The Methodology of Analytic Jurisprudence

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> Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed, for want of tools that are fit to work with. To frame a complete set of new ones is impossible. All that can be done is, to make here and there a new one in case of absolute necessity, and for the test, to patch up from time to time the imperfections of the old.
>
> Jeremy Bentham[2]

Abstract

The paper purports to provide a tentative introduction to the methodology of analytic jurisprudence. Section 1 puts to the fore ten basic principles of the analytic approach. Section 2 draws the charter of analytic jurisprudence, distinguishing an expository and a normative variety thereof. Section 3 draws up a bird-eye survey of some of the main tools the mastery of which fares as a necessary condition for fruitful analytic enquiries upon the law. Section 4 outlines a variety of analytic conceptual analysis as a response to some recent skepticism. Section 5, finally, strikes a blow in favour of analytic legal philosophy against a variety of (allegedly) truly "philosophical" jurisprudence, by way of a comparative argument concerning their respective dealing with the "concept of law" issue.

Keywords: Jurisprudence. Analytic Jurisprudence. Methodology of Analytic Investigation. Conceptual Analysis. Concept of Law.

0. Foreword

Analytic jurisprudence represents a major achievement in the millenary coping of humans with law. Nonetheless, its identity looks uncertain, and its merits, if any,

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[1] The present paper represents a first, tentative, study towards an introductory chapter to the planned second volume of my "history" of analytic jurisprudence (see Chiassoni 2016a: xv-xvii). That purpose will perhaps excuse its overall naiveté. A modified form of it will appear in a book dedicated to the methodology of jurisprudence and edited by Mathieu Carpentier.

[2] Bentham 1789: 214-215, fn J2.

are currently at stake. Recent meta-philosophies of law entertain a dim view of the analytic enterprise. Roughly since the turn of the century we breathe a new air[3], where legal philosophers are apparently driven by the pursuit of what are presented as less modest, truly "philosophical", more "robust", more "interesting" conceptions of their tasks[4].

My aim, in this paper, is outlining a vindication of analytic jurisprudence (it goes without saying: as I see it) from the standpoint of its meta-philosophy of law and methodology[5].

Section 1 provides a reconstruction of the basic investigation instructions ("principles") that characterize the analytic approach to legal philosophizing.

Section 2, taking stock of the principles in Section 1, offers a tentative account of the disciplinary statute of analytic jurisprudence, distinguishing an expository and a normative variety thereof.

Section 3 draws up a bird-eye survey of some of the main tools the mastery of which fares as a necessary condition for fruitful analytic enquiries upon the law.

Section 4, a follow-up of Section 3, outlines a variety of analytic conceptual analysis as a response to some recent skepticism.

Section 5, finally, strikes a blow in favour of analytic legal philosophy against a variety of (allegedly) truly "philosophical", and hence of (allegedly) more robust and interesting, jurisprudence. That will be done by comparing an instance of essentialist coping with the "concept of law" issue (coming, as we shall see, from Robert Alexy) with the analytic approach, and bringing to the fore why the latter should be considered preferable.

1. The Principles of an Analytic Approach to Jurisprudence

An analytic approach to jurisprudence is a peculiar way of dealing with problems concerning the law-world that are usually regarded as philosophical. These are typically about the law (in general), legal norms, legal systems, legal sources, legal interpretation, legal reasoning, legal science, sovereignty, validity, legal rights, legal duties, the relation(s) between law and morals, law and justice, law and coercion,

[3] The "new air" is in part the effect of the publication of Hart's "Postscript" to *The Concept of Law*, a section thereof is dedicated to a reflection on "legal theory" (Hart 1994: 239-244; Coleman (ed.) 2001).

[4] See, e.g., Dworkin 2006: 140-186; Alexy 2001; Dickson 2001; Dickson 2004: 117-156; Raz 2004: 17-46; Alexy 2006: 281-299; Dickson 2006; Dickson 2011: 477-497; Shapiro 2011, ch. 1; Langlinais, Leiter 2013; Dickson 2015: 207-230; Alexy 2017: 314-341; Plunkett, Shapiro 2017: 37-68; Dickson 2017: 11-40; Luque 2017; Enoch 2019: 65-86.

[5] The word "methodology" is ambiguous. It can stand both for any discipline (or "science") concerned with the method for carrying out certain operations, and for the set of methods used in a particular branch of learning or practical business. Here I will use it in the latter meaning.

law and state, law and logic, law and rhetorics, law and truth, law and social sciences, law and cognitive sciences, etc.

The peculiarity of the analytic approach comes from the adoption of a set of investigation instructions ("principles") that have been theorized or adopted in the course of the two-hundred-and-forty-five years since (what can be viewed as) the founding essay of analytic jurisprudence, Jeremy Bentham's *A Fragment on Government*, was published[6].

A tentative (and by no means exhaustive) reconstruction would present analytic principles as a set encompassing not fewer than ten different items, to wit: (1) the principle of ignorance, (2) the principle of conversion, (3) the principle of refinement, (4) the principle of capture, (5) the principle of empirical support, (6) the principle of contact, (7) the principle of simplicity, (8) the principle of austerity, (9) the principle of separation, and, last but (of course) not the least, (10) the principle of commitment[7].

The *principle of ignorance* requires jurisprudents to be methodically distrustful as regards to what they assume to know about the law: above all when the presumed knowledge sounds familiar, looks like a matter of unquestionable course, is something anybody is used to. Herbert Hart, one of the leading figures of contemporary analytic jurisprudence, makes clear why this principle should be honoured, when, in his inaugural Oxford lecture, he warns that «In law as elsewhere, we can know and yet not understand»[8]. The principle of ignorance works accordingly as a remedy to the received views ("tradition"), biases and false certainties jurisprudents fatally bring to bear in their investigations about law and legal experience. In a Benthamite-styled formulation, the principle of ignorance requests jurisprudence to be turned into «the art of being methodically ignorant of what everybody knows»[9]. Ignoring, notice, *must* be (made into) *an art*: it must become an action the legal philosopher performs by consciously applying a technique of philosophical enquiry[10].

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[6] Bentham 1776.

[7] I have identified some of these principles in various writings over the last ten years: Chiassoni 2019: 9, Chiassoni 2016a: 9-32, 118-131, 308-337, 387-396, Chiassoni 2016b: 384-409, 445-469, Chiassoni 2016c: 61-71, Chiassoni 2013: 247-258, Chiassoni 2011: 331-334. In passing, the principles appear to be quite useful also in coping with issues outside of legal philosophy, like, e.g., issues proper to specific areas of the doctrinal study of law (administrative law, criminal law, constitutional law, the law of evidence, etc.).

[8] Hart 1954: 21; see also Austin 1832: 370.

[9] Chiassoni 2016c: 62-63. I say "in a Benthamite style", since Bentham's definition of jurisprudence as "the art of being methodically ignorant of what everybody knows" can be read, and is usually read as, a sarcastic and derogatory characterization of the study of law as a whole (and perhaps, of the law itself), as it was at the end of the XVIII century.

[10] The principle of ignorance may look like an offspring of the Cartesian principle of methodical doubt (Descartes 1641). This is not the place, however, to cope with such issue.

The *principle of conversion* requires transforming metaphysical (or "ontological") problems into conceptual problems: at least, as a fruitful preliminary step of jurisprudential inquiries. Metaphysically formulated problems (like, e.g., "What is law?", "What is legal validity?", "What is legal interpretation?", "What is a legal duty?", etc.) should be converted into as many conceptual problems ("What does "law" mean in the here and now of extant legal culture?", "What does "legal validity" mean?", "How is "legal interpretation" being used by jurisprudents, jurists and judges?", "What do people mean, if they mean anything at all, when they talk about 'legal duties' or 'legal rights'?", etc.)[11]. Synthetically minded jurisprudents are used to regard the principle of conversion as pushing legal philosophy towards pointless (and boring) lexicography. Analytic jurisprudents, contrariwise, take it as a safe-conduct against abstruseness, as well as a reliable guide to effective and deep mastery of legal reality.

The *principle of refinement* requires jurisprudents to engage in a never-ending (if you like, Sisyphean) fatigue. Any knowledge lawyers may have about the law, as well as their everyday practice as jurists, judges, attorneys, etc., inside of some legal experience, necessarily depend on (is unavoidably mediated by) some terminological-conceptual apparatus (some scheme, framework, or set of terms and corresponding meanings). The principle of refinement invites jurisprudents to be distrustful about the extant terminological-conceptual apparatus their legal culture happens to (have inherited from previous generations and) make use of at any station in its temporal progression. It suggests that there is always room for moving from (fatally) less fine (poorer, obscurer, obsolete) terminological-conceptual apparatuses to (ever) finer (richer, clearer, updated) ones, containing a larger set of more precise concepts tied to a more articulated set of terms. In sum, the principle requires jurisprudents helping their legal culture to enjoy, at any time, of the finest possible terminological-conceptual apparatus that can be worked out. This outcome they should achieve by the constant, relentless, carrying out of two tightly connected and synergetic jobs that are often packed together under the uncertain label of "conceptual analysis": i.e., *conceptual precisification* (clarification, elucidation) and *terminological articulation*.

The *principle of capture* follows in the previous principle's footprints. It sets the regulative ideal any refinement job should be aiming at: to wit, the working out of a terminological and conceptual *net* capable of capturing, by means of an adequately wide set of well defined concepts, all the relevant phenomena in the

[11] G.E. Moore, in his lecture "What Is Analysis?", presents (what I am calling) the principle of conversion as a matter of course for philosophical inquiry: «You see the general question we've got to try to answer is one which it's most natural to put in the form: What *is* Philosophy? But this means the same as: How is the word philosophy in one of its senses used *now*? What is the modern English usage?» (Moore 1966: 153).

relevant field of enquiry (if you like, all the worthwhile fishes in the legal pond)[12].

The *principle of empirical support* requires conceptual frameworks to be both worked out and evaluated in relation to legal reality conceived as a set of empirical events. The problems jurisprudents must cope with should be those that originate from everyday legal practice. The outputs of jurisprudential inquiries must be firmly grounded on experiential data. Jurisprudence must be, in sum, a bottom-up, experience-driven, philosophical investigation. Any belief in conceptual heavens (*conceptualism*), any belief in forms of respectable and fruitful knowledge that would be different from either empirical or formal ones (*anti-naturalism*), and the pursuit of unrealistic utopias so far as normative jurisprudence is concerned (*irrationalism*), must altogether be rejected.

The principles of contact, simplicity and austerity consist in as many complements to the principle of empirical support.

The *principle of contact* requires jurisprudents to avoid conceiving legal philosophy as a bookish enterprise. Books of jurisprudence should not deal solely, or primarily, with other jurisprudential books; they should not be solely, or primarily, "upon other books". On the contrary, jurisprudents should constantly cast their eyes on legal reality, as a (richer) world made of jurists, judges, legislators, administrative officials, and also, of course, people at large with their material and spiritual interests. They should take into account the outputs of the doctrinal study of law and legal sociology. They should be alert to the reality of law in its conspicuous linguistic dimension, taking into account the huge, nuanced, sometimes baffling, discursive stuff that is the main stuff the law is made of. The principle of contact, in sum, stands as a remedy against any dogmatic or (as we may even say) "theological" way of doing jurisprudence. It works as a check against jurisprudents' keenness on turning the discipline into a quotations game, where some (often unfortunate) sentence is raised at the dignity of an eternal statement of some ("necessary") truth about the law and, accordingly, is made the object of interpretations, qualifications, developments or refutations, roughly in the same way as religious dogmas are.

The *principle of simplicity* urges jurisprudents to avoid any magniloquent phrase while pointing to the purpose of their investigations. It sees expressions like "enquiring about the nature", "the fundamental nature", "the essence" or "the charac-

[12] Together, the principle of refinement and the principle of capture suggest an anti-reductionist approach to jurisprudence theory-and-concepts building. They oppose unwarranted theoretical reductionism, to wit, the tendency to underappreciate, overlook, or disregard the complexity of legal systems and legal experience, in order to present them, so far as possible, as structurally simple phenomena. The anti-reductionist jurisprudent, on the contrary, is not on the lookout for «pleasing uniformity of pattern»; she strives instead to retain and display the complexity of legal systems (so far as conceptually warranted by functional and other practical differences, of course) by means of a network of adequately articulated concepts. For a couple of examples of anti-reductionist jurisprudence, see e.g. Hart 1961: 38 ff.; Tarello 1974, part II.

ter" of law, which are supposed to point to as many valuable matters of jurisprudential investigations, as being laden with unnecessary (and possibly obnoxious) ontological suggestions. It requires, therefore, that such forms of words be put down in favour of simpler, ontologically uncompromised, ones (like, e.g., "enquiring about the law"). The principle, in sum, stands up to any non-naturalistic, pre-analytic, "metaphysical" conception of jurisprudence: to any view that still entertains, perhaps unconsciously, the idea of legal philosophy as vested with the role of "the first philosophy" (*philosophia prima*) about the law, as the only enterprise capable of disclosing those "necessary truths" about the law-world, which empirical legal science (and its servant, analytic jurisprudence) cannot even imagine to come close to.

The *principle of austerity* sets a standard of no-exaggeration in the formulation of jurisprudential theses (like, e.g., those concerning the actual role legal rules, interpretation, adjudication, etc., would play in the life of a legal system). If we read this principle together with afore considered principles of empirical support and simplicity, it appears to work as a gap filling instruction, suggesting jurisprudents the proper way of giving word to their discoveries. Such wording, it claims, should not indulge either in metaphors, or, even worse, in forms of expression where the informative content is overwhelmed, disguised or altogether dissipated by the use of combinations of words meant to be shocking for the audience. The principle of austerity admits of no *succès de scandale*. It tolerates no *pour épater les juristes.* Jurisprudence is no literary exercise. It is no words-magic for the amusement of jaded intellectuals and other leisured people. Its claims must be couched in the severe, tightly controlled, language of conceptual precision and empirical reference.

The *principle of separation* requires jurisprudents to avoid any confusion between knowledge and practical action, between description (broadly conceived), on the one hand, and ethical evaluation, prescription and justification, on the other. In the well-known Benthamite terminology, the principle urges legal philosophers to keep expository (descriptive) and censorial (normative) jurisprudence rigorously apart. This, it must be noticed, does not mean arguing *for* descriptive jurisprudence, and *against* the normative variety thereof. The principle of separation does not extoll ethical *Wertfreiheit* as the sole worthwhile posture for a jurisprudent to adopt. As we shall see in a moment, from an analytic standpoint, full-blown jurisprudents should do both. Never, however, in such a way that pieces of normative jurisprudence get smuggled as innocent "discoveries" of the purest descriptive sort[13].

[13] Julie Dickson doubts about the genuinely descriptive character of "descriptive legal theory", arguing for an approach she dubs "indirectly evaluative legal philosophy" (IELP) (see Dickson 2001, Dickson 2006, and, above all, Dickson 2015, where the five "tenets" of IELP are presented). Her preoccupation is sound. It must be noticed, however, that "descriptive", as applied to jurisprudence, may be understood in two different ways. In a narrow sense, "descriptive jurisprudence" is an enterprise strictly devoted to providing (sociological, empirically-grounded) narrations about aspects of the law-world. In a broad sense, "descriptive jurisprudence" is an enterprise devoted to working out general theories of

Finally, there comes the *principle of commitment*. Commitment – one may query – to *what*? The question commands an answer that, at a first blush, may look like an outright violation of the austerity principle. It must be emphasized, however, that the whole history of the analytic approach to legal philosophy suggests the answer I am going to offer. Analytic jurisprudence arises, and thrives down the ages in the works of its supporters, out of the conscious pursuit of an overwhelming, never-to-be completely achieved, goal (a "regulative ideal"); out of the conscious pursuit, if you like, of a realistic utopia. This is the utopia that requires establishing the rule (the dominance) of reason upon positive law and legal thinking. Jurisprudents should bring their own contributions, tentative and passing as they are doomed to be, to that awesome aim. To be sure, a commitment to the rationality of the law-world can be understood in quite different ways, according to the conception of reason, reasonableness, and rationality that is being adopted. The analysts' choice, as we shall see in the next section, goes for a modest but sound variety. They look at reason as "a small light"; but also assume, at the same time, it to be "the only light" that can help turning the law into a better enterprise to human benefit[14].

2. The Statute of Analytic Jurisprudence

A disciplinary statute is a set of sentences that establish the matter, purpose, and tools of the concerned line of enquiry. The several principles reviewed in the previous section play different, sometimes complex, roles in relation to analytic enquiries about the law. In so doing, as we shall see now, they contribute in different ways to defining the disciplinary statute of analytic jurisprudence.

The *principle of commitment*, we have just seen, requires analytic jurisprudents to contribute to the promotion of the rationality of positive law and legal thinking. In so doing, the principle sets up a very broad *purpose* to the enquiries of analytic jurisprudence. From the standpoint of the austere conception of reason I mentioned before (reason as "the small but only light"), that broad purpose needs to be broken down into more precise ones. Five purposes "of detail" come to the mind, which

law, of descriptive and explicatory import, and deprived of any morally justificatory intent. Herbert Hart, for instance, when arguing for the "descriptive" character of legal theory, used that adjectival word in a broad sense. It must also be noticed, in passing, that Dickson's idea of an "indirectly evaluative legal philosophy" looks troublesome. Apparently, by that expression she wants to emphasize that also any genuine theoretical job necessarily involves "evaluations". This is true. These are *epistemic* evaluations, however. Indeed, any serious theoretical job is committed to values like empirical truth, clarity, non-contradiction, explanatory power, intellectual honesty, etc. Commitment to epistemic values can go along with *ethical Wertfreiheit*. Talking of "indirect evaluation" appears, accordingly, un-precise and misleading.

[14] Bobbio 1998: 199.

correspond, respectively, to the *epistemic*, *conceptual*, *methodological*, *instrumental*, and *substantive* dimensions of rationality.

Promoting the *rule of epistemic rationality* requires analytic jurisprudents to further true and reliable knowledge about law and the doctrinal study thereof. Two different tasks must be carried out to that end.

First, jurisprudents should work out realistic general theories of law, of the doctrinal study thereof, and of (assumedly) scientific investigations about it. They should provide true accounts ("descriptions") of the law-world. This task, it must be noticed, has both a *constructive* and a *deconstructive* side. Providing realistic theories requires engaging in a relentless critical assessment of extant theories. In particular, it requires analytic jurisprudents to detect mystifications, whenever they may be afoot, and put them to pieces by means of demystification work.

Secondly, jurisprudents should also take up the role of legal epistemologists. They should enquire about the better ways conceivable of making the law the matter of truly scientific investigations, and put the outcomes of their enquiries into the form of prescriptive legal epistemologies.

Promoting the *rule of methodological rationality* requires jurisprudents to further the accuracy and correctness of legal reasoning, as performed by jurists, judges, officials of the legislative or executive branch, attorneys at law, etc. Accuracy and correctness are to be measured from the standpoint of logic, rhetorics, and sound theories about legal interpretation and legal argumentation, both as to matters of law and as to matters of fact. The rule of methodological rationality over legal reasoning presupposes, accordingly, the working out of realistic theories of adjudication and "legal science" (as doctrinal study of law) in their argumentative dimensions. Its pursuit turns jurisprudents into controllers and reformers of how jurists, judges, and lawyers reason.

Promoting the *rule of conceptual rationality* requires jurisprudents to further the conceptual precision and terminological articulation of legal thinking. In view of this purpose, jurisprudents should perform the tasks identified by the *principles* of *refinement* and *capture* (§ 1 above): extant conceptual-terminological apparatuses must be subject to a relentless work of conceptual precisification (clarification, elucidation) and terminological articulation, aiming at providing legal thinking and legal practice with conceptual structures favouring, at the same time, a better grasp of legal phenomena and a conceptually conscious practice.

Promoting the *rule of instrumental rationality* requires jurisprudents to contribute to making of law an instrumentally rational enterprise. To such an end, jurisprudents should instruct jurists to perform a double task: (a) checking whether extant sets of legal norms (at the national or international level) are instrumentally adequate to the goal(s) they are presumed to serve; and (b) in the negative case, imagining which norms would be instrumentally (more) adequate to such goal(s).

Promoting the *rule of substantive rationality*, finally, requires jurisprudents to promote law's adequacy to a peculiar set of *ethical values*. These are the values that can be argued for as representing the *ideal ethical background*, or the *ideal ethical setting*, of humans as agents endowed with the capacities "reason" stands for: namely, the capacities of calculating causes and effects, means to ends, the consequences necessarily following from given sets of premises, the arguments most apt to persuade or convince an actual or ideal audience, the outputs of adding or subtracting items (be they numbers, physical data, data concerning the human condition and capabilities, data concerning human institutions, etc.). In view of such aim, jurisprudents are required to perform a double task: (a) seeing whether the content of extant laws (at the national or international level) is acceptable to *rational agents*, i.e., from the standpoint of individuals that, due to their being provided with reason, are assumed to be conscious of their dignity as free and equal moral persons; and (b) in the negative case, setting forth reform proposals[15].

After Bentham, we are used to distinguish between expository (descriptive) and censorial (normative) jurisprudence. How do the several tasks of analytic jurisprudence I have just singled out relate to the Benthamite distinction? In very rough terms, the following answer seems to be in order.

(1) The purpose of *epistemic rationality*, insofar as it requires jurisprudents to provide true descriptions of the law-world, and the purpose of *conceptual rationality*, even taking into account that refinement involves a *reconstruction* of extant terminological-conceptual apparatuses (as we shall see in more detail at §§ 3 and 4, below), can be regarded as identifying as many purposes of an *expository*, (broadly) *descriptive*, or *explanatory* variety of analytic jurisprudence.

(2) Contrariwise, the purpose of *epistemic rationality*, insofar as it requires juris-

[15] In his account of the "critical" branch of jurisprudence, Hart, as it is well known, presents the evaluation of law as a two stages process. In the first stage, the only one that is relevant to the present purpose, any positive legal system should be assessed from the standpoint of its being «acceptable to any rational person» individually considered. Acceptability depends in turn, according to Hart, on meeting three conditions. To begin with, the legal system must contain «certain rules concerning the basic conditions of social life»: namely, «rules restricting the use of violence, protecting certain forms of property, and enforcing certain forms of contracts». Furthermore, these rules must satisfy the «procedural requirements» proper of «the rule of law»: i.e., «the principles of legality» (the rules must be general, fairly determinate, publicly promulgated, easily accessible to knowledge, not *ex post facto*), and «the principles of natural justice» (the rules must be applied by impartial judges through fair trials). Finally, the person (the rational agent) who is evaluating the legal system must be among the beneficiaries of the protections and capabilities its rules provide (Hart 1967: 109-116). My other sources for the present conception of what I am calling (the) *substantive* (dimension of) *rationality* are (obviously) Rawls 1971, Rawls 2001, and Alexy 1978. I wish to emphasize that my argument for the rule of substantive rationality over positive law and legal thinking presupposes no claim to ethical objectivity. I take it to belong to a non-objectivist and non-cognitivist metaethical vantage point.

prudents to work out prescriptive legal epistemologies, and the purposes of *methodological rationality*, *instrumental rationality*, and *substantive rationality* can be regarded as identifying as many purposes of a *censorial*, *prescriptive*, or *normative* variety of analytic jurisprudence, though with different, rising degrees of ethical commitment on jurisprudents' part.

The *principles of commitment, refinement, empirical support*, and *contact* conspire to identify the *matter* of analytic enquires, expository or normative alike. These are legal materials and legal thinking. *Legal materials* are what make up "positive law": i.e., municipal legal systems, primitive laws, international law, soft law, etc. They are mostly linguistic materials: constitutional charters, statutes, executive orders, regulations, judicial opinions and decisions, administrative orders, best-practice statements, etc. *Legal thinking* is likewise to be conceived broadly, to include, besides jurisprudential thinking, doctrinal thinking, sociological thinking, views about the law entertained outside of the (inner) legal culture, etc. It is made, again, of linguistic materials in the forms of jurisprudence books, doctrinal essays, sociological, anthropological and historical legal studies, etc.

Up to now, we have seen how several principles of the analytic approach to jurisprudence contribute to defining the *purposes*, the *varieties*, and the *matter* of analytic enquiries upon the law. A few words must be said, to conclude, as to their contribution to designing the *tools* an analytic approach should make use of.

We can look at the *principles* of *ignorance*, *conversion*, *empirical support*, *contact*, *simplicity*, *austerity* and *separation* as representing as many tools of properly carried out analytic enquiries: in particular, of those belonging to the expository variety. They set by what sort of *attitude* (principle of ignorance) and by what sort of *questions* (principles of conversion and simplicity) analytic investigations should start with. They rule upon the *proper direction* of analytic enquiries (principles of empirical support and contact), and the *proper way of formulating* the results thereof (principle of austerity). They warn against any undercover trespassing into the realm of normative jurisprudence: for instance, by working out value-laden pseudo-descriptions of the law-world, or proposing value-laden conceptual reconstructions (principle of separation).

These are not the only tools an (expository) analytic jurisprudent should make use of, however. I have already mentioned that analytic jurisprudents should be able to perform conceptual analysis, as a way of fostering the conceptual rationality of a legal culture, by the twin operations of conceptual precisification and terminological articulation. As anticipated, the two following sections will be devoted to a survey of some tools of analytic jurisprudence (§ 3) and to a more precise account of conceptual analysis (§ 4).

3. Two Sets of Analytic Tools

From the mid-1950s onwards, roughly, after Herbert Hart's appointment to the Oxford chair, (expository) analytic jurisprudence is usually presented as the branch of jurisprudence characterized by resort to "conceptual", "linguistic", or "philosophical analysis"[16].

The identity of conceptual analysis, however, is far from being established even nowadays. Several forms – some richer, some poorer – inhabit the region of philosophical methodology[17], and this fact has fuelled uncertainty also inside of the province of legal philosophy. In such situation, the safer way to proceed seems adopting a bottom-up strategy of enquiry, one that requires identifying and bringing to the fore the tools analytic jurists in fact make use of when they carry out analytic investigations on legal-philosophical issues.

If we cast a glance, even a very shallow one, on the tools actually employed by analytic jurists from Bentham onwards, it seems useful distinguishing two sets of instruments, at least insofar as the expository branch of analytic jurisprudence is concerned. The first set includes tools for the *analysis of legal discourses*. The second set includes tools for the *refinement of extant terminological and conceptual apparatuses*. The two sets of tools, it must be noticed, are not mutually exclusive from a functional standpoint. In fact, some of the tools I put into the bag of those apt for the refinement task can, and do, also work as instruments for the analysis of legal discourses task, and vice versa.

One further precision is in order before proceeding. Whether the tools I am going to review *as a whole*, or, rather, *only a subset of them*, are tools of "conceptual analysis" is an issue to be settled later on: to wit, at the end of the present section and in the next one. It must be noticed since now, however, that whatever solution will come out as preferable, it will be one in tune with the principle of empirical support and the principle of contact.

3.1. Tools for the Analysis of Legal Discourses

Legal discourses are strings of (mostly written) sentences in a natural language, coming from such agents as constitutional assemblies (constitutional charters), parliaments (statutes), officials of the executive branch (executive orders, executive regulations), judges (judicial decisions, judicial opinions), independent administrative agencies (administrative regulations), city councils (local traffic regulations), academic jurists (essays, hornbooks, treatises, commentaries on some legal topic), attorneys at law (writs of summons, "soft law" documents), jurisprudents (general theories of law, theories of justice, natural law theories), etc.

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16 See, e.g, Cohen 1955; Bodenheimer 1956; Cowan 1963; Pannam 1964.

17 See, e.g., Strawson 1962: 320-330.

From the standpoint of the purposes of analytic jurisprudence, the analysis of legal discourses is *a necessary step*: both in view of the refinement of the extant terminological and conceptual apparatus (refining presupposes a fair grasp of what has to be refined), and in view of the performance of its demystification task.

The tools for the analysis of legal discourse analytic jurisprudents put to use in their enquiries compose a quite varied set. It seems worthwhile distinguishing two main subsets. On the one hand, there are tools the identification thereof is the output of (what may be regarded as) a general theory of natural languages[18]. On the other hand, there are tools of (what may be regarded as) hermeneutic investigations.

3.1.1. Tools from the Analytic Theory of Natural Languages

A theory of natural languages is a set of claims purporting to provide true information about their components and the ways those components work as communication tools. The enquiries of analytic jurisprudents typically presuppose a theory of natural languages. From that theory, they draw methodological instructions for the analysis of legal discourses. In what follows, I will provide a very tentative, rough, and rush account of such instructions. In fact, most of them concern distinctions and raise issues so momentous, that they would deserve pages-long treatments.

1. Any fruitful analysis of legal discourses must be equipped with *a theory of words* and *a theory of sentences*, as much developed and sophisticated as possible[19].
2. So far as *words* are concerned, the following notions, distinctions, and related instructions, are to be taken into account by abiding analytic jurisprudents:
   (a) the distinction between *logical terms* (like, e.g., "not", "and", "or", "if … then") and *descriptive terms* (proper names, definite descriptions, ordinary names, adjectives, and verbs);
   (b) the distinction between *concrete* ("real") *terms* (like, e.g., "table", "gold", "elephant") and *abstract* ("fictitious") *terms* (like, e.g., "fortitude", "justice", "legal duty", "legal right", "sovereignty", "legal power", etc.), paying attention to whether abstract terms are being used, inside of the analysed discourse, in ways that present them mistakenly or by guile as concrete ones, and so incurring into an objectivist or substantive fallacy;
   (c) the distinction between *emotively neutral terms* (that do not trigger the passions, emotions or sentiments of hearers/readers, like, e.g., "moved by a monetary interest", "government by universal suffrage and majority rule",

[18] By "natural language" I mean, to the present purpose, any system of communication by means of articulated sounds or the corresponding graphic signs human communities employ, both in their daily linguistic transactions, and as the bedrock on which the specialized languages of scientific and practical disciplines are built up.

[19] A Benthamite mind cast would talk of "terminology" (theory of words) and "sentenciology" (theory of sentences), respectively.

"policemen") and *emotively laden terms* (that trigger the passions, emotions or sentiments of hearers/readers, like, e.g., "greedy", "democracy", "enforcer of law and order"), paying attention to the ways emotively laden terms are used to further mystifications of some aspect of legal reality;

(d) the distinction between *natural kind* ("water", "gold", "tiger"), *functional kind* ("appendectomy", "vulcanization"), and *moral kind* ("marriage", "freedom of expression", "right to the equal protection of laws") *terms*, the meaning thereof would depend on their objective reference, on the one hand, and *conventional terms*, the meaning thereof depends contrariwise on linguistic usages, on the other hand, paying attention to the fact that no term is a self-qualifying entity (no term tells us: "Hey, I am a genuine moral kind term!"), and therefore to the fact that considering a certain term (say, "freedom of expression") as a moral kind term depends not on some hard-and-fast linguistic datum (on "the very nature of things" as somebody may say), but, rather, on a deliberate or unconscious choice by the user and interpreter;

(e) the distinction between *ordinary terms* ("water", "tree", "house", "car") and *technical terms*, proper of specific disciplines, like, e.g., technical legal terms ("trespass", "nuisance", "strict liability"), paying attention to the fact that it can be the case that ordinary terms are being used also to convey specialized meanings, and vice versa;

(f) the distinction between *deontic terms* (like, e.g., "permitted", "obligatory", "forbidden", "authorized", "ought to", "ought not to", etc.) and *other terms that are indexes of a possible prescriptive use of discourse* (like, e.g., "can", "cannot", "sovereign", "penalty", "prison", "fine", "sanction", "punishment", "punished", "republic", "prosecutor", "contract", "wrong", "right", "lawful", etc.), on the one hand, and *non-deontic, prescriptively neutral, terms* (like, e.g., "open", "closed", "tiger", "jogging", "housing", "rocks", "mountain", "seaside", etc.), on the other hand, paying attention to the fact that deontic terms are typically used *both* in sentences expressing legal prescriptions or conceived as legal norm formulations, *and* in sentences *about* legal prescriptions or legal norm formulations.

3. So far as *sentences* are concerned, the following notions, distinctions, and related instructions, are likewise to be taken into account by abiding analytic jurisprudents:

(a) the grammatical-lexical distinction between *ontic sentences* (indicative sentences not containing deontic terms, like, e.g., "Whoever trespasses into another person's property is punished with a 500€ fine")[20], *deontic sentences*

[20] Notice that this sentence does contain many terms that, though not deontic, are nonetheless indexes of a possible prescriptive use of discourse. This fact would suggest to distinguish between *purely* ontic sentences, and *prescriptively biased* ontic sentences.

(indicative sentences containing deontic terms, like, e.g.: "Trespassing into another person's property is forbidden", "Whoever trespasses into another person's property ought to be punished with a 500 € fine"), and *imperative sentences* ("Punish whoever trespasses into another person's property with a 500 € fine"), paying attention to the fact legal norm formulations and legal prescriptions are not necessarily put in the form of deontic or imperative sentences;

(b) the functional distinction between *descriptive sentences*, conveying true or false pieces of information about the world (like, e.g., "The Civil Code contains 2367 articles"), *prescriptive sentences*, conveying instructions about what can, ought to, ought not to, be done (like, e.g.: "Civil Code provisions ought to be construed liberally"), and *constitutive sentences*, that immediately realize a certain state of affairs (like, e.g.: "The Civil code is hereby derogated"), paying attention to the fact that the descriptive, prescriptive and constitute uses of discourse are just a few ways of using a language, though apparently the most relevant ones to the analysis of legal discourses;

(c) the semantic distinction between *empirical sentences*, which are true or false in relation to how the piece of empirical reality they purport to describe in fact is, and *analytic sentences*, which contrariwise are true or false in relation *either* to the meanings of the words they are made of (like, e.g., "Spinsters are unmarried women"), *or* to their syntactic structure (like, e.g., "Harry likes seafood and does not like seafood"), which suggests analytic jurisprudents to be alert about the fact that the correctness of a sentence does not necessarily depend on its (direct) correspondence to states-of-affairs;

(d) the semantic-syntactic distinction between the *grammatical form* of sentences (the form they happen to have in a given piece of discourse) and the *logical form* of sentences (the form that exactly corresponds to their actual syntactic structure, full meaning, and pragmatic force in a communicative context), paying attention to the fact they do not necessarily coincide; that it may happen contrariwise that, inside of an actual discourse, prescriptive sentences be formulated by means of ontic sentences, and descriptive sentences by means of deontic ones[21];

(e) the semantic distinction between *first-order sentences* (which are immediately about some behaviour or state of affairs, like, e.g.: "Citizens ought to go to the Opera house every Sunday") and *meta-sentences* (which, contrariwise, are about other sentences: "The norm 'Citizens ought to go to the Opera

[21] For instance, the grammatically descriptive sentence 'He is out' may be used, in contexts like a cricket game, not to *describe*, or *state*, that somebody is out, but to *pass a judgment* to that effect. On this issue, see, e.g., Hart 1954: 21 ff., Hart 1955: 258 ff., Hart 1961: ch. I, Hart 1967: 89 ff., Hart 1970: 269-277, Hart 1983b: 1-6, Guastini 2011: 2-7, Jori, Pintore 2014: 4-9.

house every Sunday' is hereby declared void and null"), paying attention to the fact that sentences inside of a legal discourse, far from dwelling all on the same semantic level, can belong to several different levels of discourse[22];

(f) the fact that *descriptive sentences* and *prescriptive sentences* are *heterogeneous* communication items. The former, as we have seen, serve to convey people pieces of information about the world, saying them how the world is, was, or (probably) will be; they are true or false according to whether what they say is, or is not, the case, has, or has not, the declared probability to be the case; they elicit attitudes of theoretical acceptance, reject, or doubt. Contrariwise, the latter serve to make people doing something; they are neither true nor false, but, when legal prescriptions are at stake, possible or impossible to comply with, efficacious or not efficacious, legitimate or illegitimate, just or unjust, etc.; they elicit practical attitudes of acceptance or rejection, consisting in a disposition to comply or not to comply with them;

(g) the fact that, provided descriptive and prescriptive sentences are heterogeneous, no genuinely prescriptive conclusion (like, e.g.: "Freedonian citizens ought to go to the Opera house every Sunday night") can be logically derived by sets of genuinely descriptive (and non-contradictory) premises (like, e.g.: "There is a parliament in Freedonia", "The Freedonian parliament has enacted a law according to which Freedonian citizens ought to go to the Opera house every Sunday night") (so called Hume's Law or Hume's Guillotine);

(h) the fact of *linguistic indeterminacy* of the sentences in a natural language, that is due to syntactic, semantic or pragmatic ambiguity, as well as to the actual or potential vagueness of concepts[23]; though analytic jurisprudents should be aware that the linguistic indeterminacy of the sentences that are norm-formulations (like, e.g., the provisions of a constitutional code) is not the only form of indeterminacy to be considered; that there is always the possibility of legal provisions being indeterminate not linguistically, but rather from the standpoint of powerful material or spiritual interests and conspiring juristic theories and constructions (*juristic indeterminacy*);

(i) the fact that strings of sentences inside of a legal discourse may instantiate different types of reasoning, like, e.g., deductive reasoning, analogical reasoning (in the sense of epistemology), inferences to the best explanation, or rhetorical (*a contrario*, *a simili*, *a fortiori*, etc.) reasoning (*reasoning pluralism*);

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[22] A relevant, law-peculiar, instance of the distinction between sentences and meta-sentences is the distinction between *norms* and *normative propositions*, i.e., between sentences coming from some normative legal authority that, for instance, express prescriptions concerning the behaviour of a person or a class of persons, on the one side, and sentences coming from jurists or legal sociologists that, for instance, inform about the enactment, efficacy, or validity of norms, on the other side.

[23] See, e.g., Hart 1961: chs. I and VII, Hart 1954: 26 ff., Hart 1970: 269-271, 274-275, Nino 1983: 259-268.

(j) the fact that the instances of legal reasoning formulated inside of judicial opinions or doctrinal essays are often *enthymematic* strings of sentences, i.e., logically incomplete sets, which suggests abiding analytic jurisprudents should identify and bring to the fore the missing premises, as a way to make judicial and juristic reasonings amenable to rational criticism.

3.1.2. Tools of Hermeneutic Investigations

Hermeneutic tools work as complements to the tools suggested by the theory of natural languages, in view of making a powerful methodological equipment available to analytic enquiries. They reflect the twin interest of analytic jurisprudents in anthropological philosophy (the use of anthropological tools in philosophical enquiries) and philosophical anthropology (the converse use of philosophical methods to construct and sharpen anthropological tools), fuelled by the spell, and promise, of contemporary developments in the social sciences[24]. It is precisely at this crossroads of perspectives that the distinction between the *internal* and the *external* points of view as to any set of social norms comes out. Following Hart's lead, analytic jurisprudents should reject any purely behaviouristic conception of the external point of view, favouring instead a hermeneutic one. A wise *observer*, as any analytic jurist must be, is not to be content with recording the non-linguistic behaviour of *participants* or *users* to a social, rule-governed, practice. She should also crucially take into account the participants' *use* of normative language and their normative concepts. Furthermore, by means of a process of identification (*Einfühlung*, *immedesimazione*), she should even put herself in the participants' own shoes, as it were, in order so far as possible to understand *their* normative structures as *they* themselves understand them[25].

The observer-participant divide is connected to another key distinction analytic jurisprudents do (should) pay attention to. This is the distinction between *descriptive* sentences *about* a normative set (*external* statements of fact about the rules and rules-oriented behaviours and attitudes of the system's officials and subjects), on the one hand, and *applicative* sentences *grounded on* the (pretended) content of some normative system (*internal* statements, made by *users* of the rules or norms of some given normative system, like, e.g., statements of what duties, rights, liabilities, etc. a person has under that system, statements «assessing» situations «by reference to rules» assumed to be valid legal rules of the system), on the other hand[26].

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[24] See, e.g., Hart 1961: 289, where, besides P. Winch (Winch 1958), he also quotes an essay by R. Piddington on B. Malinoswki's theory of needs, and p. 291, where works by Malinowski, A.S. Diamond, K.N. Llewellyn and W. Hoebel are quoted.

[25] See, e.g., Hart 1961: 88 ff., 239 ff., Hart 1961: 247-249, Hart 1982: 106-161, Hart 1983b: 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 which we watch'; the latter amounts instead to 'participating in the game' (Kant 1970: 542).

[26] See Hart 1955: 247 ff., where, at p. 248, we read: «We can contrast the "external" standpoint of

3.2. Tools for the Refinement of Extant Juridical Terminological and Conceptual Apparatuses

Also this subset of tools is, really, a quite mixed bunch. Four main subsets are worthwhile considering, namely: (1) a theory of concepts, (2) a theory of definition, (3) a theory of classification, and, last but not the least, (4) a theory of philosophical imagination.

3.2.1. A Theory of Concepts

Analytic jurisprudents should adopt a theory of concepts characterized by three backbone ideas.

First, concepts are a matter of either convention or stipulation. Outside of the realm of common (ordinary or specialist) uses of words, there are no true concepts. Differently from what had been maintained by the adherents of *Begriffsjurisprudenz*, endorsing *conceptualism* (see § 2 above), concepts are not to be found in some rarefied dimension of «real essences»[27].

Second, stipulated concepts are neither true nor false. Stipulations are to be assessed instead in terms of whether they are pragmatically justified; their value, if any, depends on the goal(s) they are meant to serve, and on whether they prove to be actually useful to such goal(s). Analytic jurisprudents should endorse a pragmatic view of concept (pragmatic conceptualism).

Third, theoretical concepts, like those worked out by expository analytic jurisprudence, should be stipulated concepts informed by an overall explicatory, refinement, goal. They should amount, accordingly, to weak stipulations, meant not to depart altogether from the ways the redefined concepts are ordinarily understood, but to provide improved, puzzle-solving, versions thereof[28].

3.2.2. A Theory of Definition

Analytic jurisprudents should adopt a theory of definition resulting from the combination of classical theory, Bentham's path-breaking account of fictitious terms (like "right", "duty", "power", "responsibility", etc.) and method of paraphrasis (a specific method of definition in use)[29], and the contributions of contemporary linguistic philosophy[30]. It revolves around three ideas.

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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 Hart 1954: 27, Hart 1961: 56-57, 88-90, 102-105, 109-110, 115-117, 291, Hart 1983b: 13 ff.

[27] See, e.g., Hart 1970: 265-277.

[28] See, e.g., Carnap 1950a: 1-19, Hempel 1952: 2-20, Robinson 1954; Scarpelli 1955: 35-70, Hart 1961: 213-214, Hart 1970: 269-271.

[29] See Bentham 1776: ch. V, para. 6, n. 1, Hart 1970: 272.

[30] Hart 1961: 279-280.

First, there are several different forms of definition. There are, particularly, forms of definition other than definition *per genus et differentiam specificam* (definition by kind and specific difference) – to wit, contextual definition (definition in use) and standard or central-case definition – which are more suitable to define legal terms, since they either do not refer to any definite object in reality (compare, e.g., "duty", "right" and "corporation" with "elephant", "triangle", "table", "gold", etc.), or no clear *genus*, no closed set of common necessary and sufficient properties, is available to characterize their reference (like, e.g., is the case with 'punishment')[31].

Second, good definitions – so far as legal terms are at stake – are *explanatory* or *explicatory definitions*. These provide instruction both about how the term being defined is (or may be) used, and about the things to which the term refers. They are not just «about words»: on the contrary, they are to be meant to «make explicit the latent principle which guides our use of a word» and should possibly «exhibit relationships between the type of phenomena to which we apply the word and other phenomena»[32].

Third, following John Austin, attention must be paid not to fall prey of the "definitional fallacy": i.e., of the methodological blunder of pretending to solve some complex theoretical problem – like the long-standing problem "What is law?" – by way of the sentences that make up the definition of a term (e.g., by providing a strictly conceived, therapeutic-regulatory, definition of "law")[33]. At the heart of every theory, of course, there are definitions of key-terms[34]; but no theory can be superseded by definitions, nor should be «built on the back of it»[35].

3.2.3. A Theory of Classification

Since Bentham, analytic jurisprudents should also master the know-how for properly building up new terminological and conceptual apparatuses. These should

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[31] Hart 1961: 15, Hart 1968: 4-5.

[32] Hart 1961: 13-14, 214-215.

[33] See Austin 1832: 370-371, Hart 1954: 25-26, 26 ff., 47 fn 28, Hart 1961: 16, 213-214, Hart 1963: 2-3. In the latter work, Hart recalls the importance of reflexion upon «the criteria for judging the adequacy of a definition of law», and considers definitions aiming «to provide, by marking off certain social phenomena from others, a classification useful or illuminating for theoretical purposes». The passage, however, must be read against other passages in Hart 1961 (15, 213-214), where Hart insists on the difference between providing a *concept* of law and providing a *definition* of law: «It is because we make no such claim to identify or regulate in this way the use of words like "law" or "legal", that this book is offered as an elucidation of the concept of law, rather than a definition of "law" which might naturally be expected to provide a rule or rules for the use of these expressions» (213).

[34] According to Hart, for instance, adequate descriptive theories of social phenomena like law are made of three basic ingredients: definitions of key terms; empirical statements about *passing features* of the world («ordinary statements of fact»); and empirical statements 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 1961: 199-200.

[35] Hart 1954: 23 ff., Hart 1961: 13 ff., 279-280.

be arranged in such a way as to identify, at every classificatory level, mutually exclusive and jointly exhaustive classes of individuals. Analytic jurisprudents should abide by such a technique, for instance, when drawing general theories of legal norms[36].

3.2.4. Explanatory and Constructive Imagination

The purposes of refinement and demystification analytic jurisprudents should pursue (see § 2 above) makes a combination requiring them to carry out also investigations that are similar to those of so-called descriptive and reformatory metaphysics – really, as we shall see now, two forms of "conceptual", "linguistic", or "philosophical" "analysis"[37].

Descriptive metaphysics purports to bring to the fore (expose) and explain the basic or fundamental *conceptual structure* of our thought and discourse. This structure is (assumed to be) presupposed in our everyday talks (and thoughts), whenever we use, as we currently do, terms having to do with identity, existence, knowledge, space and time, cause, effect and the temporal order of objects, mental states, moral properties, classes of individuals in the animal or vegetable kingdoms, etc. "Descriptive metaphysics", it must be noticed, is a belittling label. Indeed, such inquiry must not only identify and provide an accurate *report* about the several basic concepts we make use of, and their mutual relationships. It should also *explain* why, at any given time, we have the basic conceptual structure we do. In view of these objectives, it must go beyond description in a proper or narrow sense. On the one hand, it must bring to the fore, and cure, the perplexities that may arise in the use of basic terms and concepts, performing a *therapeutic function*. On the other hand, in order to explain *why* we have the basic conceptual structure we in fact do, it must perform thought-experiments of *explanatory counter-factual imagination*. It must imagine what the basic conceptual structure would be like, if (we) humans and the world we live in were different.

Reformatory metaphysics purports to see whether the basic conceptual structure we have could be changed for the better, from the standpoint of the way we (and our world) in fact are, and the interests we in fact have. Reformatory metaphysics is parasitic on descriptive metaphysics. Its investigations start where the latter's end (though, saying it in passing, from a diachronical perspective they are both doomed to be never-ending enterprises). Its basic tool consists, again, in performing thought-experiments. In this case, however, they are experiments of *construc-*

[36] On classification see, e.g. Bentham 1817.

[37] The distinction between "descriptive" and "reformatory" metaphysics is drawn and fleshed out by P. F. Strawson in several essays: see, e.g., Strawson 1959: 9-12, Strawson 1962: 105-118, Strawson 1985: chs. I-III. These essays, together with Strawson 1956, provide the basis for what I am going to say in the text.

tive imagination, which are meant to set forth a different and improved conceptual structure.

Analytic jurisprudents are not philosophers *sans phrase*. Their lot consists, rather, in philosophizing about that specific province of social reality that is the law-world. They are local philosophers, dealing with local conceptual apparatuses, ontologies, and epistemologies. By now, however, it should be clear why some at least of their investigations should be similar to those of descriptive and reformatory metaphysicians. The matter of their enquiries, we have seen (§ 2 above), is the extant terminological-conceptual apparatus legal cultures happen to make use of, together with legal thinking in its mystifying capabilities. The purpose of refinement requires conceptual description together with exercises in explanatory and constructive imagination. The purpose of demystification requires, in turn, conceptual description and therapeutic proposals[38].

3.3. The Tools of Analytic Jurisprudence and Conceptual Analysis

How do the several sets of tools above (§§ 3.1 and 3.2) fare in relation to "conceptual analysis"? Are they amenable to it? Or, contrariwise, do they compose a methodological box of their own, to which such a label would be inappropriate?

There is to be sure no objectively true notion of conceptual analysis that could help us out the riddle. In the next section, I will argue, by way of proposal, that the tools I have considered can reasonably be regarded, as a whole, as the instruments of a useful variety of conceptual (linguistic or philosophical) analysis in the service of profitable legal philosophical inquiries.

4. A Modest and Reconstructive Variety of Conceptual Analysis

In a well-known collection of essays, Brian Leiter makes a pressing call for a "naturalized jurisprudence"; this aims «to describe the reality of legal phenomena»,

[38] Hart, for instance, regards, and uses, philosophical imagination as a main tool of his " descriptive jurisprudence", believing that adequately devised thought-experiments may throw much light on our actual conceptual and institutional structures by comparing them to alternative imaginary situations. The use of thought-experiments is manifest in at least three points in Hart's theory: first, in his reconstruction of the simple model of law as a coercive order; second, in his idealized picture of a primitive, pre-legal, society governed only by a set of unconnected primary rules (a prelude of sorts to Nozick's invisible-hand explanation for how the emergence of state out of a Lockean state of nature: Nozick 1974: part I); third, in his account of the "minimum content of natural law" (the «empirical theory of natural law» which Hart sets against both traditional natural law theory and Kelsenian positivism): see Hart 1961: 18 ff., 91 ff., 193 ff. Cf. also Hart 1970: 270-271, Hart 1983b: 12, 13-14. It is worthwhile noticing that, in his enquiries of reformatory analytic jurisprudence, Hart also makes use of a further principle: the principle of anti-reductionism. This principle conspire with the refinement and capture principles. See § 2 above, footnote 11.

and poses as the heiress to American Legal Realism and Quine's empiricist philosophy of science[39]. In so arguing, Leiter urges the abandonment of the «method of conceptual analysis via appeal to folk intuitions»[40]. He claims that method to be doomed to failure, *if* one is looking for a philosophically valuable explanation of the "nature" or "essence" of law: that is to say, if one wishes to get at "necessary truths" about the law, as many *soi-disants* analytic jurisprudents, in recent times, seem fond to do[41].

At first blush, Leiter's case for a naturalized jurisprudence, and against conceptual analysis, may appear as casting a sinister light on the enterprise of analytic jurisprudence, as I have reconstructed it so far.

Upon reflection, however, that is not the case. Leiter's darts aim at conceptual analysis (based on folks' intuitions) as an instrument of analytic enquiries that look for a philosophically valuable explanation of the "nature" or "essence" of law, and

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[39] See Leiter 2007: 183 ff., Leiter 2012, Langlinais, Leiter 2013. On conceptual analysis in (and) jurisprudence, see also Endicott 2002: § 3.1, Bix 2007: 1-7, Marmor 2012: 1-26.

[40] Leiter 2007: 1-2: «the method of conceptual analysis via appeal to folk intuitions (as manifest, for example, in ordinary language), a method that was itself at risk of becoming an item of antiquarian interest in the context of the naturalistic revolution of late 20th century philosophy»; Leiter 2012: § 2: «The question that plagues conceptual analysis, post-Quine, is what kind of knowledge such a procedure actually yields? Why should ordinary intuitions about the extension of a concept be deemed reliable or informative? Why think the "folk" are right?».

[41] Leiter 2007: 177-178, 196-197, where, discussing Ian P. Farrell's defence of the Hartian search for "the concept of law" as a worthwhile piece of "modest conceptual analysis", retorts: «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 […] *Modest* conceptual analysis illuminates our concepts – our *talk*, as it were – not the referent we might have intended to understand» (italics in the text, ndr). See also Leiter 2012: § 2. Leiter's criticism is in order, when, by "modest conceptual analysis", necessary truths about aspects of reality are looked for. It does not do, contrariwise, when, following J. L. Austin's suggestion (J. L. Austin 1956-7: 129-130), such an ambitious, and mysterious, task is put down, and a «sharpened awareness of words» is looked for in order to «sharpen our perception of the phenomena», though «*not as the final arbiter of*» (italics added; the passage, without this last, quite relevant, qualification, is quoted by Hart in the opening page of the "Preface" to *The Concept of Law*: Hart 1961: vii). For a defence of "traditional conceptual analysis" in jurisprudence, like the one performed by Hart 1961, against Leiter's naturalistic attack, see Himma 2005: 1-23, Himma 2015: 65-92. Himma's defence, however, looks flawed. It sets forth an apparently inconsistent view of "traditional conceptual analysis": on the one hand, it would be just about "our" concept of law, and hence would be tied, and limited, to a contingent, changeable, local, experience; on the other hand, it would lead, mysteriously, to making metaphysical claims about the nature or essence of law in general, telling us metaphysical, necessary, truths «about not just all *existing* legal systems, but all *conceptually possible* legal systems. Thus conceived, a conceptual analysis of law consists in a set of conceptually (or metaphysically) necessary truths and thus constitutes a piece of metaphysical theorizing – just as an analysis of the concept of free will is a piece of metaphysics» (Himma 2015: § 5). In the same passage, Himma also presents Hart as a torchbearer of such a metaphysical conceptual analysis. This view, nowadays common among jurisprudents, is nonetheless disputable. See, for instance, Marmor 2012, who advocates that the basic thrust of Hart's jurisprudence was not conceptual analysis, but reductionism. I have argued against the "essentialist" reading of Hart's conception of conceptual analysis in Chiassoni 2012: § 2.2, and Chiassoni 2016b: 61-71.

wish to unearth "necessary truths" about the law. It should be clear, then, that such a way of conceiving analytic jurisprudence is not the way I have outlined in the preceding sections. Indeed, its research program flies in the face of the principles of simplicity and austerity (§ 1 above). Nonetheless, Leiter's criticism is welcome, for it elicit a well-needed work of precisification.

Let's start from the fact that distinct forms of conceptual (linguistic, philosophical) analysis are conceivable. Provided that that is the case, two pairs of opposite varieties present as worthwhile considering. Very roughly speaking, we can draw a line between conceptual analysis of a (purely) descriptive *or* of a reconstructive character, on the one hand, and conceptual analysis of grand *or* of modest ambition, on the other.

Descriptive conceptual analysis inquires on current conceptual and terminological apparatuses with the aim of clarifying and precisifying their scope in the light of the "intuitions" of those who make daily use of them ("the (mythical) folks"), whatever such intuitions may be[42]. Folks' intuitions (their methodologically unaccountable "sense" about objects and concepts) are paramount: they both delimitate the ground, and determine the output, of the inquiry[43].

Reconstructive conceptual analysis, by contrast, investigates current conceptual and terminological apparatuses with the aim of eventually and ultimately replacing them with "better" ones, from the standpoint of the rational values of simplicity, clarity, precision, empirical adequacy, consistency, coherence, comprehensiveness, explicatory force, and adequacy to the (presumed) purposes of the "game(s)" they are played in. Reconstructive conceptual analysis, to be sure, also takes into account "folks' intuitions" (if we like to call in that way people's ordinary ways of thinking), as they are fatally embodied in, and mirrored by, linguistic practices. In doing so, however, it assumes those intuitions may back a conceptual and terminological apparatus in need of rational repair (rational reconstruction, rational revision).

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[42] See Leiter 2007: 1-2, 183-199; the basic source for intuitionist conceptual analysis is Jackson (1998), especially chap. 2.

[43] According to Jackson, (intuitionist) «conceptual analysis» is needed, if we want to «have much of an audience», and do not want turning «interesting philosophical debates into easy exercises in deduction from stipulative definitions together with accepted facts». If, for instance, our problem is about free action and determinism, the only fruitful way to proceed is by asking «whether free action *according to our ordinary conception*, or something suitably close to our ordinary conception, exists and is compatible with determinism» (Jackson 1998: 30-31, italics in the text). The ascertainment of our (or folk's) conception of free action, in turn, requires appealing to ordinary, shared, intuitions, which reveal «our shared theory» (Jackson 1998: 31-32, 46 ff.). This can be carried out by means of introspection and, above all, socio-psychological inquiries. It is worthwhile stressing that, according to Jackson, «in practice», «the role» he is «recommending for conceptual analysis will often be *very* like the role Quine gives to the [Benthamite] notion of paraphrase» (Jackson 1998: 46). In the light of such remark, the case against "conceptual analysis" *à la* Jackson from Quinean perspectives seems, at least partly, the fruit of an uncharitable exaggeration.

Grand conceptual analysis is the Platonist-flavoured enterprise that, by way of linguistic-conceptual enquiries, presumes to be capable to «reveal» the «a priori», «necessary», «conceptual truths» about «the way things are and the way the mind works»[44].

Modest conceptual analysis, by contrast, characterizes for endorsing the following views:

(a) it conceives of linguistic-conceptual enquiries mainly as a way to know the ways of thinking, and the sets of beliefs and attitudes, that are embodied in on-going conceptual and terminological apparatuses;
(b) it grants to on-going apparatuses only a presumptive epistemic value, since it assumes that the intuitions (beliefs, attitudes) they mirror may be inchoate, confused, contradictory, idle, superstition-laden, wrong as a matter of fact, or otherwise flawed, so that such apparatuses may provide a misleading way to look at the natural or social phenomena they concern;
(c) it adopts a conventionalist and pragmatist conception of conceptual sets[45];
(d) it does not look for "necessary", "a priori", "conceptual truths" about reality, but is content to look for the (relatively) constant features thereof as they are mirrored in on-going sets of concepts[46].

Nonetheless, modest conceptual analysis is more than a "glorification" of lexicography, though it may walk some way along with it. It does not aim at «teaching the use of sentences»; it does not wish making its readers «profit by the sentences» that they «see or hear», or helping them «react to» sentences «in expected ways» and «emit sentences usefully»[47]. Rather, it aims at providing its readers with improved, better, ways of thinking at some natural phenomenon or human undertaking, as observers or acting subjects ("participants") alike.

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[44] These words, by which I characterize what I call "grand conceptual analysis", are from Smith Churchland 2013: xi-xii.

[45] Such a conception of «linguistic frameworks» is defended, for instance, by Rudolf Carnap. In his view, many questions which are presented as «*theoretical* questions» (like, e.g., the question «"are there natural numbers?"»), should be interpreted as «*practical* questions, i.e., as questions about the *decision* whether or not *to accept a language* containing expressions for the particular kind of entities» at stake (italics added, ndr). In his view, «whether or not» a «linguistic framework» should be introduced depends on the purposes one is aiming at, and «is a practical question of language engineering, to be decided on the basis of convenience, fruitfulness, simplicity, and the like» (Carnap 1963: 66. See also Carnap 1950b: 205-221).

[46] Smith Churchland 2013: xi-xiv. «So what is a philosopher to do, if not troll his mind for conceptual truths? The Quinean answer is this: *many* things, including synthesizing across various subfields and theorizing while immersed in and constrained by available facts. Despite much hand-wringing by overwrought philosophers, Quine did not aim to put an end to philosophy, but to remind us of what the older philosophical tradition had always been: broad, encompassing, knowledgeable of everything relevant, and imaginative» (xiv, italics in the text). For a condensed account by Quine himself, see e.g. Quine 1960: 275-276.

[47] Quine 1992: 56-57.

By combination, four complex forms of conceptual analysis result, namely: *grand and descriptive* conceptual analysis; *grand and reconstructive* conceptual analysis (ascribing to reconstruction the mysterious virtue of being capable to get at "conceptual truth about reality"); *modest and descriptive* conceptual analysis (which amounts to something very close to lexicography); and, finally, *modest and reconstructive* conceptual analysis [48].

The statute of analytic jurisprudence, as I roughly outlined it in § 2, and the tools such enterprise should employ (§ 3 above), suggest its commitment to something very close to the modest and reconstructive variety of conceptual analysis. This variety can be presented as proceeding by means of enquiries articulated in the three stages of *conceptual detection*, *conceptual reconstruction*, and *conceptual therapy*.

First, there comes the stage of *conceptual detection*, or conceptual analysis in a narrow sense – what J.L. Austin proposes to call "linguistic phenomenology"[49]. Here, the on-going terminological and conceptual apparatus that is the matter of the enquiry is identified, analysed, and its rational virtues and flaws dispassionately brought to the fore. Here, the several tools for the analysis of legal discourses (§ 3.2 above) are to be put to work. Conceptual detection paves the way for the two following steps.

Second, there comes the stage of *conceptual reconstruction*. Here, the on-going terminological and conceptual apparatus is modified into a new one, that is capable of replacing it, but does, and should do, roughly the same job of the on-going one, though in a better, more rational way – for instance, due to its finer articulation in a larger, more comprehensive, set of terminologically distinct and semantically clearer and more exact concepts. Here, the several tools for conceptual and terminological refinement (§ 3.3 above) are to be put to work. Conceptual reconstruction aims at the refinement and capture purposes of analytic enquiries.

Third, and finally, there comes the stage of *conceptual therapy*. Here, the use of the reconstructed and replacing conceptual and terminological apparatus set forth in the second stage is recommended, and carried out, as a way-out from the (supposed) rational flaws of the on-going one[50]. Conceptual therapy satisfies the demystification purpose of analytic enquiries.

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[48] Ian P. Farrell (Farrell 2006) apparently advocates the third variety. Leiter criticizes both forms of (what I call) descriptive conceptual analysis, i.e., the grand and the modest one, while recognizing, following Larry Laudan, the usefulness of something like the modest and reconstructive variety I stand for here (see Leiter 2007: 183 footnote 3, and 133 footnote 45, 168 ff., 179-181, where, in line with a central, though apparently overlooked, tenet of Logical Positivism, he regards philosophy as «the abstract branch of successful scientific theory […] the abstract and reflective part of empirical science»; Leiter 2008).

[49] J.L. Austin 1956-57: 130.

[50] My view of conceptual analysis may look a piece of eclecticism, where suggestions from Bentham, Russell, Carnap, Quine and Strawson, among others, are put together in a sort of mental patchwork. It is indeed. In fact, I do not care for strict philosophical allegiance. I care for (hopefully) smoothly working tools for (hopefully) fruitful jurisprudential investigations.

5. Analytic Approach v. Essentialist Jurisprudence

The virtues of the analytic approach appear in full light as soon as we cast a glance upon ways of doing legal philosophy that fly in the face of it, in the name of (assumedly) more "philosophical", more "robust", more "interesting" investigations.

In view of supporting this claim of mine, in this final section I will compare the analytic approach with an instance of essentialist approach to an issue jurisprudents usually regard as paramount: to wit, "the concept of law" issue[51].

When jurisprudents set to the task of inquiring about "the concept of law", it happens quite frequently that they understand such an investigation differently. Four different ways of inquiring upon the concept of law are worthwhile considering[52].

To begin with, an investigation upon "the concept of law" can be conceived as a lexicographic research upon the actual meaning(s) (or communicative content(s)) of the word "law" and the corresponding expressions in other modern languages, like, e.g., *derecho*, *direito*, *diritto*, *droit*, *prawo*, *Recht*, etc.[53]

Secondly, an investigation upon "the concept of law" can be conceived as an enquiry aimed at the precisification (clarification, elucidation, rational reconstruction) of the meaning(s) associated to the word "law" in a certain legal culture, in such a way as to furthering jurists' and people-at-large' understanding about it and the phenomena it refers to[54].

Thirdly, an investigation upon "the concept of law" can be conceived as an en-

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[51] In the words of Uberto Scarpelli (Scarpelli 1955: 35): «the definition of law, and the analysis of the relationships between the concept of law and the concepts of justice, morality, economics, politics, etc., are the matter of an ancient and always renewed dispute». Likewise, according to Robert Alexy 2008: 281: «The debate over the concept and the nature of law is both venerable and lively. Reaching back more than two millennia, it has acquired in our day a degree of sophistication hitherto unknown».

[52] Throughout this section, I will deal with the concept or concepts of law conceiving them as linguistic entities: as the meaning(s) or communicative content(s) associated to the word "law" and corresponding expressions in other natural languages. In so doing, I do not wish to enter into the ontological dispute about the nature of concepts (whether, in particular, they are psychological entities or something else) – which, by the way, is often loaded with obscurity, baffling definitions, metaphors, and mental cramps. I will assume that, whatever conception we take, concepts always have a linguistic side: whatever they are, they are, and work as, the meaning(s) or communicative content(s) of "descriptive", "predicative", "categorical", or "class" terms. On the ontologies of concepts, see e.g. Carnap 1932: 60-81, Margolis and Laurence 2011: para 1, Lalumera 2009: 29-95, Moreso 2017: 63-99, drawing on Margolis and Laurence 2011, and referring to the conceptual pluralism about the law advocated by Carlos Santiago Nino (Nino 1985, Nino 1994) and Ronald Dworkin (Dworkin 2006, Dworkin 2011). In passing, Gottlob Frege appears to dismiss the ontological issue in the turn of a few, crystal-clear, lines: «The word "concept" is used in various ways; its sense is sometimes psychological, sometimes logical, and sometimes perhaps a confused mixture of both. Since license exists, it is natural to restrict it by requiring that when once a usage is adopted it shall be maintained» (Frege 1892: 42).

[53] See e.g. Tarello 1993a: 5-10, Guastini 2011: 15-18.

[54] See e.g. Hart 1954: 21-26, Hart 1961: vi-vii, 213-237, Scarpelli 1955: 36-38, 67-119, Tarello 1993a: 10-12, Tarello 1993b: 109-119, Guastini 2011: 15-18, Jori, Pintore 2014: 41-56.

quiry meant to providing a proper (adequate, accurate, useful) definition of one or more meanings of the word "law": i.e., one in tune to what the legal philosopher considers as needed in view of certain explicatory, reconstructive, demystifying, or normative purposes at hand[55].

Fourthly, and finally, an investigation upon "the concept of law" can be conceived as an enquiry aimed at identifying the concept of law (the meaning of "law") that is (truly) adequate to the very nature or essence of law[56].

The four lines of investigations understand "the concept of law" differently.

From the standpoint of *lexicographic enquires*, "the concept of law" is tantamount to the meaning(s) corresponding to the actual uses of the word "law" or homologous words in other natural languages. The correctness of the concept of law, here, is a matter of empirical truth. A lexicographic concept of law is true, if, and only if, the word "law" is being used in fact, inside of the relevant communities, as the lexicographic jurisprudent says it is[57]. Though they may appear idle, lexicographic enquiries are the bedrock of analytic legal philosophy. Usually, they provide the empirical data making up the starting point for conceptual investigations of the second (precisification) or third (stipulative) kind[58].

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[55] See e.g. Williams 1945: 134-156, Kantorowicz 1958: 37-49, Hart 1961: 209-212, Nino 1994: 17-42; Jori, Pintore 2014: 45-46, where they deal with the stipulative approach as "idiosyncratic conceptual manipulation", leading to "idiosyncratic concepts of law", as opposed to the "minimal", "common sense" concept that can be identified by means of lexicographic enquiry. A stipulative approach, based on sound empirical knowledge about legal experience, is apparently endorsed also by Frederick Schauer in his crusade for considering coercion «not strictly necessary but so ubiquitous that a full understanding of the phenomenon [of law, ndr] requires that we consider it» (Schauer 2015: 40; see also Schauer 2018: para 1: «humans can remake or modify the very concept of law that exists within some community»).

[56] See e.g. Alexy 2008: 281-299, Alexy 2001, Alexy 2006: 73-98, Alexy 2017: 314-341.

[57] In perhaps more precise terms, a lexicographic concept of law is true of the word "law" when the corresponding lexicographic sentence is true: namely, when a sentence of the form "According to the linguistic uses of 'law' in time t_i and place p_j, 'law' means l_i" is empirically true.

[58] Acting as legal lexicographer, and using the (Benthamite) technique of contextual definition or definition in use, Tarello (1993a: 5-10) identifies four different meanings of "*diritto*" in contemporary Italian legal experience. When it occurs in sentences like "Il diritto è dalla mia" ("The law is on my side"), "diritto" ("law") refers to law in an objective sense: i.e., it refers to a set of social norms having a certain typical social function. When it occurs in sentences like "Ho diritto di fare *f*" ("I have the legal right to do *f*"), "diritto" refers, contrariwise, to a subjective, favourable, legal position. When it occurs in sentences like "Il diritto di proprietà è riconosciuto in Freedonia" ("The law of property is recognized in Freedonia"), "diritto" refers to a legal institute, i.e., to a certain sub-set of positive legal norms. Finally, when it occurs in sentences like "In caso di morte del Presidente il Vicepresidente subentra di diritto" ("In the event of the President's death, the Vice-President steps in by law"), "diritto" ("law") refers to some legal automatism. It must be emphasized that, according to Tarello, the identification of lexicographic concepts of law is to be considered as the first, sound step in a virtuous analytical enquiry. The second step, which already belongs to conceptual analysis in a reconstructive function, consists in bringing to the fore the conceptual connexions between the four actual meanings of "law" previously identified. These connexions allow for regarding the concept of law as a set of social norms (the law in an objective sense) as the basic concept, which the other three concepts presuppose. A legal right ("diritto

From the standpoint of *precisification enquiries*, "the concept of law" is the result, in terms of the analytic theory of definition, of an explicatory definition, or re-definition, or, in logical positivism's terminology, rational reconstruction. As we have seen (§ 3.2.2 above), this is a definition of the concept(s) of law that aims at bringing to the fore the (complex) meaning of "law" on the basis of the ideas usually associated to the actual uses of the word. The correctness of an explicatory concept of law is not a matter of empirical truth. To be sure, it must get adequate empirical support from the relevant legal experience; it must be tightly fastened, so to speak, to a certain set of sound empirical linguistic and cultural data. Nonetheless, its theoretical correctness depends on such theoretical virtues as simplicity and explicatory power. Simplicity rules out any unnecessarily complex concept of law. Explicatory power requires the concept of law to consist in a concise discourse bringing to the fore (what are regarded and presented as) the theoretically paramount properties of the law. To be sure, from the standpoint of precisification enquiries, which properties, in a complex social phenomenon like "the law", are to be regarded as theoretically paramount is not, and cannot be, a matter for objective cognitive judgments (meaning by that judgements not depending on the jurisprudent's own beliefs, attitudes, and purposes). It is, rather, a matter for judgements by means of which the legal philosopher sets forth what, in her or his view, should be regarded as the theoretically paramount properties of law, taking into account legal experience and public jurisprudential opinion[59]. Explicatory concepts of law are, accordingly,

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in senso soggettivo") is a right conferred by some norm of objective law. A legal institute, like property or contract, is nothing else but a sub-set of norms of an objective law. A legal automatism is necessarily established, again, by some set of norms of objective law. The third and last step of Tarello's conceptual investigation belongs to a clarification or elucidation approach to the concept of law. Here, by way of clarification of the concept of law in use in actual Western legal culture, he sets forth a functional definition of "law" in the objective sense of the word. In his own terms: "the object or phenomenon to which the word law (and the corresponding words in other modern languages) refers" consists of "the set of rules that, in any society whatever, regulate a) *the repression of the behaviours considered as socially dangerous* […]; b) *the allocation of goods and services to individuals and communities*; c) *the institution and ascription of public powers*" (italics in the text, ndr). Tarello also adopts the same approach, binding lexicographic to clarification enquiry, in relation to the notion of "positive law" in the Italian legal culture of the 1950s and 1960s (see Tarello 1993b: 109-119).

[59] One of the prominent torchbearers of the clarification approach to the concept of law has been, to be sure, Herbert Hart. As it is well known, Hart insists that the purpose of clarifying or elucidating the concept of law ("our" concept of law) should not be meant as requiring to provide a definition of law: i.e., a set of rigid rules about the correct use of "law", to be adopted for regulating people's linguistic behaviours. He thinks, indeed, that people do already know how to use "law" (and related legal words), but also that, as it often occurs, they do not (fully) understand the phenomenon it refers to ("In law as elsewhere, we can know and yet not understand": Hart 1954: 21). That is the reason why, in *The Concept of Law*, he sets to «further the understanding of law, coercion, and morality as different but related social phenomena» (Hart 1961, p. vi). That is the reason why, always in *The Concept of Law*, while dealing with international law, he rejects the definitional approach and stands for an analysis that purports to bring to the fore (make "explicit") «the principles that have in fact guided the existing usage» of "law" and

something legal philosophers propose to fellow legal philosophers, and to the legal community at large, hoping for approval. Sometimes the proposal succeeds[60]. It may also fail, though. The "Jurisprudence" bookshelves of university libraries are replete with ambitious, but forever forgotten, explicatory concepts of law.

From the standpoint of *stipulative enquiries*, "the concept of law" is conceived as a pragmatic entity. It is a notion the value thereof depends on its adequacy to the specific theoretical or practical goals the legal philosopher happens to pursue. As I said, it may even be not just one concept, but a set of several concepts, according to the several different needs the jurisprudent pursues at once. The need may be strictly theoretical. In such a case, the concept(s) of law will serve some explicatory goal. It may also be of a practical character, though. In such a case, the concept will serve some ideological purpose. For instance, the goal may be that of providing the conceptual ground for a certain doctrine about the moral duty of obedience to positive laws. In any case, the correctness of stipulative concepts of law is a matter of instrumental rationality: they are correct, if, and insofar as, they serve the purpose(s) they are meant to serve in a satisfactory way[61].

«inspect» their «credentials» (Hart 1961: 214-215). These ideas of Hart, as it is well known, have been developed in a direction conceiving of legal philosophy as an enquiry not (solely) on the concept of law, but rather on the nature or essential or necessary properties of law. See e.g. Raz 2009b: 17-46, 91-106, Shapiro 2011: 9-32. The position of Raz, however, looks close to the idea of a rational reconstruction of the structure of legal thought as advocated by Hart. For instance, he insists that an enquiry upon the nature of law consists in «inquiring into the typology of social institutions, not into the semantics of terms. We build a typology of social institutions by reference to *properties we regard*, *or come to regard*, *as essential* to the type of institution in question» (Raz 2009b: 29, italics added, ndr). Furthermore, he makes clear that an enquiry upon the nature of law is an enquiry about «the nature of our self-understanding […] It is part of the self-consciousness of our society to see certain institutions as legal, that consciousness being part of what we study when we inquiry into the nature of law» (Raz 2009b: 31). Raz leaves «the question of the *kind of necessity involved* unexplored» (Raz 2009b: 91, italics added, ndr). Apparently, however, the "necessary truths" about the law that, in his view, legal theory should be looking for are the truths about the law that *appear to be so* upon an inquiry on societies' legal self-consciousness (Raz 2009b: 98: «legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture»). On the same footing, in view of getting to law's "necessary and interesting properties", Shapiro adopts a conceptual analysis approach, the starting point of which is provided by a set of legal "truisms" (Shapiro 2011: 13-22).

[60] For instance, Hart's proposal of conceiving the law of municipal legal systems as the union of primary rules of conduct and secondary rules of change, adjudication, and recognition (Hart 1961: chs. V and VI), can be counted among jurisprudential successes, at least so far as contemporary common law legal culture is considered.

[61] In his posthumous work *The Definition of Law* (Kantorowicz 1958: 37-49), Hermann U. Kantorowicz advocates "conceptual pragmatism", "conceptual relativism", or Carnap's "tolerance principle", against "verbal realism." The latter he sees as a mysterious quest for the essence of the things the concept of which is to be defined: «Nobody […] has [ever] been able to explain what the metaphysical term "*Wesen*" or "essence" means, and nobody has [ever] been able to point to a method for teaching the intuition necessary to grasp it» (Kantorowicz 1958: 41). Conceptual pragmatism (see § 3, above), contrariwise, is to be regarded as the only approach compatible with truly rational enquiries. Following

Finally, from the standpoint of *essentialist enquiries*, "the concept of law" is conceived as liable to objective, truth-like, correctness. It is correct, as I anticipated, if, and only if, it is adequate to the very essence or nature of law: that is to say, when it captures the set of properties the presence of which makes some social phenomenon to be (really) *law*, and *not something else*[62].

Of the four different ways of investigating the concept of law, the former may appear totally un-philosophical. Indeed, one may say, it is just a dull exercise in legal lexicography. A couple of arrows can be shot in its favor, though. To begin with, it is worthwhile emphasizing its salutary, demystifying import. The lexicographic approach to the concept of law is in fact the tip of that powerful philosophical iceberg that is the analytic way of philosophizing. Now, such a way considers the *principle of conversion* as paramount (see § 1 above). The principle of conversion, as we have seen, requires converting (obscure, overwhelming, puzzling, paralyzing) metaphysical issues ("What is law?") into (manageable) conceptual issues ("What do we (they) mean by "law"?"). To be sure, as I said, the lexicographic approach does not usually exhaust analytic enquiries on the concept of law. Usually, it is the first step in a process of investigation that is geared either to the precisification and refinement of the on-going concept of law in a given legal culture, or to the stipulation of some theoretical or practical concept, to some corresponding theoretical or practical purpose.

The second and the third ways of investigating about the concept of law belong, too, to the analytic way of philosophizing. In fact, the precisification approach can be regarded as nothing else but a specific variety of the stipulative approach, where the aim the re-defined, rationally reconstructed, elucidated concept of law must serve consists in providing a notion, at the same time, as much simple as possible, and as much ripe with explicatory (understanding-furthering) power, as to the corresponding social phenomenon of law.

The fourth way of investigating about the concept of law, the essentialist approach, is to be sure the more ambitious – and, on its face, the more promising.

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it, Kantorowicz comes to stipulating a concept of law suitable to identify the matter of "legal science", from classical antiquity to modern times, from China and India to Europe (Kantorowicz 1958: 64-66, 106-157). Hart considers a stipulative, pragmatic, approach to the concept of law as the only sensible approach, when he comes to analysing Gustav Radbruch's critique to the positivist concept of law (see Hart 1961, pp. 209-212). Another instance of pragmatic conceptualism about the concept of law can be found in Carlos Santiago Nino's *Derecho, moral y política. Una revisión de la teoría general del derecho*, where he advocates conceptual pluralism as the sole adequate answer to the variety of problems besetting legal theory (see Nino 1994: 17-42).

[62] Alexy 2008: 281-299, Alexy 2001, Alexy 2006: 73-98, Alexy 2017: 314-341. In perhaps more precise terms, an essentialist concept of law is true of the word "law" when the corresponding *essentialist sentence* is true: i.e., when a sentence of the form "According to the very nature or essence of law, the word 'law' means l_i," is true, whatever we take the conditions of the essentialist truth of a concept to be.

It rejects any dwelling in dull lexicography[63]. It likewise turns down the rational reconstructions or stipulations about the concept(s) of law that characterize the second and third approach, as fatally subjective, and therefore philosophically inadequate[64]. It claims, as we have seen, to be able of getting to the very, true, essence of law, and capturing it in its concept.

It must be emphasized however that, from the standpoint of the analytic way of philosophizing I am advocating here, any (purportedly) essentialist concept of law whatsoever looks like fool's gold.

I have already recalled the analytic way of thinking about concepts, which is characterized by pragmatic conceptualism (see § 3.2.1 above). Pragmatic conceptualism sounds sensible from the vantage point of experience. Material objects, beasts, persons, behaviours, events, and complex social phenomena have properties, to be sure. They have not, however, intrinsically essential properties. The essential character of any property whatsoever is fatally in the eye of the beholder. Consequently, coming to the matter of the present argument, any *essential* property of law as a complex social phenomenon is, and cannot be but, in the eye of the legal philosopher who looks after it. What such an essence is, depends, necessarily (as a matter of empirical, psychological necessity), on the theoretical or practical purpose(s) the philosopher happens to pursue[65]. Essentialist investigations about the concept (and the nature of) law, therefore, either are preposterous, or, if they have any useful sense at all, are reducible to investigations of the precisification or stipulative sort, though vested in the pre-analytic, or even anti-analytic, pseudo-objective mode of speech dear to "synthetic", "hard", philosophical outlooks[66].

This conclusion of mine – delusive and disappointing as it may appear – is not a

[63] Essentialist legal philosophers reject dwelling in lexicographic enquiries. Nonetheless, they may consider such enquiries as a necessary, preliminary step to capturing the essence of law and formulating its proper concept. Starting from the statement that «Concepts, as always on the path to the nature of those things to which they refer, are in part parochial or conventional and in part universal», i.e., "non-conventional", or endowed with an "ideal dimension", Robert Alexy concedes that «concepts as conventional rules of meaning» play an «indispensable» role in «philosophical analysis», since they make possible the very «identification of the object of analysis. Without a concept of law *qua* conventional rule, we would not know what we are referring to when we undertake an analysis of the nature of law» (Alexy 2008: 291-292).

[64] See e.g. Alexy 2008: 281-284.

[65] Unless, of course, the legal philosopher aims at bringing to the fore the properties of the phenomenon "law" which are in fact *regarded as* essential in a certain legal culture at a certain time. In which case the enquiry is a piece of cultural sociology, usually in view of ideologies' critique and *Weltanschauungen* analysis.

[66] The pseudo-objective, or "material", mode of speech consists in presenting verbal or conceptual issues (i.e., issues about the meaning or communicative content of words) in the form of objective issues (i.e., issues dealing with the properties of non-linguistic objects). The material mode of speech resorts to "pseudo-object-sentences", while genuine objective speech (i.e., speech about non-linguistic objects) is made of "object-sentences" (Carnap 1959: 284-292).

piece of analytically biased wishful thinking. It looks sound, for instance, as soon as we cast a dispassionate analytic glance upon what is perhaps the most powerful and influential essentialist approach to the concept of law in recent times: I mean the one defended by Robert Alexy.

The core of Alexy's essentialist coping with the concept (and the nature) of law issue can be recounted as follows.

1. The debate about the concept (and the nature) of law is endowed not only with a practical relevance ("significance"), one that would turn it «simply» in «one more dispute in law» among jurists. That is so because it is, in fact, also a debate «over necessary truths about law»[67].
2. An enquiry concerning necessary truths about law is not an empirical enquiry. It is, rather, a philosophical enquiry. The debate concerning the concept and the nature of law is, accordingly, a «genuine philosophical debate»[68].
3. Necessary truths about law are truths about the «necessary or essential properties of law»:

> Necessary properties that are specific to the law are essential properties of law […] Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists[69].

4. The necessary or essential properties of law are the objective benchmark for telling the adequate concept of law (for there is one, and only one, adequate concept of law), from those concepts that, contrariwise, are inadequate[70]. A concept of law is philosophically adequate, if, and only if, it is adequate to the object to which it refers. And it is adequate to its object, if, and only if, it captures and accounts for the necessary or essential properties of the object[71].
5. The method of a philosophical enquiry on the concept and the nature of law, properly conceived, is not intuition, but rational argumentation. A set of properties we find in legal phenomena is the set of the necessary or essential properties of law, if, and only if, the claim that it is *the set* of the necessary or essential properties of law can be supported by *rational argument*[72].

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67 Alexy 2008: 284.

68 Alexy 2008: 284.

69 Alexy 2008: 290.

70 As it is well known, according to Alexy the necessary or essential properties of law would allow discriminating the sole adequate concept of law – that happens to be his own inclusive non-positivist concept – from four inadequate concepts: namely, the inclusive positivist concept (proposed by inclusive legal positivism), the exclusive positivist concept (proposed by exclusive legal positivism), the exclusive non-positivist concept, and, finally, the super-inclusive non-positivist concept (see e.g. Alexy 2008: 284-290).

71 Alexy 2008: 291-292.

72 Alexy 2008: 290-291.

6. Rational argument supports the following necessary truths about law:

> law necessarily comprises a real or factual and an ideal or critical dimension. This might be termed the dual-nature thesis. A central element of the real dimension of law is coercion or force. A central element of its ideal dimension is a claim to correctness, which includes a claim to moral correctness and which, if violated, implies legal defectiveness in normal cases and legal invalidity in extreme cases[73].

7. The necessary character of *coercion* depends on the fact that coercion is a necessary means – a *sine qua non* condition – to achieve the goals ("the basic formal purposes") of *legal certainty* and *efficiency*[74]. In turn, the necessary character of the goals of legal certainty and efficiency depends on their necessary connection to justice. Justice, in its broader scope, requires the law to be certain and efficient, besides having contents that must keep below the threshold of extreme (substantive) injustice. The necessary character of law's connection to justice depends, in turn, on law's necessary claim to correctness, which is also a claim to moral correctness. The necessary character of law's claim to justice can be argued for, finally, by appealing to the argument from pragmatic contradiction ("performative contradiction"). A constitutional provision claiming, for instance, that "*X* is a sovereign, federal, and unjust republic" would be evidently absurd[75]. Such an evident absurdity is – and cannot be but – the index of a contradiction between what the constitution expressly *says* (namely, to be *unjust*), on the one hand, and what the constitution – indeed, any constitution *qua* constitution – tacitly but necessarily *claims* (namely, to be *just*), on the other hand[76].

So much for Alexy's argument on behalf of the essentialist concept of law he stands for. It should be evident, by now, why the essentialist approach to the concept of law, even one as sophisticated as Alexy's, is pretence from the standpoint of an analytic approach. The necessary or essential properties on which the objective adequacy of the concept of law depends, as Alexy avows, neither are the matter of a purely empirical enquiry (therefore, statements about them are not empirically true or false sentences), nor are the matter of incontrovertible, indisputable, rational arguments. Indeed, as we have seen, the rational arguments Alexy provides boil down, finally, to the argument from pragmatic contradiction. Such an argument,

[73] Alexy 2008: 290, 292: «the single most essential feature of law is its dual nature. The thesis of the dual nature of law presupposes that there exist necessary properties of law belonging to its factual or real dimension, as well necessary properties belonging to its ideal or critical dimension. Coercion is an essential feature found on the factual side, whereas the claim to correctness is constitutive of the ideal dimension».

[74] Alexy 2008: 292-293.

[75] Alexy 2008: 294: «It is scarcely possible to deny that this article is somewhat absurd».

[76] Alexy 2008: 292-297.

however, is too weak to bear the heavy burden of the necessary truths about law Alexy wishes it to carry. Absurdity is fatally in the eye of the beholder[77]. Furthermore, the argument appears to be flawed by a *petitio principii*. It assumes what it is meant to prove: i.e., the implicit necessary claim to justice every constitution would make, *qua* constitution. Indeed, the *sheer fact* of a constitution that includes a clause such as the one Alexy considers ("*X* is a sovereign, federal, and unjust republic"), by itself, can also be read as evidence that *no* claim to moral correctness, *no* claim to justice, is necessarily connected to the making of a constitution. These remarks bring us back to the conclusion I adumbrated before. Though dressing his theory in the language of "essences" and "necessary truths", Alexy is in fact (a) *stipulating* a concept of law in view of certain theoretical and, above all, practical goals, and (b) providing rational (but, as we have seen, disputable) arguments in its favor.

So, to sum up, if we cast a cool, discriminating, glance on Alexy's way of proceeding as a searcher for the (truly) adequate concept of law, it turns out that Alexy is doing nothing else but adopting and recommending a concept of law in tune with the (noble) ideals enshrined in Radbruch's Formula and Radbruch's human dignity and human rights tuned conception of justice[78]. From the standpoint of analytic jurisprudence, his proposal, once duly demystified, fully and clearly belongs to the province of normative jurisprudence[79].

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[77] See e.g. Bulygin 1993: 41-51, Bulygin 2000: 85-93, Chiassoni 2011: 127-142.

[78] In a classical statement of the analytical theory of definition, Richard Robinson (Robinson 1954: 149-192) identifies twelve different paths actually followed by philosophers in their search for the "real definition" of something: i.e., for definitions of the essence of the object to which a certain concept refers. Among them, the "betterment of existing concepts" and the "adoption and recommendation of ideals" represent useful activities actually consisting in proposing some stipulative or explanatory definition of some key-term. See also Scarpelli 1955: 62-67, and, so far as the concept of law is concerned, 71-86.

[79] For a similar recent criticism to Alexy's essentialist approach, cf. Barberis 2020: 247-263.

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