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Conceptual Jurisprudence

Methodological Issues, Classical Questions and New Approaches

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Editors

Conceptual Jurisprudence

Methodological Issues, Classical Questions and New Approaches

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Preface

This volume contains 15 cutting-edge essays by leading legal theorists on the central issues of conceptual jurisprudence: methodological questions about its aim and approaches, substantive questions about the legal system and its coercive character, law's relationship with morality, and law's normative character, as well as the discussion of new approaches to the field. The introduction sets the stage by explaining the goals of conceptual jurisprudence and providing a summary of the essays. We hope that this volume helps to shape the agenda for future research in this field.

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Hamilton, ON, Canada — Jorge Luis Fabra-Zamora
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Introduction

Jorge Luis Fabra-Zamora and Gonzalo Villa Rosas

Abstract The introduction sets the stage by explaining the goals of conceptual jurisprudence and providing a summary of the essays.

This volume advances a systematic exploration of the field of *conceptual jurisprudence,* the theoretical enterprise concerned with elucidating the concept of law and foundational concepts that figure prominently in legal discourse and practice, including legal systems, legal obligation, legal rights, and legal powers.[1] As we conceive it, conceptual jurisprudence involves the analysis, construction, engineering, and refinement of individual concepts as well as the creation and development of comprehensive theoretical frameworks and languages to clarify the legal phenomenon and explain its relationships, similitudes, and differences with other phenomena.

Following Hart's *The Concept of Law*, conceptual jurisprudence has been the primary concern of legal philosophy.[2] Discussing methodology early in that text, Hart rejects the strategy common among previous jurisprudents of attempting to provide a "definition" of law—i.e., a linguistic formula that differentiates objects properly marked by the word "law" from phenomena marked by different words.[3] For Hart, not only do definitions fail to resolve the puzzlements that motivate the question, but law is not an object type that a definition can capture. "Law" features both central cases (i.e., modern state legal systems) and borderline cases (i.e.,

[1] Although we have derived this illustrative label from KE Himma, as explained in footnote 14, we do not follow his approach. See Himma (2015). For more information, see van der Burg (2020).

[2] Hart (2012).

[3] For the classical expression of this view, see Kantorowicz (1958).

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international and so-called "primitive" laws), and these are not united by the same characteristics, as required by *per genus et differentiam* definitions.[4]

Instead of a definitional project, Hart suggests that legal theorists should attempt to elucidate the concept of law as understood by "ordinary educated" citizens. To do that, we must identify and resolve "persistent questions" that have vexed the legal theorists that are divided on how best to elucidate such a concept despite being able to identify clear instances of law. The three questions are: "How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?"[5] According to Hart, these puzzles "are not graciously chosen or invented for the pleasure of academic discussion. . . [but] concern aspects of law which seem naturally, at all times, to give rise to misunderstandings, so that confusion and a consequent need for greater clarity about them may coexist even in the minds of thoughtful men with a firm mastery of knowledge of the law."[6]

In this Hartian understanding, jurisprudence's theoretical task is to provide a rational reconstruction of the citizen-animated concept of law by examining certain influential attempts to capture it and their coherence with academic and folk beliefs about law and a range of related phenomena, including coercion and morality. Although Hart never explicitly mentions "conceptual analysis" nor does he thoroughly explain the title of his book, the philosophical context in which the book is positioned has been taken as sufficient reason for asserting that conceptual analysis is "the spirit" and "the implicit method," that animates his philosophical project.[7] Nonetheless, in a later work, he suggests that the task of jurisprudence is to provide a "general" theory of all instances of legal practices (as opposed to particular accounts of specific legal systems) that should be advanced in a "descriptive" or value-neutral manner (as opposed to value-committed or "normative" jurisprudence).[8] As this volume examines, these statements have been the focus of methodological discussions of conceptual jurisprudence.[9]

For Hart, what we are calling conceptual jurisprudence constitutes one of law's three main philosophical problems, along with normative jurisprudence and

[4]Hart (2012), pp. 13–14; Hart (1983a), pp. 33–35.

[5]Hart (2012), chap. 1.

[6]Ibid., p. 6.

[7]Mainly based on certain historical connections with the school of Oxford's ordinary language philosophy, Hart was taken "to be engaged in a familiar philosophical project of conceptual analysis"—that is, according to this interpretation, he was "doing the same kind of philosophical work that his peers in the philosophy of language, metaphysics, ethics and epistemology were doing." Coleman (2001), p. 175. Similarly, according to Nicos Stavropoulos, "Rather than seeking rules for using the key expressions, or setting out to list the situations in which users apply the expressions, Hart's method was usually called conceptual analysis." Stavropolous (2001), p. 69. Others, however, have rejected such a connection. See, for example, Green (2012); Marmor (2013).

[8]Hart (2012), pp. 239–40.

[9]Langlinais and Leiter (2016), p. 671.

adjudicative affairs.[10] Following the Hartian tradition, Joseph Raz further suggests that each of the three branches of practical philosophy—legal, political, and moral—comprise both a "substantive" or "evaluative" component and a "formal" component, which elucidates its basic concepts.[11] Thus, what we call here "conceptual jurisprudence," philosophy of law's formal element in Raz's terminology, has correlatives in both ethics ("conceptual ethics," which studies the basic notions of moral discourse)[12] and political philosophy ("conceptual political philosophy," which examines foundational concepts of political discourse).[13]

By using the label "conceptual jurisprudence," we do not mean to suggest that this philosophical project presupposes a specific methodology. Importantly, conceptual jurisprudence is not necessarily equivalent to the influential type of conceptual analysis qua elucidation of folk concepts that aims to explain the nature of law in terms of necessary and sufficient conditions.[14] As several of this volume's chapters recognize, there are numerous forms of "analysis" and "conceptual analysis" to be found in both general philosophy and jurisprudence.[15] Furthermore, as Michael Giudice has aptly indicated, there exist other devices different from the "analysis" of folk concepts that have dominated contemporary jurisprudence. For example, Giudice discusses "conceptual construction"; that is, the theorist's creation of novel concepts that aim to remedy the defects of insufficiently consistent folk concepts.[16] In a related project, some philosophers have introduced the notion of "conceptual engineering" to represent several initiatives that aim to design, create and improve conceptual devices for explanatory and normative purposes.[17] Furthermore, in addition to conceptual analysis tools—rational reconstruction, reflective equilibrium, thought experiments, etc.— philosophers use several other methodological devices. These include linguistic analysis and other forms of language clarification, the creation of terms, hermeneutic approaches, deconstruction, and the development of analogies, characters, models, and metaphors.[18]

While conceptual jurisprudence primarily constitutes a philosophical enterprise, we do not imply that it is the exclusive domain of legal philosophers. As some chapters in this volume illustrate, there are meaningful connections between conceptual jurisprudence and empirical and doctrinal inquiries that might provide new

[10]Hart (1983b).

[11]Raz (1999), pp. 10–1.

[12]See, e.g., Burgess and Plunkett (2013).

[13]See, e.g., Flathman (1973).

[14]The most influential approaches in this sense are found in Shapiro (2011), chap. 1, and Himma (2015).

[15]As an illustration of the richness of the notion analysis, see Beaney (2014). For the different understandings of "conceptual analysis" in jurisprudence, see the first Chapter by Pierluigi Chiassioni.

[16]Giudice (2015).

[17]Cappelen (2018); Burgess et al. (2020).

[18]William Twining offers a useful catalogue of the tools available to legal theory, with references to secondary literature. Twining (2009), pp. 40–1.

evidence regarding existing legal practices or highlight new pre-theoretical data that theoretical accounts should consider.[19] Furthermore, it is possible that empirical scholars and legal practitioners might more directly contribute to the conceptual jurisprudence project. Some writers have developed *ad hoc* accounts of law to pursue specific empirical or doctrinal inquiries. For example, representatives of the heterogeneous tradition of legal pluralism have developed different theories of the concept of law. These include approaches focused on bodies of justiciable procedures and standards[20] and self-generated discourses that both adopt the binary code legal/illegal and incorporate institutionalized secondary rulemaking processes.[21] While some of these theories might be disconnected from mainstream philosophical discourse, it would be a mistake for jurisprudents to entirely dismiss the analytical components of the proposals of anthropologists, sociologists, and jurists as non-philosophical. It would also be erroneous to assume the superiority of theories with philosophical pedigree. The analytical components of these *ad hoc* theories and theoretical fragments also contribute to conceptual jurisprudence insofar as they in some way answer the question of law, and it is possible to compare them with the standard accounts of jurisprudence—such as those advanced by Hart, Raz, and Kelsen—using the theoretical standards of simplicity, coherence, consilience, and generality.

Thus, we arrive at a broader understanding of conceptual jurisprudence that encourages philosophers to consider contributions to conceptual jurisprudence advanced outside of mainstream philosophical theory and empirical scholars and jurists to overcome their contrived attitude towards purely theoretical inquiries. "Conceptual jurisprudence" is not defined by a certain disciplinary pedigree, method, or form of evidence. Instead, it is characterized by its attempt to provide general answers to the conceptual questions about law and fundamental legal concepts that do not refer to any particular legal order or institution, a characterization that enables philosophers, empirical scholars, and doctrinal theorists alike to contribute to what is a collective enterprise.

The chapters are divided into five parts. Part I comprises three chapters concerning methodological issues of conceptual jurisprudence, including the scope and purposes of legal philosophy, its proper methodology, and theoretical criteria for adjudicating between competing theories of legal phenomena.

In the first chapter, Pierluigi Chiassoni provides a general exploration of the problem and methodology of conceptual jurisprudence. Despite the near consensus that conceptual jurisprudence aims to investigate "the concept of law," it is not clear what is meant by this expression nor what the proper methodology for accessing this concept might be. Furthermore, while many philosophers endorse the "conceptual analysis" methodology, there are multiple understandings of the requirements and process of such an analysis, including several skeptical and revisionist views.

[19] See, e.g., the chapters by Lucas Miotto and Andrés Molina-Ochoa.

[20] de Santos (2002), p. 86.

[21] Teubner (1997), p. 14.

Chiassioni's chapter provides a thorough investigation of the central methodological questions of conceptual jurisprudence, exploring the diverse understandings of conceptual analysis and discussing several criticisms about them.

Meanwhile, Juan B. Etcheverry focuses on Hart's proposal of advancing a "general" and "descriptive" legal theory, a proposal furthered by many of his followers, including Raz, but rejected by so-called "normative" jurisprudents of many sorts, including John Finnis and Ronald Dworkin. Etcheverry taxonomizes the main challenges to Hart's proposal: if legal theory takes as its object of study "our" concept of law, as Raz suggests, how could it be that a general theory merely studies a parochial concept? How is it possible to develop a theory of the nature of law in terms of necessary features of a practice that is often thought to be contingent? How is it possible to create a descriptive theory of a practice that, according to critics, does not merely describe empirical facts but necessarily requires descriptive judgement? How is it possible to describe, in morally neutral terms, a normative practice such as law? Can jurisprudence be both prescriptive and descriptive? Is there only one concept of law? Why do we need a concept of law in the first place? In turn, these questions promote the issue of the theoretical criteria for selecting among diverse theories of law. Ultimately, Etcheverry doubts the success of Hart's project, mainly on the basis of the absence of clarity surrounding its aim and its central terms.

In the closing chapter of Part I, Margaret Martin advances other critiques of the project of a descriptive jurisprudence developed by Hart and Raz. For Martin, Hart's endorsement of inclusive legal positivism[22] entails a dramatical transformation of his methodological approach: if morality were a condition of validity, as the inclusive theorist would maintain, we would be forced to revisit or abandon the descriptive project. Martin finds a similar defect in Raz's proposal, although he does attempt to accommodate the normative dimensions of law within the value-neutral Hartian conceptual analysis. Following Nigel Simmonds, Martin reframes the project of jurisprudence in terms of three questions, namely, the problem of fundamental law-making authority, the issue of law's justificatory force, and the problem of the "ideality" of law. The chapter aims not only to demonstrate the shortcomings of the descriptive project but also to emphasize the connection between substantive and methodological concerns.

Part II turns its attention to the primary tool created to explain the concept of law as an "affair of rules," i.e., the notion of a *legal system*.[23] According to numerous theorists, the central cases of law concern specific complex of norms that comprise criteria of validity and officials responsible for the creation, application, and identification of law, including those of paradigmatic nation-states and similar arrangements (e.g., the Greek *polis*, the Roman *civitas*, the Inca *tawantinsuyu*). Some theories have further argued that the *differentia specifica* of legal systems, compared to other normative arrangements that might share similar features (say, the normative

[22]This view is discussed in the chapters by José Juan Moreso and Sari Kisilevsky, among others.

[23]HLA Hart, for example, suggests that this notion is the "most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist." Hart (2012), p. 98.

systems of universities or FIFA), is that legal systems distinctively employ forms of coercion—e.g., using force or intense social pressure (such as depriving citizens of honour, resources, or even their life)—that are unavailable in other arrangements. Part II questions the nature of legal systems and explores their main attributes.

Antonia M. Waltermann connects the question of the social foundation of legal systems with the notion of popular sovereignty, the idea that political power emanates from the people. However, despite popular sovereignty being a widely used notion in legal and political philosophy, constitutional law, and many empirical studies, it is far from clear what popular sovereignty is or how political power can be said to emanate from people. Responding to this issue, Waltermann develops a conception of popular sovereignty that connects legal theories of social rules and conventions with understandings of political sovereignty developed by political philosophers. The resulting account of popular sovereignty applies to state-law and non-state political communities (such as the European Union).

Then, Massimo La Torre criticizes a recent positivist approach, paradigmatically represented by Frederick Schauer,[24] which grounds law in the use of force and sanction. For La Torre, this law-as-coercion approach aims to offer a common-sense account of law in which the use of force is the central and distinctive feature of legal systems. Furthermore, to evade Hart's objection to Austin's coercion-based account of legality, the law-as-coercion approach adopts an anti-essentialist perspective which recognizes coercion as an explanatorily central element of legal practice but not a necessary or sufficient condition. However, La Torre argues, such alleged anti-essentialism is only superficial because force remains the core condition of the legal experience, and law is effectively reduced to some form of organized violence. Furthermore, *pace* the putative common-sense perspective heralded by its defenders, La Torre claims that the law-as-coercion approach fails to account for the complexity of the legal phenomenon as understood by those who practice it. Moreover, the law-as-coercion approach might not promote its desired anti-ideological assessment of legal practices but, on the contrary, intimate an authoritarian perspective potentially at odds with certain rule of law principles.

Finally, Lucas Miotto closes Part II with an examination of the role of coercion in the motivation of the agents who participate in the legal system. He argues against the view that citizens are motivated, at least partly, to comply with most legal mandates most of the time by their legal system's threats of sanctions and other unwelcome consequences. After providing several refined versions of this view, Miotto rejects all of them as not according with the best empirical evidence available. Consequently, he suggests that while coercion is a factor that motivates citizen conduct, it is not the only one, with other elements—i.e., social, cultural, and moral norms and beliefs—also demanding consideration.

[24] Schauer (2015).

Part III studies what has historically been considered the central question of conceptual jurisprudence: the relationship between law and morality.[25] According to contemporary legal theory, jurisprudents can be divided into two general camps. On the one hand, legal positivists that hold that there are no necessary connections between law and morality, thereby focusing their attention on the existence conditions of legal systems.[26] On the other hand, non-positivists, which include classical natural lawyers in this characterization, that claim that there are relevant explanatory connections between law and morality, devoting their theoretical efforts to elucidating them.[27] In addition to this traditional debate, defenders of Hartian positivism are divided into two camps, with "inclusive" legal positivists holding that morality can sometimes be a condition of validity or membership in a legal system,[28] and "exclusive" legal positivists holding that, for conceptual reasons (such as the service function that law should play), morality can never be a condition of validity.[29]

In the first chapter, José Juan Moreso explores the problem of law and morality in Hart's positivism, criticizing Hart's endorsement of the inclusive camp in his influential *Postscript* to *The Concept of Law*.[30] According to Moreso, Hart's particular defence creates a dilemma: either the thesis of moral objectivity is true and, thus, determining what the law requires depends on moral arguments, or the thesis is false and, thus, the law's references to morality only constitute recommendations to courts to create laws in accordance with morality. In this view, both approaches to the dilemma remain within the sphere of exclusive legal positivism, precluding any consideration of inclusive positivism.

Matti Ilmari Niemi establishes a novel approach to legal theory that captures the fundamental intuitions of both natural law and positivist theories of law while also resisting the core objections to them. Concerning classical natural law jurisprudence, Niemi argues that this approach adequately captures the ways legal systems share many common values and protect human goods. However, mainstream natural law theories are often problematic because they either presuppose a religious foundation or select principles of justice that appear arbitrary or unwarranted. Meanwhile,

[25]There are numerous statements from legal philosophers suggesting that this is the central question of jurisprudence. For example, as noted above, one of Hart's central questions concerns explaining how legal obligations differ from and are related to moral obligations. Hart (2012), pp. 7–8. Brian Leiter similarly diagnose legal philosophers as having "been preoccupied with specifying the differences between two systems of normative guidance that are omnipresent in all human societies: law and morality. In the last 100 years... the problem of how to distinguish these two normative systems has been *the* dominant problem in jurisprudence..." Leiter (2011), p. 664.

[26]Austin (1995), Kelsen (1992), and Hart (2012) are considered primary examples of legal positivism thus understood.

[27]Aquinas (1981), Finnis (2011), and Murphy (2003) are examples of classical natural lawyers, who generally endorse a specific conception of basic goods. In turn, Dworkin (1986) and Alexy (2002) are examples of self-styled "non-positivists," who differ from natural lawyers by not endorsing a classical conception of basic goods.

[28]See, e.g., Waluchow (1994).

[29]See, e.g., Raz (1994).

[30]Hart (2012), pp. 238–276.

although legal positivism captures the factual dimensions of law, it fails to adequately capture the role of principles of morality and justice in the interpretation of legal materials and the application of laws to specific cases. To overcome these issues, Niemi outlines the foundations of a theory of law as an "expression of adopted justice." In his view, this theory captures the factual dimension of legal materials emphasized by positivists and describes the role of principles and substantive reasoning in legal interpretation and the application of these materials.

Then, Andrés Molina-Ochoa's chapter examines what he calls "the Resistance argument," one of Hart's arguments for legal positivism. For Hart, a positivist concept of law that separates law from morality compares favourably with non-positivist concepts because it facilitates resistance against oppressive regimes.[31] According to this argument, given law is separable from morality, law loses part of its "aura of majesty," and, thereby, the legality of a norm is not a conclusive reason for citizen obedience. Molina-Ochoa argues that the evidence the Milgram experiments provides regarding obedience to authority figures offers empirical support for Hart's hypothesis. He also suggests that these experiments call non-positivist concepts of law into question, particularly those in which law claims moral correctness, such as that advanced by Robert Alexy.

In the next chapter, Andrea Romeo explores the problem of the concept of law in the domain of legal ethics, i.e., the study of the moral standards applicable to the legal profession. The chapter is framed as a dialectical reconstruction of the central jurisprudential debates in the domain of legal ethics. Romeo begins with the "standard view" in legal ethics—premised on certain forms of legal realism and certain positivist views—that portrays lawyers as "hired guns" that have to defend their client's causes to the best of their ability within the rules of the legal system. In response, some legal ethicists have utilized non-positivist theories of law to develop a second approach, according to which, given the connections between law and morality, lawyers must exercise their moral judgement on the client's goals, advancing their defence on the basis of the law's moral principles. Meanwhile, a third approach to legal ethics, based on Hart and Raz's positivist theories of law, maintains that, given law's goal is to remedy disagreements present in pluralist societies through forms of settlement, the function of lawyers is to enable these settlements by defending the causes of citizens without morally assessing them. Given objections to these views, Romeo sketches a new alternative that conceives of lawyers as "filters against legal abuse," arguing that this view compares favourably to the previous options by establishing a role for legal ethics not equal to pure moral discourse yet independent of the morality or values of the settled law.

Part IV focuses on questions on the law's normative character and its role in practical reason. While there are competing notions of what constitutes law's "normativity"—including its norm-based nature, its particular form of operation, and its moral value—many theorists have followed Raz by characterizing this problem as "protected" reasons for action: legal norms create reasons to act in a

[31] Ibid., p. 210.

certain way and to exclude other reasons in practical judgement.[32] Part IV explores several problems regarding these critical issues.

Sari Kisilevsky enters the debate between positivist and non-positivist approaches to conceptual jurisprudence with a discussion of the moral significance of law, particularly in the resolution of hard cases. She begins by considering the often-neglected Hartian claim that law is a system of rules rather than of orders backed by threats. According to Kisilevsky, Hart's conception of law as a system of rules involves a critical internal normative framework that provides law with its distinctive moral force. Moreover, she argues that the moral significance of this internal structure is distorted by theorists who develop external descriptions of legal practice. She illustrates these theses through discussion of hard cases, such as *Riggs v. Palmer.* While positivists often suggest that these cases concern the applicability of moral considerations external to law, Kisilevsky holds that the internal normative structure of law resolves these issues, helping positivists to answer the challenges non-positivists have levied against them.

Then, Pau Luque and Israel Martínez critically examine a recent attempt by David Plunkett and Scott Shapiro to reconstruct general jurisprudence as "a branch of meta-normative inquiry," i.e., as the project of explaining normative thought, talk, and reality.[33] While Plunkett and Shapiro hold that jurisprudence parallels metaethics, the other sector of meta-normative inquiry, they differ in their object of study. Whereas metaethics focuses on ethical talk, thought, and reality, jurisprudence is a meta-legal study that focuses on legal talk, thought, and reality. Luque and Martínez argue that this meta-normative approach to general jurisprudence is under-inclusive in two respects. On the one hand, the meta-normative approach might ultimately mischaracterize or exclude theories—traditionally considered parts of general jurisprudence—that deny the ways legal discourse is normative, particularly legal realism and imperativism. On the other hand, the meta-normative conception of jurisprudence ignores important sectors of legal discourse that are descriptive, including detached statements, i.e., statements about a normative system issued by a non-committed agent. According to Luque and Martínez, detached legal statements are legal thought and talk despite not being normative. They conclude that, *pace* Plunkett and Shapiro's goals, the meta-normative conception fails to capture both legal discourse and theory, and it is unable to illuminate the existing debate surrounding jurisprudence.

In the last chapter of Part IV, Paula Gaido critically evaluates the links between legal norms and reasons for action in Raz's theories of law, authority, and practical and legal reasoning. On the one hand, Raz's theory of law maintains that legal norms operate as protected reasons for action, including complex reasons that not only prescribe reasons to act but also exclude other considerations regarding the action required. In addition, Raz's conception of authority further holds that law's exclusionary powers are connected to the service that law provides, namely, identifying

[32]For the classical formulation, see Raz (1999).

[33]Plunkett and Shapiro (2017).

the right thing to do. However, on the other hand, Raz's theory of legal reasoning indicates that judges are required to make moral arguments while applying the law and that they are allowed to change it in some circumstances. Furthermore, Raz suggests that this feature persists even when the law is settled, potentially leading judges to change the law. Gaido argues that the judge's power to revise the underlying applicable moral reasons is incompatible with Raz's conception of law and its service function. Specifically, if the law is authoritative for judges, it is a protected reason and need not consult the underlying applicable reasons. Alternatively, if judges can change the law, it is not authoritative for them, at least not in the exclusionary sense developed by Raz.

Finally, Part V comprises two works that suggest novel approaches to conceptual jurisprudence. Their novelty derives from their attempts to break with the methodological approach and three vexing questions presented by Hart.

Jason Allen radically transforms the hackneyed analogy—employed by Hart and many of his followers—that compares law to games. While many jurisprudents and social philosophers have focused exclusively on simple games, such as chess,[34] Allen considers Massive Multiplayer Online Role-Playing Games (MMORPGs) such as World of Warcraft and Second Life. MMORPGs retain the rule-constituted nature of games that motivates the analogy; however, they include features that compare favourably to traditionally used games. According to Allen, whereas the mainstream examples are relatively simple—from a normative perspective—MMORPGs are complex normative phenomena intrinsically intertwining social, normative, and technical components. In these games, players commonly create avatars, act in a virtual environment, and, sometimes, perform economic-like transactions that resemble "real" life. Hence, MMORPGs not only constitute normative systems worthy of jurisprudential study but also significantly parallel the law in ways that might illuminate certain traditional questions of jurisprudence. These questions include issues of agency, personhood, acts-in-law, non-robust normativity, and the so-called fictional character of both games and law. Through this argument, Allen highlights connections between the work of general jurisprudence and the fields of social ontology, philosophy of language, and philosophy of games.

In this volume's final chapter, Enrique Cáceres Nieto outlines the foundations and main results of a novel approach to jurisprudence that he labels "Legal Constructivism," an epistemological, theoretical, and methodological approach that attempts to explain legal systems as complex social constructs that emerge from cognitive agents' consistent behaviour and attitudes. One distinctive feature of this approach is its explicit attempt to connect conceptual jurisprudence and social philosophy with scientific evidence. This specifically includes recent developments in the areas of cognitive science and complexity theory. Cáceres Nieto also suggests that this theory is an attempt to establish foundations for a truly naturalized jurisprudence, providing resources for addressing certain novel challenges of legal theory, including artificial

[34]For a classical formulation, see Marmor (2006).

intelligence, neuroscience, and complexity, that he considers incapable of proper explanation using extant legal theories.

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Part I
Methodological Questions

On the Concept of the Concept of Law

Pierluigi Chiassoni

Abstract Jurisprudents often conceive their task as requiring investigating "the concept of law." What is, however, the concept of "(the) concept of law"? What do legal philosophers do when they investigate the concept of law? What do legal philosophers mean when they set for the concept of law? Is conceptual analysis—apparently, the primary tool for any search about the concept of law—a useful instrument for jurisprudential enquiries? The chapter purports to cast some light on these issues by way of a meta-philosophical investigation.

1 Foreword

Meta-philosophy of law is critical reflection upon legal philosophy. It may be conceived either as a prescriptive or as a descriptive enterprise.

Prescriptive meta-philosophy of law purports to provide recommendations about the philosophically proper (fruitful, useful, worthwhile) way of devising the matter, purpose, and method of legal philosophy.

Descriptive meta-philosophy of law, contrariwise, is about legal philosophy as it is carried out in fact by legal philosophers at a certain time and place.

Assuming the perspective of descriptive meta-philosophy, I will pursue two—very modest—aims in this chapter.

First, I will draw a (tentative) map of a few different ways in which legal philosophers conceive (and proceed to) an enquiry about the concept of law. The map, as we shall see, will provide an opportunity for setting forth a few arguments in favour of analytical enquiries, and against essentialist or synthetic ones.

Second, taking stock of an influential critique to conceptual analysis as a useful tool for worthwhile jurisprudential investigations, I will consider three varieties in turn and defend one of them as adequate for an analytical and realistic legal philosophy.

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2 The Diversified Quest for the Concept of Law

Jurisprudents often regard their task as requiring some investigation about "the concept of law."[1] When they do so, however, it quite frequently happens that they understand such an investigation differently. Four different ways of inquiring upon the concept of law seem worthwhile considering.[2]

To begin with, an investigation upon "the concept of law" can be conceived as a lexicographic enquiry upon the actual meaning(s) (communicative content(s)) of the word "law" and the corresponding expressions in other modern languages, like, e.g., *derecho*, *direito*, *diritto*, *droit*, *Recht*, *prawo*, etc.[3]

Secondly, an investigation upon "the concept of law" can be conceived as an enquiry aimed at the elucidation—clarification, 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's understanding about it and the phenomena it refers to.[4]

Thirdly, an investigation upon "the concept of law" can be conceived as an enquiry geared to providing a proper (adequate, accurate, useful) definition of one or more meanings of the word "law", according to what the legal philosopher

[1] In the words of Uberto Scarpelli (1955), p. 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. " (my translation from the original text in Italian, ndr). Likewise, according to Robert Alexy (2006), p. 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."

[2] Throughout this paper, 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), pp. 60–81; Margolis and Laurence (2011), para 1; Lalumera (2009), pp. 29–95; Moreso (2017), pp. 63–99, drawing on Margolis and Laurence (2011), and referring to the conceptual pluralism about the law advocated by Carlos Santiago Nino (Nino (1994a), Nino (1994b)) and Ronald Dworkin (Dworkin (2006) and 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), p. 42. In my enquiry I also considered Alexy and Bulygin (2001), Austin (1961), Bernal Pulido (2011), Burazin et al. (2018), Carnap (1956), Castignone et al. (1994), D'Almeida et al. (2013), Farrell (2006), Hart (1983), Jori and Pintore (2014b), Laslett (1956), Quine (1981), Raz (1983), Raz (1994), Raz (2007), Raz (2009a), Schilpp (1963).

[3] See e.g. Tarello (1993a), pp. 5–10.

[4] See e.g. Hart (1954), pp. 21–26; Hart (1961) pp. vi–vii, 213–237; Scarpelli (1955), pp. 36–38, 67–119; Tarello (1993a), pp. 10–12; Tarello (1993b), pp. 109–119; Jori and Pintore (2014a), pp. 41–56.

considers to be needed in view of certain legal theory's or legal policy's purposes.[5]

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 adequate to the very nature or essence of law.[6]

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 modern languages. The correctness of the concept of law is a matter of empirical truth. A lexicographic concept of law is true, if, and only if, the word "law," as a matter of fact, is being used in that meaning within the relevant linguistic community.[7] Though they may appear idle, lexicographic enquiries are the bedrock of analytical legal philosophy. Usually, they provide the empirical data making up the starting point for conceptual investigations of the second (clarification) or third (stipulative) kind.[8]

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[5] See e.g. Williams (1945), pp. 134–156; Kantorowicz (1958), pp. 37–49; Hart (1961), pp. 209–212; Nino (1994a, b), pp. 17–42; Jori and Pintore (2014a), pp. 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), p. 40; see also Schauer (2018), para 1: "humans can remake or modify the very concept of law that exists within some community").

[6] See e.g. Alexy (2006), pp. 281–299; Alexy (2001); Alexy (2017) pp. 314–341.

[7] 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_i, 'law' means l_i" is empirically true.

[8] Acting as legal lexicographer, and using the (Benthamite) technique of contextual definition or definition in use, Tarello (1993a, b), pp. 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") means law in an objective sense: i.e., it refers to a set of social norms having, as we shall see, 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 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

From the standpoint of *clarification enquiries*, "the concept of law" is the result, in terms of the analytical theory of definition, of a so-called explanatory definition, or re-definition, or, in logical positivism's terminology, rational reconstruction. This is a way of defining the concept of law that aims at replacing a clearer, more precise, more refined *explicatum*-concept of law to the extant, less clear, less precise, less refined *explicandum*-concept, taking into account the complex of ideas usually associated to the actual uses of the word "law". The correctness of an explanatory 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 precision, simplicity and explanatory power. Precision requires the narrowing down, so far as possible, of any unnecessary indeterminacy in the extant concept of law. Simplicity rules out any unnecessarily complex concept of law. Explanatory power requires the concept of law to consist in a concise discourse bringing to the fore the theoretically paramount properties of the law. To be sure, from the standpoint of clarification enquiries about the concept of law, 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.[9] Explanatory concepts

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 research to clarification enquiry, in relation to the notion of "positive law" in the Italian legal culture of the 1950s and 1960s (see Tarello (1993b), pp. 109–119).

[9]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), p. 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 "inspect" their "credentials." Hart (1961), pp. 214–215. These ideas of Hart, as it is well known, were developed in a direction conceiving of legal philosophy as an enquiry not (solely) on the concept of law, but rather on the

of law are, accordingly, something legal philosophers propose to other legal philosophers, and the legal community at large, hoping for approval. Sometimes the proposal succeeds.[10] But it may also fail. The Jurisprudence bookshelves of university libraries are replete with ambitious but forever forgotten explanatory 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, the output of a stipulative approach may even be not just one concept, but a set of several concepts, according to the several different needs being pursued at once by the legal philosopher. Furthermore, the need may be strictly theoretical. In such a case, the concept(s) of law will serve some explanatory goal. Accordingly, clarification enquiries can be regarded as a variety of stipulative enquiries as presently defined. 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.[11]

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nature or essential or necessary properties of law. See e.g. Raz (2009b), pp. 17–46, 91–106; Shapiro (2011), pp. 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), p. 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. And that consciousness is part of what we study when we inquiry into the nature of law." Raz (2009b), p. 31. Raz leaves "the question of the *kind of necessity involved* unexplored" ((Raz (2009b), p. 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), p. 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), pp.13–22. On Hart's and Raz's approach to the concept of law, see also, in the present book, Etcheverry (2020) and Martin (2020).

[10]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.

[11]In his posthumous work *The Definition of Law* (Kantorowicz (1958), pp. 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), p. 41). Conceptual

Finally, from the standpoint of *essentialist enquiries*, "the concept of law" is conceived as liable to objective, truth-like, correctness. A concept of law is correct, if, and only if, it is adequate to the essence or nature of law: that is to say, if, and only if, it captures the set of properties, the presence of which makes some social phenomenon to be (really) *law*, and not something else.[12] 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.

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 favour, 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 analytical way of philosophizing. Now, such a way considers (what I shall call) the principle of conversion as paramount. The principle of conversion requires converting (obscure, overwhelming, puzzling, paralyzing) metaphysical issues ("What is law?") into (manageable) conceptual issues ("What do we (they) mean by the word "law"?"). To be sure, as I said before, the lexicographic approach does not usually exhaust the enquiries about the concept of law. Usually, it is the first step in the process of investigation that is geared either to the clarification 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 the concept of law belong, too, to the analytical way of philosophizing. In fact, the clarification approach can be regarded, as I said, 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 precise and simple as possible, and as much ripe with explanatory (understanding-furthering) power as to the corresponding social phenomenon of law.

The fourth way of investigating the concept of law, the essentialist approach, is to be sure the more ambitious and, on its face, promising. It rejects any dwelling in dull

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pragmatism, contrariwise, is to be regarded as the only approach compatible with truly rational enquiries. Following 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), pp. 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 (1994b), pp. 17–42.

[12] Alexy (2001); Alexy (2017), pp. 314–341.

lexicography.[13] It likewise turns down, as fatally subjective, and therefore philosophically inadequate, the rational reconstructions or stipulations about the concept (s) of law that characterize the second and third approach. It claims, as we have seen, to be able to get to the very, the true, essence of law, and capture it in its concept.

It must be emphasized however that, from the standpoint of the analytical way of philosophizing, any (purportedly) essentialist concept of law whatsoever is fool's gold.

I have already recalled the analytical way of thinking about concepts, which is resumed in the idea of pragmatic conceptualism. Pragmatic conceptualism sounds sensible from the vantage point of experience. 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. Coming to the matter of the present paper, it is in the eye of the legal philosopher who looks after the essence of law. 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.[14] As a consequence, essentialist investigations about the concept (and the nature of) law either are preposterous, or, if they have any useful sense at all, are reducible to investigations of the clarification or stipulative sort, though couched in the pre-analytical, or anti-analytical, pseudo-objective mode of speech dear to "synthetic," "hard," philosophical outlooks.[15]

This conclusion of mine—delusive and disappointing as it may appear—is not a piece of analytically biased wishful thinking. It looks sound, for instance, as soon as we cast an analytical 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 approach to the concept (and nature) of law can be recounted as follows.

[13]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."

[14]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.

[15]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), pp. 284–292.