JOSEPH RAZ ON CONCEPTUAL ANALYSIS – A CRITICAL ENGAGEMENT

Joseph Raz sobre a análise conceitual – Um Engajamento Crítico

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ABSTRACT

In this essay, I intend to engage critically with Joseph Raz's views on the concept and the nature of law. In the second section, I present a summary of the razian argument. Then, I make two thrusts against Raz's theses. In the third section, I will argue that from the concept of law we cannot presume anything about the nature of law, nor can we be very confident about the existence of something as a nature of law. In the fourth section, I will argue that our concept of law does not have the criterial structure Raz attributes to it, or that at least he fails to present reasons in favor of his view. This is so because he ignores the many concepts of law that we have due to the plurality of language-games we participate, and because he fails deflect what I will call the "problem of demarcation".

KEYWORDS: Joseph Raz, Hillary Nye, Ronald Dworkin, Ludwig Wittgenstein, Conceptual Analysis, Methodological Debate

RESUMO

Neste artigo, pretendo me engajar criticamente com os argumentos de Joseph Raz sobre o conceito e a natureza do direito. Na segunda seção, apresento um resumo da visão raziana. Em seguida, esboço dois ataques contra as teses de Raz. Na terceira seção, argumento que a partir do conceito de direito nós não podemos presumir nada sobre a natureza do direito, nem podemos ser muito confiantes sobre a existência de algo como a natureza do direito. Na quarta seção, argumento que nosso conceito de direito não possui a estrutura criterial que Raz lhe atribui, ou que ao menos ele falha em nos fornecer razões em favor de seu entendimento. Isso ocorre porque ele ignora os muitos conceitos de direito que temos em decorrência da pluralidade de jogos de linguagem nos quais participamos e também porque ele falha em afatas aquilo que chamarei de "problema da demarcação".

Palavras-chave: Joseph Raz, Hillary Nye, Ronald Dworkin, Ludwig Wittgenstein, Análise Conceitual, Debate Metodológico

1 – Introduction: what's the problem?

How can we know if a given theory of law has succeeded? How can we know if it adequately explains its object? Those questions presuppose an answer to another one: what is, to begin with, the object of legal theory? Joseph Raz, probably the most important contemporary legal positivist after H.L.A. Hart and Hans Kelsen, has argued in a powerful way that – unlike the concepts deployed in physics and chemistry – the concept of law plays a crucial role in the understanding we make of ourselves. Legal theory, thus, takes part in the task of deepening the understanding we have of society by helping us to grasp how people understand themselves (RAZ, 1995, p. 237). How does legal theory do that? Here is Raz:

> [A] theory of law provides an account of the nature of law. The thesis I will be defending is that a theory of law is successful if it meets two criteria: First, it consists of propositions about the law which are *necessarily* true, and, second, they *explain* what the law is. (RAZ, 2009b, p. 17)

For Raz, legal theory must be able to grasp what is essential about law, what makes law what law is, so to say. There is a labor division between legal theory (or philosophy) and sociology of law. Sociology of law is concerned with contingent, local characteristics of the legal systems, whereas legal theory's concern is with the universal and the necessary (RAZ, 1979c, p. 104)[1]. Legal theory, then, is concerned with *the nature of law*. To this, Raz adds that we should not think that we are free to opt for any concept that generates morally attractive results. The duty of legal theory is with the nature of law, not with morally embellished constructions (RAZ, 1995c, p. 237). One can see here Raz's positivist methodology at work: legal theory should depict the nature of law. To do so, it should not dabble itself in morality.

In this essay, I intend to engage critically with Raz's methodology, especially with his view about the kind of concept that the concept of law is. I make two claims against Raz's theses. Firstly, relying heavily on the work of Hillary Nye and Nick Barber, I will argue that from *the concept of law* we cannot presume anything about *the nature of law* (that is, the study of the concept of law only awards us with information about our concepts), nor can we be very confident about the existence of such a thing as the nature of law, because the pervasive disagreements about the concept of law and the inexistence of a uncontroversial method to settle them are enough to put the burden of proof on those who believe in the existence of the nature of law. Secondly, drawing from

[1] See also Raz (1979b) for an early, but useful, exposition of his views.

Ludwig Wittgenstein's *Philosophical Investigations* and from Ronald Dworkin's criticism of legal positivism, I will argue that our concept of law does not have the criterial structure Raz attributes to it. This is so because he ignores the many concepts of law we have, due to the plurality of language-games we participate, and because he fails to deflect what I will call the "problem of demarcation". Raz is wrong about the structure of the concept of law because his theory has a starting point in a mistaken view of the *grammar* of the concept of law[2]. That is, razian conceptual analysis misrepresents the rules and practices that constitute what we call law[3]. Before further elaboration of the criticisms, however, we must have a good understanding of Raz's theses.

2- Razian conceptual analysis

A useful starting point to understand Raz's views on conceptual analysis is the realization that *concepts and words are not the same thing*. We can use the same word to refer to different concepts (RAZ, 2009c, p. 55). In some contexts, a word picks a given concept X; in a different context, the same word is used to pick concept Y[4]. For instance, the word "law" is used to pick very different concepts when used in the sentences "the law of gravity is such-and-such", "Murphy's law applies to Jim" and "the law of contracts allows you do to this and that"[5]. For Raz, "[c]oncepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other" (RAZ, 2009b, p. 19). To this, Raz adds:

> Those who, like Hart and Ryle, *emphasize the close connection between concepts and the nature of things* can be said to be implicitly committed to the view that a complete understanding of a concept consists in knowing and understanding all the necessary features of its object, that is of that of which it is a concept. *I will*

[2] For an author that is sympathetic to Raz, see Bix (2003, 2005, 2007).

[3] By grammar, Wittgenstein refers to "to our use of words, to the structure of our practice of using language" (MCGINN, 1997, p. 13-14). The idea appears in Wittgenstein's *Philosophical Investigations* (2009, paragraphs 90 and 108). Hans Glock thus defines grammar: "The grammar of a language is the overall system of grammatical rules, of the constitutive ruler which define that language by determining what it makes sense to say in it" (1986, p. 151). In this essay, I will adopt grammar to mean roughly this.

[4] See Chau (2010, p. 232-233): "Raz highlights that words and concepts do not stand in a one-to-one relationship. The word "law" only refers to the concept of law that we talk about in jurisprudence in some circumstances but not others".

[5] See Raz (2009b, p. 20): "Of course we express the concept, use it and refer to it by using words. But we need not use the word 'law' or 'the law' to refer to it. We could talk of the law by talking of the system of courts and legislature and the rules they endorse in a state, for example. And we could do so in a large number of other ways. Most importantly, we rely on context, linguistic and non-linguistic, to determine whether we are talking of the right sort of law when talking of law, or whether we are talking of scientific or other laws. The availability of context to determine reference establishes that there is no need for concepts to be identified by the use of specific words or phrases".

> *follow them in equating complete mastery of a concept with knowledge and understanding of all the necessary features of the objects to which it applies*. Thus, complete mastery of the concept of a table consists in knowledge and understanding of all the essential properties of tables, and so on. (RAZ, 2009b, p. 20-21, my emphases)

Two points are relevant in the excerpt. Firstly, concepts have a close connection with the nature of what they represent. Secondly, to fully master a concept means to know all the necessary characteristics of the object to which the concept applies. Both points will be explained in further detail.

For Raz, it is no objection that different concepts apply to the same object. For instance, Raz points out that the concepts of equiangular triangle and equilateral triangle apply necessarily to the same geometrical figures, but the concepts differ in their minimal conditions (RAZ, 2009b, p. 21)[6]. This is why the concept of X and the nature of X do not stand in a relation of total equivalence. Educated people know that the necessary elements of equilateral triangles are the same of equiangular triangles, that is, we are talking about the same figures, and they have the same nature. However, the concepts have different minimal conditions. *Complete* mastery over a concept means knowing all the necessary characteristics, but the much more common case of *partial* mastery means only the knowledge of the minimal conditions (RAZ, 2009b, p. 21-22)[7].

Raz's quote above has two parts: concepts and nature. We have just explained concepts, so the next question is: what does Raz mean by the nature of a thing? Another relatively lengthy quotation is, I think, the best option to understand the point:

> A theory consists of necessary truths, for only necessary truths about the law reveal the nature of the law. *We talk of 'the nature of law', or the nature of anything else, to refer to those of the law's characteristics which are of the essence of law, which make law into what it is.* That is those properties without which the law would not be law (…) *Naturally, the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists*. Moreover, these properties are universal properties of the law not accidentally, and not because of any prevailing economic or social circumstances, but because there is no law without them. (RAZ, 2009b, p. 24-25)[8].

[6] See also Chau (2010, p. 233).

[7] As Raz himself puts it (2009b, p. 21, my emphases): "The concepts of an equilateral triangle and of an equiangular triangle are not the same concepts, but the necessary features of equilateral triangles are the same as those of equiangular ones. *The necessary features of the one kind of triangle are the same as the necessary features of the other. We can accept that complete mastery of these concepts involves knowing that they apply to the same triangles, knowledge that the conditions for their complete mastery are the same*. But they apply to the same triangles in different ways, for different reasons, the one because they are equilateral, while the other because they are equiangular".

[8] Raz repeats the same idea in (RAZ, 2009d, p. 55): "What, then, counts as an explanation of a concept? It consists in setting out some of its necessary features, and some of the essential features of whatever it is a concept of. In our case, it sets out some of the necessary or essential features of the law".

Raz maintains, therefore, that the nature of something is its essence. In the case of law, this means that there are necessary characteristics that make something law (RAZ, 1979c, p. 104). To grasp such characteristics, legal theory makes use of the concept of law, for concepts are the tools we have to apprehend elements of phenomena we want to explain. According to Raz, the law is a social institution that our concept of law singles out, and that's why we should pay attention to the concept (RAZ, 2009b, p. 31).

Legal theory uses the concept of law to better understand the nature of law. This means two things: that there must be such nature, and, because of that, that the legal philosopher is not free to choose any theory he thinks morally better. If the nature of law is X, trying to argue that it is Y because Y is morally better is an instance of Frederick Schauer's "anchovy fallacy": Schauer can hate anchovies and believe the world would be a better place if anchovies did not exist, but this, of course, does not mean that there are no anchovies in the world (SCHAUER, 2005, p. 495-496). An important addendum is this: the nature of law can be successfully apprehended by our concept of law, and while Raz is quite clear in saying that the nature of law is universal, the concept is a social and historical construct (RAZ, 2009b, p. 40). That's why Raz believes that legal theory deals with a tension between the universal (the nature) and the parochial (the concept) (RAZ, 2009b, p. 38). For him, there is no way to bypass the conflict, as we must always start from where we are, however this does not mean that we cannot understand the nature of legal phenomena[9].

The concept of law is a social construct. This means that the concept is dependent on the community that employs it. For Raz, the concept of law functions as a criterial concept, that is, a concept that has "correct criteria"[10] for its successful application established by the uses made by the community. Such criteria, moreover, are not individualistic[11]. For Raz, people share a criterial concept when "They hold themselves responsible to the criteria set by their rule. For example, they are committed to admitting (at least to themselves) that their statements are mistaken if, when understood by these criteria, they are mistaken" (RAZ, 2009c, p. 64). To put it in simpler terms, for him, the concept of law has correct criteria for its application. The criteria are defined by the uses

[9] There is an interesting question about universalism and parochialism in Raz's texts. I will not delve into that, but I think it's worth pointing out what he says (RAZ, 2009b, my emphases): "Let us accept that what we are really studying is the nature of institutions of the type designated by the concept of law. These institutions are to be found not only in our society, but in others as well. *While the concept of law is parochial, ie not all societies have it, our inquiry is universal in that it explores the nature of law, wherever it is to be found*". See also Chau (2010, p. 234-235).

[10] The expression appears in Raz (2009c, p. 64).

[11] Raz accuses Dworkin of misunderstanding what criterial concepts are because, according to him, Dworkin thinks that the criteria must be individualistic. If the criteria were individualistic, then disagreement about criterial concepts would indeed be impossible as Dworkin claims. See Raz (2009c, p. 58-62).

made by those who are taken to be correct users of the concept, or as Raz says, "those that are generally believed to be the correct criteria are the correct criteria" (RAZ, 2009c, p. 64).

We should not be under the illusion that the criteria have canonical or obvious formulations. For Raz, they might be complex or non-transparent, people might err with imprecise or incomplete formulations or with different wordings for the same criteria (RAZ, 2009c, p. 67-68). This means that much of the disagreement about the concept of law can be accounted as disagreement about how to best spell out the shared criteria.

Now we can start our critical engagement. In the next section, I will argue that the relation between concept and nature is not something one can take for granted. This has two parts. On the one side, we can't simply assume that understanding a concept will reveal the nature of a thing for us. On the other side, the everlasting disagreement about law's definition is a good reason to be suspicious of anything like an essence of law. The fourth section will focus on a critique of a different kind. I will argue that even if we give up the "nature of law talk" and focus on what Raz has to say about the concept of law, we are bound to be disappointed, for Raz does not explain successfully why we should treat the concept of law as criterial.

3- From concept to nature: an unbridgeable gap

This is what we have up to this point: legal theory is mostly worried with the nature of law but apprehends this nature trough the concept of law. However, concepts are mental artifacts that we use to understand the world. For Raz, concepts are part of our self-understanding (1995c, p. 237). Following Hillary Nye, I believe that the razian argument has three problems:

> Let me briefly set out the prima facie case for why the concept–nature nexus is troubling. *First, there is a problem of epistemic access. Concepts deal in our ways of ordering and categorising the world, and metaphysics is about the fundamental structure of that world*. How do we know our concepts reflect the underlying structure? What gives them access to the ontological realm? *A second worry is that Raz claims that concepts change but that the nature of something does not. If concepts change, how do we know any given one, at a particular point in time, gets at the true nature of law?* Not only do concepts change, but their development depends, Raz says, on our history and culture. This contingent aspect of concepts should heighten our scepticism that they are able to tell us about a universal and unchanging nature. *And lastly, Raz's constant reference to 'our' concept masks disagreements about law. If we do not all agree on the concept, how can we determine whose concept correctly tracks law's nature?* (NYE, 2016a, p. 9, my emphases, footnotes omitted)

Let's take one problem at a time (I will leave the question of disagreements about law for later). The first problem Raz faces regards "epistemic access". This can be so presented: even if law indeed has a nature, how can a social and historically contingent concept be able to get in touch with it? A first attempt deployed by Raz is his claim that the law is a social institution picked by our concept of law (RAZ, 2009b, p. 31). So, we are talking about the nature of an institution. This first attempt begs the question, because institutions are not basic facts in the world. There are no institutions simply "out there" since they demand some interpretation or conceptual working in order to be identified. If the concept of law is dependent of the concept of institution, we are not really talking about the nature of things at all. We are, instead, talking about the relation of the concept of law to the concept of institution. What we understand as institutions will bear relevance for what we understand as law. To use Nye's expression, we are only on a "concept-concept" relation.

Raz, however, can be understood as saying something more sophisticated. He could have in mind a "folk theory" of concepts, as NW Barber puts it (2015, p. 5)[12]. According to a folk theory, the starting point of conceptual analysis is the understanding the relevant community has about the correct criteria of concept application. That is, analysis should start with the "common understanding" of concepts (BARBER, 2015, p. 5-8)[13]. The common understanding is an interesting starting point for our investigations because, among other things, guarantees that our theory will make sense for those that use the concept or engage with the institution we are theorizing about (this is no small thing in jurisprudence). Another advantage is that this approach allows us to make use of relevant insights the community might have about the subject (BARBER, 2015, p. 25)[14]. This is a more promising route, but it will also fail. Let us see why.

[12] As Barber himself puts it (2015, p. 7, omitted footnotes): "Raz argues that it is 'a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves'. Raz writes that he follows Hart in 'equating complete mastery of a concept with knowledge and understanding of all the necessary features of the objects to which it applies' and that, broadly speaking, 'the explanation of a concept is the explanation of that which it is a concept of'. By mastering the concept—which I take Raz to mean a refined form of the common understanding—we reach a superior understanding of the phenomena to which the concept relates. Others writing in the positivist tradition have also endorsed this methodology".

[13] See also Nye (2016a, p. 10-11).

[14] See how Nye puts the point (NYE, 2016a, p. 11, omitted footnotes): "There are three reasons we should be attentive to it: firstly, because the account we develop must ring true to our audience; secondly, because humans are the creators of social institutions, and therefore people's beliefs about institutions affect what they become; and thirdly, because the idea of the 'wisdom of crowds' might lead us to think that the common understanding holds some truth about the institution in question".

The main problem is that a folk theory can help us to understand how people (or ourselves) use a given concept and understand the world surrounding us, but, as Nye puts it, this by itself does not give us access to the "things in themselves" (NYE, 2016a, p. 11). The old skeptical question returns: why should we suppose that the way the community understands something is capable of getting into the nature of that something? To this, Raz explicitly has an answer, since for him legal officials, lawyers and so on *can't be systematically wrong* in their claims about law, after all, *law is in part what these people claim it is* (RAZ, 1995c, p. 217).

Now, that is true, law is partly consisted by what lawyers and judges say, but for Raz legal theory is trying to get into the nature of law and what people say won't do much in that aspect since for Raz himself legal officials do not have the last word either about the nature of law (RAZ, 1995b, p. 203-206) or about the concept of law (RAZ, 2009b, p. 21). Equally important, when legal officials and lawyers say the things they say, they have in mind their ways around legal practice, their world-views and conceptual schemes. There is no reason to attribute greater weight to what they say when compared with what conscious citizens or philosophers say. To put it bluntly, if our worry is with the nature of law, we should not give epistemic priority to what legal officials say.

Barber gives a useful example. Marxist legal theories claim that the nature of law – as part of a superstructure – is class oppression. Legal officials are badly equipped to perceive this because dominant classes exercise ideological power over law schools, courts, legislatures and so on. Law's oppressive nature is thus hidden from legal officials. This kind of theory is certainly at odds with the common understanding, and notably from the understanding that those involved in legal practice have. However, they are not unintelligible theories and they can't be considered wrong in the search of the nature of law because of their disagreement with the common understanding (BARBER, 2015, p. 19). Actually, theories such as the one in the example turn the argument upside-down: it is because they are not stuck with the common understanding smokescreen that they can reveal what is the nature of the phenomena. Something similar is true for Nietzsche's account of Christian morality (with the important addendum that there is no "nature" or essence in Nietzschean philosophy).

To summarize, there is a gap between concept and nature that Raz fails to address. To quote Nye, "*our concept* consists of *our beliefs* about the nature of law. But that still only gets us a concept–concept connection. It takes us to our beliefs, but cannot get us to any claims about the very nature of law" (NYE, 2016a, p. 14).

The second problem is related to conceptual changes. As Raz himself recognizes, our concept of law is contingent, it is historically and socially located and is susceptible to change with time (RAZ, 2009c, p. 98-99). This means that, as a matter of fact, there are many concepts of law. Such concepts often diverge among themselves, and they all claim to apprehend the underlying nature of law. What we have here is actually a further complication to the first problem. It's not only that we have a gap between concept and nature, we also have many conflicting concepts of law, and we do not have any means to know which one of them is better at apprehending the nature of law. How can we pick one, among many?[15]

Concepts appear to help people to understand the world around them. Communities have different needs throughout time and place, and they develop matching concepts for such needs. Raz explicitly claims, for instance, that the concept of law *we* have is a much younger one, especially, it is much younger than the institution it is meant to explain (RAZ, 2009d, p. 85). Nye argues that Raz faces here a dilemma.

On one hand, if all (conflicting) concepts of law that exist and have existed succeed in apprehending some nature, such natures would be very distinct (for the concepts are very distinct) and therefore they would not be concepts of the same thing. They would be concepts of different things for which we happen to use the same word. For example: ancient romans had a very different concept of law when compared to the ones we have in modernity. If we assume that the users of the concept can't be systematically wrong about the propositions they make (as Raz claims), the roman concept of law should apprehend a very different essence when compared to the ones picked by our contemporary concepts. We would have, then, the roman concept capturing nature X, whereas contemporary concepts capture natures Y, W or Z. Consequently, there would be no relation between roman law and our law, except by the *word* law, in the same way that there is no relation between "rose" (the flower) and "rose" (the verb). Such conclusion, of course, is highly implausible (NYE, 2016a, p. 14).

By the other hand we can assume that every single concept, except ours, is wrong. This horn of the dilemma is equally implausible, but for different reasons. To begin with, we have, now, many competing concepts of law, so trying to rule out past ones *a priori* would be an arbitrary move with no good justification. More importantly, this alternative demands an unjustified confidence in our concepts. To embrace this horn also means the endorsement of the somewhat preposterous claim

[15] Brian Bix, usually sympathetic to Raz, recognizes this problem as well. Cf. Bix (2003, p. 554-555; 2005, p. 315-316)

that no one before us could do conceptual analysis since no one before us had our concepts (NYE, 2016a, p. 14).

The attempt to use our concept to apprehend nature seems, to me, a shot in the dark. There is, however, one last interpretation of the razian argument that we must consider. One could say that our concept of law does not try to apprehend the nature of law. Instead, it *reflects* such nature. The concept would be, then, a mirror of the nature of law, since the nature *causes* the concept[16]. As I see it, this interpretation has three problems.

Firstly, it is clearly at odds with Raz's own arguments. Raz never argues, as far as I know, that the underlying nature of things causes the concepts. There is a realist flavor in this argument that is absent in Raz's philosophy (and, I would hasten to add, Raz is correct in resisting this). Secondly, and related with the first problem, how can the nature of something cause the concept in us? For this interpretation to take off, an explanation for this causal mechanism is necessary. One cannot assume, without further argument, that some underlying entity named "law" causes in us the concept in the same way that seeing a color causes in me the perception of it[17]. Thirdly, in the absence of a clear idea of how the causal mechanism could work, we are not entitled to a justified belief about the adequacy of our concepts to the nature of law because the pervasive disagreement about the very concept of law undermines it (NYE, 2016a, p. 15). Even if we didn't know about the law of gravity, we could have a justified belief that material bodies fall because our human perceptions converge about that. Nothing like this happens in the case of law. We do not converge about law in the same way we converge about the falling of apples, therefore we can't have the belief that our concepts reflect nature[18].

For what we have been discussing, it should be clear by now that there is no way for our concept of law to apprehend an underlying nature of the phenomenon, or at least that Raz was not able to provide an account of how that could be possible. One is left to wonder if, with all the doubts we have put forward, there really is a nature of law. At the very least the arguments advanced until here are enough to put the burden of proof in the hands of the believers. Nothing in our legal practices or discourses demands the existence of an essence or nature. Things are going perfectly

[16] That's how Nye summarizes this interpretation (2016a, p. 14): "The world sets the boundaries of the institution in question, and our concept is responsive to that. The thing has an independent existence and our theory is trying to reflect it".

[17] This debate demands an analysis that is much more nuanced than what I can provide here. See, for instance, Dworkin (2011, p. 69-87).

[18] The way I see it, here we have an argument quite similar to the one Bernard Williams makes when he compares science and ethics regarding objectivity. For Williams (2006, p. 135): "science has some chance of being more or less what it seems, a systematized theoretical account of how the world really is, while ethical thought has no chance of being everything it seems" (2006, p. 135).

fine in law without this kind of metaphysical approach. At any case, since we don't have the means to apprehend the nature of law (neither can we prove that it exists), the wisest advice might be Wittgenstein's: about what one cannot speak, one should be silent (2001, prop. 7).

We have not, of course, deflected all that Raz has to say. He said much more about the concept of law than about its nature. This is expected, since for him our concept of law is part of our self-understanding (RAZ, 200b, p. 31). The concept is part of our world of reasons; it is part of what legal officials have in mind when they do their business. I believe one can make better sense of Raz's efforts if she focuses on his discussions of the concept of law. As a matter of fact, Raz himself does that, because for him conceptual explanation is the closest thing we have to explanation of nature (2009b, p. 24)[19]. This is also Brian Bix's interpretation, as he argues that *Raz proposes a theory for our concept of law*: "why should we study the concept if we can study the thing itself (the practice, the type of institution) instead? Raz's answer is to deny that the two can be separated; he argues that explaining the concept of law is close to, but not identical with explaining the nature of law, but it is the latter which is the primary task of legal theory. And the concept of law is relevant primarily as it reflects the way people perceive the law" (BIX, 2005, p. 313, footnotes omitted). For the next part of this essay, I will adopt this interpretation.

4- Are we talking about the same thing? Concepts of law and language games

Before we continue our engagement with Raz's views, we need to grasp some more abstract philosophical ideas. In order to do that, I will use the famous debate about the existence (or non-existence) of Nazi law. For decades legal theory was concerned with the problem of Nazi law. It is no exaggeration to claim that contemporary legal theory, at least in the English speaking world, was born soaked in this debate. This is nicely illustrated by the famous exchange at the Harvard Law Review in the 50s between Herbert Hart and Lon Fuller[20]. At least for Oxfordians, Hart managed to win the debate, but of course there are some very powerful detractors about this verdict[21]. Yet, something very curious happens in this debate. When Hart (or any other positivist) says "The Nazis had morally bad law, but law nonetheless" we can understand what he meant perfectly. When Fuller (or Radbruch) says "The Nazi didn't had law, because their rules were too immoral to be called law" we can also understand what he meant. How can both propositions make sense at the same

[19] See also Raz (2009b, p. 32).
[20] See Hart (1958), Fuller (1958), Hart (1994), Fuller (1969).
[21] For instance, Simmonds (2007) presents us with a powerful revival of Lon Fuller's main theses.

time? Ronald Dworkin claims, rightly, that in a sense what we have here is a matter of choice for the theorist and that no deep philosophical problem is involved. He suggests that we should be "wittgensteineans" about this issue, not giving too much thought to it (DWORKIN, 2004, p. 10).

Still, one has to show why the fact that both propositions make sense is no deep philosophical problem. In a way, Dworkin answers that, even if indirectly[22]. I think we can spell it out in a clearer way if we pay due attention to an important argument made by Wittgenstein:

> 11. Think of the tools in a toolbox: there is a hammer, pliers, a saw, a screwdriver, a rule, a glue-pot, glue, nails and screws. - *The functions of words are as diverse as the functions of these objects. (And in both cases there are similarities.)*
> *Of course, what confuses us is the uniform appearance of words when we hear them in speech, or see them written or in print. For their use is not that obvious*. Especially when we are doing philosophy! (WITTGENSTEIN, 2009, par. 11, my emphases)

Wittgenstein wants to call our attention to the different functions words might have. As Dworkin puts the point, our concepts are like tools we have in a conceptual toolbox (2011, p. 160). We can use different concepts for different things. That is the reason why the debate about Nazi law is not philosophically deep (at least not in the ways it is usually proposed). Positivists use a given concept of law to call attention to the formal structures of law, to what they call the "sources thesis". Lon Fuller and Gustav Radbruch, on the other side, use another concept of law to denunciate the immorality of the Nazi regime. We must appeal to Wittgenstein once more:

> 23. *But how many kinds of sentence are there?* Say assertion, question and command? - *There are countless kinds; countless different kinds of use of all the things we call "signs", "words", "sentences*". And this diversity is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten. (We can get a rough picture of this from the changes in mathematics.)
> *The word "language-game" is used here to emphasize the fact that the speaking of language is part of an activity, or of a form of life*. (WITTGENSTEIN, 2009, par. 23, my emphases).

For Wittgenstein, a language-game is a given practice of language use. For example, telling jokes, making prayers, impersonating a character in a play are all language-games. They have, each one, different grammars, that is, different rules of meaning and use. Different language-games employ different concepts in different manners with different meanings, even when they share the same words. This is what I take to be the reason Dworkin says that the Nazi law debate is not a philosophical problem at all. The so-called disputants are actually confusing the language-games

[22] See, specially, Dworkin (2006b, 2006c).

they are playing. They are wrongly supposing that there is disagreement about the *one* concept of law, whereas in fact they are probably mixing up different concepts of law[23]. For instance, it might make more sense of what Fuller says if we interpret him as claiming that law, *as an ideal*, has a certain morality, whereas the Hart can be interpreted as attempting some kind of "descriptive sociology"[24].

One more thing must be added to this explanation before we can return to Raz. For what reason sensible philosophers have misunderstood their own efforts? I can make only a sketchy hypothesis. They have fallen prey to the *family-resemblances* between concepts. This is the last idea I want to draw from Wittgenstein. Between some concepts, "we see a complicated network of similarities overlapping and criss-crossing: similarities in the large and in the small" (2009, par. 66)[25]. Different concepts in different language-games might share similarities just as people share similarities in a family. That's why there might be some confusion. Philosophers sometimes fail to chart where one concept ends and the other begins, so they mix up different concepts in the same way someone who has seen my brother and I only in photographs might confuse us in real life.

Let's go back to Raz. He claims that the concept of law has a criterial structure, that is, the concept can be accounted in terms of correct shared criteria for its application (RAZ, 2009c). Dworkin, in contrast, claims that the concept of law is an interpretive one, and "we share an interpretive concept when our collective behavior in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us" (DWORKIN, 2011, p. 158). One ought to stop and ask: about what concept of law are the authors diverging?

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[23] Frederick Schauer tries something different, but in the same "spirit": he argues that in order to make sense of the Hart-Fuller debate we should see *both* as engaged in normative inquiry (to put it differently, to make sense of the debate we should interpret the positivist against his own explicit position). See Schauer (1999).

[24] The expression "descriptive sociology" is employed by Hart in *The Concept of Law*, but he does not make it clear in the book. I think we can reasonably interpret him as attempting to describe law in a similar way to what Max Weber does. See Macedo Jr (2012). There are lots of disputes between interpreters of Hart and I don't want to take part in them in this essay.

[25] See also Wittgenstein (2009, par. 67): "67. I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family a build, features, colour of eyes, gait, temperament, and so on and so forth a overlap and criss-cross in the same way. - And I shall say: 'games' form a family. And likewise the kinds of number, for example, form a family. Why do we call something a "number"? Well, perhaps because it has - a direct - affinity with several things that have hitherto been called "number"; and this can be said to give it an indirect affinity with other things that we also call "numbers". And we extend our concept of number, as in spinning a thread we twist fibre on fibre. And the strength of the thread resides not in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres. But if someone wanted to say, "So there is something common to all these constructions a namely, the disjunction of all their common properties" a I'd reply: Now you are only playing with a word. One might as well say, "There is a Something that runs through the whole thread a namely, the continuous overlapping of these fibres"."

The lesson from Wittgenstein is that we have a plurality of concepts of law[26]. Dworkin himself (2011, p. 402)[27] presents a collection of those. We have what he calls a *sociological sense of law*. That's the sense (or concept) we have in our minds when we say things as "the law has emerged in the context of societal complexification". We have also an *aspirational or ideal sense of law*. We use this when we talk about the virtue of the Rule of Law. The most important sense we use law for Dworkin is what the calls the *doctrinal sense* (or concept). The doctrinal sense is the one we use when we make proposition as "Brazilian law forbids the consumption of marijuana" or "American constitutional law protects freedom of speech". To put it in another words, the doctrinal concept is about what the law is in a given context. Dworkin's list of concepts might be imprecise or even wrong, but it is useful in highlighting Wittgenstein's point. Dworkin goes on to make his criticism of Raz, taking the following excerpt as his starting point[28]:

> Here and in the sequel I will use 'law', as it is often used, *to refer sometimes to a legal system*, and sometimes to a rule of law, *or a statement of how the law is on a particular point*. Sometimes I will use the word ambiguously to refer to one or the other of these, as it does not matter for the purposes of the discussion of this chapter which way it is understood (RAZ, 2009b, p. 28, footnote 8, my emphases).

In the quotation Raz deliberately opts to use the word law in an ambiguous way. The problem is that the things he puts under the umbrella of a single word belong to different language-games, or if you prefer Dworkin's terminology, they are different concepts of law. My first emphasis in the quotation above captures the sociological sense. When we engage in legal sociology, we can use without any problem a criterial concept of law. One might define a set of criteria and then go on applying it for her research purposes. On the other hand, the second emphasis is about the doctrinal sense of law (DWORKIN, 2006d, p. 226-229). The question that naturally arises is this: is this sense of law also criterial, as Raz claims? When two lawyers diverge about what is the law in a given jurisdiction, are they looking for shared common criteria, even when they do not know what are they? (RAZ, 2009c, 65-66) Or are they doing something else?

I believe that the doctrinal concept of law is not criterial. To make my case, it is useful to start with a gap in Raz's argument that was perceived by Peter Chau. Raz assumes that the existence of a shared attitude *of recognition of common criteria is enough to sustain that indeed the speakers share those criteria*. However, Raz does not explain *why* the attitudes the speakers have regarding

[26] See also what Macedo Jr has to say in (2012, p. 180). My arguments are largely influenced by Macedo Jr's work on the methodology of legal philosophy.
[27] See also Dworkin (2006b, 2006c, 2006d). Natalie Stoljar presents us a different "collection" of concepts (2013).
[28] Dworkin quotes this excerpt in (DWORKIN, 2006d, p. 227-228).

their concepts cannot be based in mistakes (CHAU, 2010, p. 236-237). There is the possibility that the attitude misrepresents reality, that is, that the speakers are mistaken in assuming they share criteria. In a more general level, we should notice that people might be wrong about the explanation they give about their own conceptual uses. For instance, if legal practitioners were to say (somewhat implausibly empirically) that the doctrinal concept of law is a criterial one, this does not mean that this is really the case, as they might be mistaken in the explanation they present.

There is a crucial point here. How can one be mistaken about the description she offers of her own practice? The question is, I believe, about how we can make sense of things. Dworkin claims that the conceptual classifications he offers (criterial, natural kinds, interpretive, etc.) can only be justified in so far as they help us to understand conceptual practices. The classifications are not themselves used by the concept-users. There is nothing mysterious here: most of the time, people do not grasp the scaffold necessary for their conceptual uses and yet they can use concepts without any problems (DWORKIN, 2011, p. 163)[29]. Conceptual classifications are, after all, "philosopher's ideas", as Dworkin says.

The discussion of the last two paragraphs helps to put aside Raz's claim that legal officials cannot be systematically mistaken about their practices. Even if they claim that the concept of law is criterial, we have no reason to take their explanations as necessarily true. To bridge the gap between the explanations offered and truth, Raz would need to do more than just presenting the logical possibility of a criterial treatment of the doctrinal concept. As his argument stands, there is no reason why we should consider Dworkin's interpretivism as a worse option, for example.

Someone more sympathetic to Raz can complain that what has allowed Dworkin to claim the correctness of his theory (and therefore allowed my criticism here) was a distortion of Raz's project. The razian theses we have been analyzing, a defendant could say, are not about a theory of adjudication[30], about how we can figure out what the law says in a given case and in a given jurisdiction. To say that Raz is committed to a criterial interpretation of the doctrinal sense of law is a mistake, if we see the doctrinal sense as a matter of legal interpretation. Indeed, Raz himself affirmed that legal reasoning is a special case of moral reasoning, that legal officials do employ moral considerations in their decisions every day (1995b, p. 209).

[29] See also Wittgenstein (2009, par 124-126). A lot has been said about what exactly Wittgenstein meant when he said that philosophy "leaves everything as it is". I do not intend to do wittgensteinean exegesis here. It is important to notice that Raz agrees with the general remark made in this paragraph.

[30] Raz explicitly accuses Dworkin of confusing a theory of law with a theory of adjudication. See Raz (1995b, p. 202-203).

Raz's argument, the defense would say, is about the concept of law in general, about what are the necessary features for something to be considered law. We have seen in the previous section that the search for a nature or essence of law was bound to fail, but there is something different that Raz can claim. He can affirm that legal theory (or at least the kind of theory he tries to do) aims at retrieving the common shared criteria for something to be called law. Raz says that:

> *The criteria that govern people's use of language are simply the criteria generally relied on in their language community for the use of those terms*. People who think that they understand a term or a concept think that they have at least some knowledge of what the common criteria are. They may be wrong. They may be partially or completely mistaken about the common criteria. It is part of each person's rule for the use of the term or concept that mistakes can occur, for the rule refers to the criteria as they are, rather than to what that person thinks they are. What they are, however, does depend on what people think they are. *The correct criteria are those that people who think they understand the concept or term generally share, ie those that are generally believed to be the correct criteria are the correct criteria.* RAZ, 2009c, p. 64, footnote omitted, my emphases)[31].

According to this interpretation, what Raz tries to do is to spell out the shared criteria for something to be considered law. His is a search for the general concept of law. Dan Priel dubs this approach "externalist" in the sense that the shared concept of law is not in the head of a given individual, but embedded in the community (2015, p. 28). Metaphorically speaking, the concept of law is a common property of the community. It is common because people share the criteria for its application.

The argument against this view was already foreshadowed in the previous section. We can call it the "problem of demarcation". If what Raz is trying to do is to spell out the shared criteria, he must define who the relevant community is. The trouble is: as we expand the boundaries of the community, we at the same time reduce the number of shared criteria. In order to make a legal theory of shared criteria that is applicable to all contemporary legal systems, one would need to see what is common between US law, UK law, EU law, North Korean law, Theocratic Iran law and so on. If we suppose that we can do that, what we would get is an extremely impoverished set of criteria. Something like Hart's minimum natural law, possibly.

We should also notice that even within a single political community like the US we have pervasive disagreement about what count as law (PRIEL, 2015, p. 29). To see this, it suffices to think about the debates regarding constitutional interpretation. Textualists, originalists and intentionalists all belong to what we can call the "conservatives" about constitutional interpretation,

[31] Dan Priel (2015, p. 27-28) also quotes this excerpt.

and they fight among themselves in order to decide what law is. When we add the pragmatists, critical legal thinkers and feminist legal theorists to the stew, we can claim, without any lack of rigor, that the search for a common set of criteria for law is either destined to fail or to find extremely trivial criteria (such as "the law is a set of norms that help the guidance of conduct"). The search for common criteria would give us very little, even as a method for local theories of law, such as a theory for US law or Brazilian law.

As Priel puts it, to find a more useful concept of law, one needs to be selective. For instance, instead of looking for shared criteria, the theorist might appeal to values she finds relevant to law and then interpret law according to them. One would ask "what is it that is valuable about law?". She would then need to find an answer she finds compelling and proceed with the craft of a more adequate concept of law. This is pretty much the same thing as Dworkin's interpretive method[32] (PRIEL, 2015, p. 29-30). Philosophical disputes among legal theorists become, in this light, normative disputes about the value of law. In a sense, legal theory becomes a branch of political philosophy.

V – Conclusion and Some Disclaimers

In this essay I relied on the works of Nye, Barber, Dworkin and Wittgenstein to show why razian conceptual analysis faces difficulties in two fronts. On the one side, I have argued that Raz's discussion about the nature of law fail to bridge the gap between concept and nature, because reflection about concepts can only bring about relevant information about other concepts. This has important consequences for any universalizing ambition a theory can have. On the other, Raz's arguments about the concept of law face problems in explaining why the practitioners' own views should have explanatory priority, and there is also the problem of demarcation. Raz is imprecise about what kind of concept the concept of law is because he does not account for the many contexts we can sensibly talk about a concept of law. Finally, if we interpret his theory as a sort of unveiling of common shared criteria, we are probably going to be disappointed, for the pervasive disagreements about the content of law severely limit the possible shared criteria[33].

[32] This is roughly what Dworkin proposes for legal theory since *Law's Empire* (1986).

[33] As I see it, the arguments I've presented here are in continuity with Macedo Jr (2012; 2013) and Neiva (2017). Both Macedo Jr and Neiva offered dworkinian criticisms of legal positivism, drawing elements also from Wittgenstein. The difference between their arguments and the ones I'm making is, I think, that I am relying less on Dworkin's proposal.

I believe that some disclaimers are in order. Firstly, even if Raz is wrong on this score, this does not mean that other methodological positivists are wrong. It remains to be seen if the sort of criticism advanced here has any bite against Andrei Marmor or Jules Coleman, for instance. Secondly, I have deployed Dworkin as a useful thinker that helps us to see through some of Raz's shortcomings, but *I have not claimed* that Dworkin's own proposal is the best one in the market. All I did was to claim that he is right in taking seriously Wittgenstein's contribution to legal theory. I believe one can challenge Dworkin's ambitious interpretive project without giving up the wittgensteinean insight he brought to jurisprudence. Thirdly, and more importantly, my criticism is circumscribed to one particular aspect of Raz's philosophy, his understanding of the concept and nature of law. Nothing I have said here impacts Raz's account of legitimate authority (the service conception of authority) nor his views on practical reasoning, for instance. Indeed, it seems to me that one can be skeptical about Raz's account of the concept and nature of law but endorse nonetheless his views on authority or reason (I am myself inclined to accept Raz's service conception of authority, for instance). It is one of Raz's many merits that his work breaks so much new ground in different fronts.

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