and conceptual certainties.<sup>12</sup>

The *anti-reductionism principle* is a safety device against unwarranted theoretical reductionism. The works of many legal philosophers exhibit the tendency to reduce the complexity of legal systems in order to show them, so far as possible, as structurally simple phenomena, characterized by «a pleasing uniformity of pattern». Contrariwise, the anti-reductionism principle suggests to preserve the complexity of legal systems by means of a network of adequately articulated concepts, so far as it is conceptually warranted by functional and other practical differences.<sup>13</sup>

As I said before, Hart regards the *method of philosophical imagination* as a major tool in the game of descriptive metaphysics. In Hart's understanding, philosophical imagination requires the working out of thought experiments meant to explain how our actual conceptual and institutional structures are, and why, by comparing them with alternative imaginary situations. Three thought experiments lay at the core of Hart's legal theory: 1) the simple model of law as coercive orders; 2) the idealized picture of a primitive, pre-legal, society ruled only by a discrete set of unconnected primary norms of obligation, somehow preluding to Nozick's invisible-hand explanation for the rise of the state out of a Lockean state of nature; 3) the theory of the minimum content of natural law: the «empirical theory of natural law»

<sup>12</sup> Remember: «In law as elsewhere, we can *know* and yet *not understand*» (Hart, H. L. A., "Definition and Theory in Jurisprudence", 1953, in Hart, H. L. A., *op. cit.*, n. 2, p. 21, italics added).

<sup>13</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. 38 ff.

Hart opposes both to traditional natural law theorists and to Kelsenian legal positivism.

So far for the Principle of Conceptual Analysis. The three latter principles of Hart's Model of Ordinary Analysis may be recounted in shorter terms.

### 2.3 *The Not-Upon-Other-Books Principle*

The third tenet of Hart's Ordinary Analysis Model is the pedagogically aimed *Not-Upon-Other-Books Principle*.<sup>14</sup>

In its positive side, the principle prescribes legal theory to be about the *law* and related *social phenomena*, not about legal theory *books*.

In its negative side, the principle purports to rule out *jurisprudential theology*: the way of doing legal philosophy where jurists identify some very broadly formulated "truth" (or "likely true intuitions") about the law as the focus of their investigations (like, e.g., "law is fact", "law is convention", "law is force", "law is norm", "law is morality", "law depends on social sources", "law is interpretation", etc.), and then spend their time discussing competing interpretations of such assumed "truths", in a never-ending series of argument, counter-argument, counter-counter-argument, and so on.

### 2.4 *The No-Mystery Principle*

The fourth tenet of Hart's Ordinary Analysis Model is the *No-Mystery Principle*.

Due to the influence of natural law thinking, jurisprudence has been conceived for a long time, and is still being conceived *now*, as an investigation upon the *nature* or *essence* of law: assuming, in so doing, that the law *does* have *one true nature*, *one true essence*, liable to be discovered by means of adequate inquiries.

<sup>14</sup> *Ibidem*, p. vi.

In Hart's view, however, such naturalist or essentialist conceptions of jurisprudence are metaphysically suspect. They build around the law an unnecessary, misleading halo of mystery, since the very way they pose their starting questions ("What is *the nature* of law?", "What is *the essence* of law?"). For, as Hart suggests, there is no such a thing as *the one true nature* or *the one true essence* of law. All we have in fact, is a general social phenomenon we are used to call "law" (*derecho, diritto, droit, Recht*), so that any philosophical inquiry upon such phenomenon may simply be conceived as purporting to provide an answer to plainer, metaphysically safer, questions like "What is law?" or "What is the concept of law?" —to be read, of course, against the background of Hart's Clarification and Conceptual Analysis principles. Accordingly, if we nonetheless do like using such phrases as "the nature of law" or "the essence of law", we should at least surround them with the sanitary belt provided by inverted commas.<sup>15</sup> Indeed, as Hart suggests, surely things do have *properties*; but they do not have any *essential* property, outside of some determinate conceptual frame.

### 2.5 *The Soft-Tone Principle*

The fifth, and (for the present survey) last, tenet of Hart's Ordinary Analysis Model is the *Soft-Tone* or *Nirvana Principle*.

Legal philosophers frequently present their (presumed) discoveries about the law by way of immoderate forms of speech. They tend to great exaggerations, surely *pour épater les juristes*, but with a price: for they raise unnecessary paradox and puzzlement among jurists and educated public opinion alike, which call for adequate deflationary analysis. In Hart's view, on the contrary, legal theorists should carefully avoid exaggerations, and prefer

<sup>15</sup> As Hart himself does. See, e.g., Hart, H. L. A., *op. cit.*, n. 1, p. 155.

instead (what may be regarded as) a more modest, craftsmanlike, Nirvana approach, aiming at «cool definitions»:<sup>16</sup> it goes without saying, to be regarded as tentative and always revisable.

Hart's own work as a whole provides a clear evidence of his unflinching abiding to the Soft-Tone principle.

### III. THEORETICAL CLAIMS

So far, I have stayed with Hart's philosophy of jurisprudence. It is time now, before proceeding to consider a few rival views, to recall the answers Hart offered to legal theory's persistent questions by employing the methodological apparatus of the Ordinary Analysis model. We all (presume to) know those answers, so a very swift account should go.

*The law and rules issue.* Hart sets forth a paradigm-case definition of the concept of law ("law as the union of primary and secondary rules"), warning it should not be used as a strict definition of expressions like "law", "legal", or "legal system" ruling upon linguistic uses, but simply as a *theoretical device* ("a concept") whose value must be measured on the rod of its ability to promote clearer theoretical inquiries and moral deliberation. There is, accordingly, nothing odd, nor self-contradictory, in Hart's entitling his major book *The Concept of Law*, provided one has a clear view about Hart's theory of concepts and overall Ordinary Analysis model.<sup>17</sup>

<sup>16</sup> *Ibidem*, p. 2.

<sup>17</sup> Dealing with the law and rules issue, Hart also defends a normativist conception of law (law is made of rules) against radical rule-scepticism, by resorting to the linguistic dependence of legal rules (legal rules work like sentences in a natural language). This view, so far as its bearing on the theory of interpretation is concerned, was criticized for overlooking the actual practice of written-law interpretation. Hart apparently accepted the criticism, conceding that interpretive methods may make the idea of there being rules which *pre-exist* to their judicial application troublesome (see Hart, H. L. A., "Introduction", in Hart, H. L. A., *op. cit.*, n. 5, pp. 8-9). In this way, however, his view about rules, and law being made of rules, becomes quite similar to Kelsen's —and soft realists'— frame-theory of rules.

*The law and coercion issue.* Hart outlines an explanation of why coercive sanctions are a constant feature of the social phenomenon of law, to be taken into account within our concept of law here and now, by appealing to a Hobbesian-Humean model of the human condition, where sanctions are needed as a *guarantee* to voluntary cooperation against free-riding.<sup>18</sup>

*The law and morality issue.* Hart defends a quite sophisticated view on this issue. Such a view, however, has been somehow obscured by the “there is no necessary connexion between law and morals” shibboleth. Three basic claims make up the Hartian theory of the relationships between law and morals: *first*, the multiple contingent connexions claim; *second*, the conceptual neutrality claim; *third*, the no-committment claim.

It is worthwhile emphasizing that these three claims, jointly considered, have in themselves a strong pedagogical import, if I may say so. For they make clear that “the law and morality issue” is *not*, really, *one* issue, but a set of heterogeneous problems, which are very often dealt with in a wholesale, confused way, but calling for separate standpoints, separate approaches, and separate answers. It goes without saying that such a problematization of the issue represents a valuable pay-off following from the adoption of the Ordinary Analysis approach.

The *multiple contingent connexions claim* points to the several ways positive legal systems may be related to systems of social and/or critical morality (content, motivation, existence, validity, interpretation, criticism, instrumentality) – as they may also be related, in fact, to religious outlooks, economic systems, rules of etiquette, etc. It suggests that any idea of a *special, necessary*, relationship of *conceptual subordination* of law to “morality” (Which morality, by the way?) is, so to speak, in the eye of the beholder.<sup>19</sup>

<sup>18</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. 191 ff.

<sup>19</sup> Hart, H. L. A., *op. cit.*, n. 1, pp. 185 ff., 200 ff.

The *conceptual neutrality claim* defends the virtues of a broader, morally-neutral, concept of law as compared with the narrow, morally-laden, concepts advocated by non-positivists (Natural lawyers & C., like Gustav Radbruch and, presently, John Finnis and Robert Alexy), since such a broader, neutral concept would be preferable to theoretical and practical purposes alike.<sup>20</sup>

Finally, the *no-commitment claim* maintains that legal theory should keep itself *out* of the controversial philosophical issue concerning the ontological status of moral values.<sup>21</sup> This claim plays a key role in shaping Hart's own version of legal positivism *vis à vis* to *inclusive* (or *soft*) and *exclusive* (or *hard*) positivism alike.

Soft positivists make two basic claims. *First*, the validity and content of legal norms *may* depend on moral criteria: it is *not necessarily the case* that validity and content of legal norms *do not* depend on morality (*contingent moral validity-clauses thesis*). *Second*, whenever a legal system includes a moral-validity clause (such as, e.g., the dignity clause of the European Constitution or the due process clauses of the American Constitution), such a system *incorporates* —i.e., *converts* into *pre-existing* law, from the standpoint of adjudication— *both* the moral norms referred to by the clause, *and* all the full-fledged norms the content of which may be derived from them (*incorporation thesis*).

Hard positivists, as we know, claim roughly the opposite. *First*, the validity and content of legal norms *cannot* depend on moral criteria: *it is necessarily the case* that the identification and content of legal norms *do not* depend on moral argument (*social sources, or no moral-argument, thesis*). *Second*, whenever a legal system includes a moral-validity clause, such a clause is tantamount to delegating to judges and other officials the power of *making new law* according

<sup>20</sup> *Ibidem*, pp. 207 ff., 213-214.

<sup>21</sup> *Ibidem*, pp. 250 ff., at pp. 253-254: «I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open [...] the general question of whether they have what Dworkin calls 'objective standing'».

to certain moral criteria (*law-making-power delegation thesis*).

Surely, Hart claims —against Dworkin— to be not a ‘plain-fact positivist’, but, rather, a ‘soft positivist’. As a soft positivist, however, Hart does not go all-the-way through along with his fellow softers. He stops at the first claim, concerning the possibility of moral validity-clauses. As to the second claim, the incorporation thesis, he takes a different view. This ultimately makes of Hart’s legal positivism a *third* theory, *au dessus de la mêlée*: above the contest between inclusive and exclusive positivists.

Hart’s reasoning runs, very roughly, as follows. *One*: soft positivist provisions (moral validity-clauses) may safely be interpreted as incorporation devices *if, but only if*, the morality they refer to has an objective standing. *Two*: unfortunately, the objective standing of moral norms and values is controversial. *Three*: consequently, soft positivists may safely adhere to the moral-validity clause claim, but not also to the incorporation claim, since, *qua* legal theorists, they *cannot rule out* that moral-validity clauses may in fact work as *power-conferring rules*, i.e., as «directions to courts to *make* law in accordance with morality». *Four*: likewise, hard positivists, *qua* legal theorists, *must leave open* the possibility of moral-validity clauses working as incorporation devices. *Five*: the objective standing of moral values, whatever we mean by that, however, makes *no practical difference* from the standpoint of the judges called to apply moral-validity clauses. In *any* case, their duty will be *the same*: namely, «to make the best moral judgment» they can, on any moral issue they have to decide.

As I said at the beginning, I think Hart’s philosophy of legal theory does represent, still here and now, a valuable outlook. Surely, like every outlook, it is to be regarded as open to continuous refinement and amendment. But its central ideas seem to outline a useful and reliable model of philosophical inquiry upon the law. Surely, we may not agree with Hart’s theoretical claims, and think better ones

may be set forth and argued for. But these shortcomings, by themselves, do not involve the repudiation of the Ordinary Analysis model—which, by the way, is a model for *legal theory*: neither for the whole philosophical investigation upon law, which includes the working out of grand justificatory theories of law, nor for the whole study of law.

Nonetheless, Hart's way has been the target of criticisms, even radical ones. I will consider now a few of them, raised by Joseph Raz, Brian Leiter, and Ronald Dworkin, respectively.

#### IV. IS THE ORDINARY ANALYSIS MODEL INADEQUATE FOR THE CONCEPT OF LAW?

According to Eugenio Bulygin, conceptual analysis may be conceived as aiming at the *explication* or *rational reconstruction* of concepts:

«Es una vieja tradición analítica llamar el proceso que conduce de un concepto a otro mejor, *i.e.*, más exacto, *explicación* o *reconstrucción racional* (Carnap). Las diferentes teorías del derecho se esfuerzan por formular un concepto de derecho más exacto y apropiado de acuerdo con algún criterio teórico, como la simplicidad, la fecundidad e incluso la elegancia de la presentación».<sup>22</sup>

Joseph Raz, however, objects that such a way of understanding conceptual analysis may work for the concepts of the natural sciences, which are descriptive, explanatory concepts, but it cannot work for *social concepts*, like the concept of law, legal right, gift, property, marriage, duty, etc. This is so, Raz claims, because social concepts are *hermeneutic concepts*: they are concepts we use to *understand* ourselves, other people, and our position in the world. They are not simply explanatory tools; they also contribute to

<sup>22</sup> Bulygin, E., "Raz y la teoría del derecho. Comentarios sobre «¿Puede haber una teoría del derecho?» de Joseph Raz", in Raz, J., Alexy, R., Bulygin, E., *Una discusión sobre la teoría del derecho*, Madrid-Barcelona, Spain, Marcial Pons, 2007, pp. 107-108.

*shaping* the very social world we try to understand and do belong to.<sup>23</sup>

Bulygin shares the same view of conceptual analysis as Hart. As a consequence, Raz's criticism to Bulygin also applies to Hart's Ordinary Analysis model.

Is Raz right? Does the Ordinary Analysis model work for natural concepts only, but is really inadequate to cope with social, constitutive concepts, like the concept of law?

I do not think so. We have seen that Hart's tool-box includes a sophisticated, hermeneutic, conception of the *external point of view*, which requires observers both to analyse users' norm-talks, and also to put themselves in users' shoes, in order to grasp the way *they* understand the concepts they use. Obviously, such an hermeneutic external point of view may be usefully adopted, by each participant to a social institution, to get a *detached understanding* of her own, and her fellows', *committed understanding* of such an institution, for here too holds *the description principle*, so elegantly formulated by Hart in his *Postscript*: "Description may still be description, even when what is described is an evaluation".<sup>24</sup> Now, this is precisely what Raz's conceptual analysis for social concepts seems to require. Accordingly, Hart's conceptual analysis, far from being outdated and unfit to deal with social concepts, appears perfectly in tune with the hermeneutic standpoint adopted by Raz.

#### V. IS THE ORDINARY ANALYSIS MODEL AT ODDS WITH JURISPRUDENTIAL NATURALISM?

One of the most powerful reform-proposals concerning the methodology of legal theory that has been advanced in

<sup>23</sup> Raz, J., "Teoría y conceptos. Réplica a Alexy y Bulygin", in Raz, J., Alexy, R., Bulygin, E., *op. cit.*, n. 22, pp. 119-120; see also Raz, J., *Can There Be a Theory of Law?*, 2004, in Id., *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, Oxford, Great Britain, Oxford University Press, 2009, pp. 17 ff.

<sup>24</sup> Hart, H. L. A., *op. cit.*, n. 1, p. 244; see also Id., "Comment", in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy. The Influence of H. L. A. Hart*, Oxford, Great Britain, Clarendon Press, 1987, pp. 35-42.

recent years, is the call for a Naturalized Jurisprudence launched by Brian Leiter.<sup>25</sup>

Apparently, Leiter criticizes Hart's jurisprudence on three counts.

*First*, Hart's theory is committed to soft or inclusive positivism. Unfortunately, naturalistic inquiries upon the law, like e.g. the Attitudinal Model developed by Segal and Spaeth, show the hard positivists' concept of law to be preferable.

*Second*, Hart's theory does not provide an adequate account of the influence judges' own ideological attitudes plays on judicial decision-making, being focussed, instead, on the problem of the normativity of law and judicial "acceptance" of legal rules.<sup>26</sup>

*Third*, Hart's theory, committed as it is to conceptual analysis, faces the following dilemma, which I propose to call "Leiter's Dilemma": *either* it is *just a piece* of «glorified lexicography», and so it is a pointless enterprise; *or* it endorses an immoderate, unwarrantedly ambitious, view about the virtues of conceptual analysis, and so it necessarily misses its target. For —Leiter claims— conceptual analysis *cannot* in fact «illuminate the reality, i.e., the nature of law»; it can, and do, illuminate «rather, the nature of our "talk" about law».<sup>27</sup>

<sup>25</sup> Leiter, B., *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford, Great Britain, Oxford University Press, 2007.

<sup>26</sup> I draw the criticism from the following passage of Leiter, B., *op. cit.*, n. 25, p. 188: «the best causal explanation of decision, the Attitudinal Model, is one that relies centrally on Hermeneutic Concepts: for it is supposed to be the *attitude* of judges towards the *facts* that explains the decision, and "attitudes" are clearly *meaningful* mental states that are assigned a *causal* role in accounting for the outcome (the decision). But a judge's favorable moral attitude towards, e.g., privacy in the home —which might be the attitude explaining some of his votes in search-and-seizure cases— is not the same as the kinds of Hermeneutic Concepts that H. L. A. Hart treats as central to the phenomena of modern legal systems: for example, that official accept some rules from an internal point of view, that is, as imposing obligations on them of compliance».

<sup>27</sup> Leiter, B., *op. cit.*, n. 25, p. 196: «But on Farrell's (more plausible) rendering of conceptual analysis, we do not illuminate the reality, i.e., the nature of law, we illuminate, rather, the nature of our "talk" about law».

If we take into account the picture of Hart's philosophy of legal theory and theoretical claims I outlined before, Leiter's criticisms seems open to rejection.

As to the *first criticism*, one may reply that, so far as the *incorporation claim* is concerned, Hart is *neither* a soft, *nor* a hard positivist. Indeed, Hart endorses and defends a more sophisticated version of legal positivism, which, on the one hand, suggests legal theorists, *qua* legal theorists, should leave the controversial issue about the objective standing of moral values open, and, on the other hand, claims that judges, when applying moral validity-clauses, *must* decide, *in any case*, by making *their* best moral judgment on the issue at stake. This last point, in turn, suggests that Hart's theory of law may be regarded as being in fact in tune with the outcomes of the Attitudinal Model of adjudication sponsored by Leiter.

As to the *second criticism*, one may notice that, according to naturalized jurists, what makes the law work is judges' *attitudes*: like, for instance, their «favourable moral attitude towards [...] privacy in the home». *Now*: what does it mean “having a favourable moral attitude towards [...] privacy in the home”? Hart would say that it means roughly the following: that (some or most) judges *accept*, for moral reasons, *the principle of privacy* as a paramount normative standard that should guide social behaviours and provides overwhelming justification to judicial decisions sanctioning conducts trespassing on privacy. Accordingly, contrariwise to Leiter's suggestion, judicial ideologies and moral attitudes *are* liable to be conceptualized in terms of Hart's legal theory.

As to the *third criticism*, two replies are in order. *First*, that it is really surprising to find a naturalized jurist assuming that there is *something*, representing “the nature of law”, *beyond* the universe of words and sentences making up legal norms and legal-norm-talk —for law, as Hart rightly suggests, is basically *a linguistic* social phenomenon. *Second*, Hart's conceptual analysis is *neither* the ambitious

enterprise described by Leiter, *nor* glorified *lexicography*. It instantiates, rather, a third genus of conceptual analysis: the prudent, illuminating, rational-reconstruction, explanatory, imaginative, conceptual analysis, so well described by Bulygin and elegantly advocated by Strawson.

#### VI. WHO IS THE WISER HEDGEHOG?

“The fox knows many things, but the hedgehog knows one big thing”. In his last book, *Justice for Hedgehogs*, Ronald Dworkin adds a new link to his criticism of Hartian jurisprudence, by appealing to an interpretivist theory of law characterized both by a one-system, integrated view, of the relationships between law and morals (law is a branch of political morality), and by an integrated view of values (the several values in the several dimensions of human life really make up a unitary whole).<sup>28</sup>

Leaving aside Dworkin’s substantive claims which, by the way, appear open to criticism on several counts,<sup>29</sup> what about the methodological outlook of interpretivist jurisprudence?

A tentative survey suggests the following principles to be afoot: 1) Rely on self-evidence; 2) Take norm-talk and justificatory-talk at face value; 3) Do not waste your time distinguishing between the external and internal standpoint, internal and external statements, observers and users, but just go to the heart of the matter; 4) Do not care about charitable interpretation; 5) Do not care about inconsistencies; 6) Do not care about establishing carefully the meaning of the key-terms and key-distinctions you employ in your argument.

<sup>28</sup> Dworkin, R., *Justice for Hedgehogs*, Cambridge, Mass., London, England, The Belknap Press of Harvard University Press, 2011.

<sup>29</sup> Is the one-system view *really* different from the interpretivist two-systems view? By what test are the implicit principles which would fit and justify positive legal materials *moral* principles? Which sort of argument, if, any, does support the claim that law is a branch of political morality?

Following these tenets, Dworkin regards it to be an «obvious» connection between law and morality, that when «a community decides what legal norms to create, it *should be guided and restrained by morality*». He considers legal positivism and interpretivism as two theories competing to provide an answer to the *same* question, as «rival normative political theories». He claims, accordingly, that the *best* interpretation of *legal positivism* makes it tantamount, though with nuances of course, to the notorious view criticized by natural-lawyers like Radbruch: i.e., *ideological positivism* or “*Gesetz ist Gesetz*” *positivism*.<sup>30</sup> He suggests, furthermore, that a legal positivist like Bentham should be regarded, paradoxically, as a «closet interpretivist». <sup>31</sup> He seems to reject *and* to accept the is/ought distinction, at the same time, apparently, on different understandings of such distinction.<sup>32</sup> He seems to associate Hart to the «jurisprudence» that «has traveled from some declaration about the essence or very concept of law to theories about rights and duties of people and officials». <sup>33</sup>

Let's go back to the hedgehog. In fact, there are many hedgehogs around, each one knowing, by definition, *just one thing but a big one*.

Now, it is unlikely that all these hedgehogs around do know the *same* one big thing. Indeed, if we cast a cursory glance at the world of jurisprudence, we see—to stay with the Anglo-American world—two competing hedgehogs. The

<sup>30</sup> Dworkin, R., *op. cit.*, n. 28, pp. 409-410.

<sup>31</sup> *Ibidem*, p. 486, fn 6.

<sup>32</sup> One thing is the is/ought distinction within the Humean tradition sponsored for jurisprudence by Bentham and his analytical followers; another thing is the is/ought distinction as a distinction, within an interpretive, value-laden, committed practice, between *de iure condito* (or *de moribus conditis*) considerations and *de iure condendo* (or *de moribus condendis*) considerations. But Dworkin overlooks the point, though it is crucial for understanding in which way “the two-systems picture”, keeping law and morality separate, is, in Hartian terms, right. See Dworkin, R., *op. cit.*, n. 28, pp. 407-409, and 410 ff., where he actually, though perhaps unwarily, defends a Radbruchian two-tiered solution to the evil law puzzle similar to Gustav Radbruch's. See Radbruch, G., “Statutory Lawlessness and Supra-Statutory Law”, 1946, in *Oxford Journal of Legal Studies*, 26, 2006, pp. 1-11.

<sup>33</sup> Dworkin, R., *op. cit.*, n. 28, p. 407.

first, self-proclaimed, hedgehog is, of course, Ronald Dworkin, who pretends to know the one big thing of the unity of law and morality, pointing in turn to the unity of value. The second hedgehog, if I may venture to say so, is Hart. However, the one big thing Hart knows, and *urges us* to know, is not a matter of substantive *theory* but, rather, a matter of philosophical *methodology*. The Ordinary Analysis Model, with its several principles, tools, and caveats, is Hart's one big thing.

How big such a thing is, may be gathered from a comparison with Dworkin's methodology, even on the basis of the swift remarks above. On the whole, the Ordinary Analysis Model preludes both to a better (clearer, more precise, candid) legal theory, and to a better (clearer, more precise, candid) political philosophy. The Hartian outlook is wider, and richer, and subtler, than the Dworkinian outlook, which is poorer, confused, made of arguments frequently ignoring the sophistications of (Hartian) positivism. So: who is the wiser hedgehog, after all? I think there should be no doubt about the right answer to such a question.

## VII. CONCLUDING REMARKS

Interpretivism (Dworkin), naturalized jurisprudence (Leiter), and hermeneutic conceptual analysis (Raz) represent, perhaps, the three most powerful post-Hartian philosophies of jurisprudence.

Their critical import upon the Ordinary Analysis model, however, appears to be modest, if not misguided or missing the target.

We may draw something of a moral, out of this story: methodologically-aware jurisprudents would do better taking into account the Hartian Model, if only to refine and complement it, also in the years ahead.

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