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PHILOSOPHICAL AND LINGUISTIC SOURCES OF HERBERT L. A. HART'S THEORY OF LAW

Abstract. The paper presents H. L. A. Hart as a leading exponent of the analytic orientation in legal philosophy. Hart showed that the principles and methods of analytic philosophy yield fruitful implications to law, where they may foster fresh ideas and innovative solutions. The text emphasizes the linguistic aspect of Hart's works; his achievements in legal theory are discussed in the context of the principles of ordinary language philosophy.

Keywords: analytic philosophy, ordinary language philosophy, open texture, performative use of language, causation in law.

1. Introduction

Herbert L. A. Hart, one of the greatest legal theoreticians of the 20th century, a lawyer and philosopher, is the author of the famous *The Concept of Law* that offers a sophisticated view of legal positivism. Studies of Hart's works usually focus on a thorough analysis of his approach to law-morality relationships while neglecting the philosopher's contributions to legal theory in the context of the philosophy of language that he adopted. The aim of this article is threefold: to highlight the linguistic aspect of Hart's pursuits and to present him against the philosophical background of other outstanding British thinkers, such as G. E. Moore, L. Wittgenstein, or J. L. Austin, by showing similarities and defining peculiarities; to determine the role of ordinary language in Hart's thinking; and, finally, to present the philosophy of language "in action". At the same time, I would like to explicitly establish Hart's position in the analytic philosophy that was a rapidly developing trend in his time while emphasizing his relations with legal philosophers whom he treated as his ideological predecessors, namely John Austin and Jeremy Bentham, again focusing on a specific linguistic perspective.

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Jan Woleński, who studied and translated Hart's works, observes that the continental tradition sees legal philosophy[1] as the domain of jurists rather than of philosophers, which in part is the effect of the physical isolation of law departments from the rest of the university. Lectures in legal philosophy were delivered more often by jurists than by philosophers, while the philosophy of mathematics, for example, was still the domain of philosophers who usually were also trained in mathematics. This resulted in attention being focused on ethical matters and on axiology, whilst other philosophical questions concerning law, e.g. the existence of law, were dealt with by legal theoreticians. A certain "separation" of legal theory from general philosophy was weaker in Anglo-Saxon countries, which was the reason why the philosophy of law there was not limited to the study of the law-morality relationship – rather, it encouraged the examination of a wide variety of law-related philosophical problems. Such an approach was characteristic of H. L. A. Hart, who – as a man of dual competencies (in both law and philosophy) – touched on philosophical issues relating to law (Woleński, 2001, pp. IX–XI) and believed that "if there is some philosophical point which can clarify or settle issues which non-philosophers have found problematic, it is always possible simultaneously to expound for them the philosophical point and to use it for that purpose" (Hart, 1986, p. 1).

2. Aims and assumptions of analytic philosophy

Hart studied philosophy in Oxford when British philosophy was dominated by G. E. Moore, B. Russell, and L. Wittgenstein – the thinkers at Cambridge University and founders of analytic philosophy[2]. All of them had a great influence on Hart's way of thinking and his presentation of legal phenomena. British analytic philosophy emerged from a protest against the idealism of the late 19th and the early 20thcentury: mainly against neo-Hegelism and its contempt for formal logic and common sense. It is assumed that analytic philosophy originated in 1903, with the publication of G. E. Moore's *The Refutation of Idealism*, and B. Russell's *The Principles of Mathematics*.

Analytic philosophy as created by Hart's masters is not a homogenous philosophical school in the traditional sense of the term; rather, it embraces many, often very different trends. According to J. Woleński, the author of a monograph on analytic philosophy, these include Moore's Common Sense philosophy, Russell's and Wittgenstein's logical atomism, logical empiricism, the Lvov–Warsaw school, late Wittgenstein's therapeutic philosophy, and the Oxford ordinary language philosophy. The quoted typology is not the

only one – the boundaries between particular trends in analytic philosophy seem to be fuzzy and allow for other ways of classification (Woleński, 1980, p. 33). J. M. Bocheński, speaking of the differences within the domain of analytic philosophy states that at least one dichotomy needs to be taken into account: hard "horse-shoe" analysis – soft "soft-shoe" analysis, i.e. the opposition between mathematical-logical analysis and linguistic analysis (1993, pp. 36–37). According to B. Stanosz, the followers of the former school seem to place an emphasis on the cognitive functions of language with the notion of truth at the centre of their interest, while the supporters of the latter one are particularly focused on linguistic communication where the key concept is "language user intention" (1993, p. 5). The above-mentioned types of philosophical analysis, despite substantial differences, are characterized by a common paradigm and their objective is – using G. Ryle's terms – to identify the "logical geography of concepts", i.e. the logical relations between concepts (Ryle, 1949, p. 39)[3].

Hart, writing about his contemporary analytic philosophy, introduces a dichotomic division between its Oxford and Cambridge variants. As he observes, the two basic trends are significantly different in terms of the main focus of interest and the description of goals, yet

> both were inspired by the recognition of the great variety of types of human discourse and meaningful communication, and with this recognition there went a conviction that longstanding philosophical perplexities could often be resolved not by the deployment of some general theory but by sensitive piecemeal discrimination and characterization of the different ways (...) in which human language is used (1986, p. 2).

The linguistic aspect always seems to be at the forefront in each variant of analytic philosophy.

The very name of the trend suggests that conceptual analysis is of such great importance that it may function as a particular determining factor of analytic philosophy. Basic methodological principles recognized by all representatives of the trend include, as proposed by J. M. Bocheński, conducting the analytical work step-by-step, which involves the rejection of any synthesis and of equating philosophy with worldview. Another principle postulates focusing attention on the meanings of linguistic expressions with simultaneous denial of "concepts in themselves", or concepts that are isolated and seem to exist "up in the air". The next principle demands the rejection of irrationalism and hence it demands that one should recognize the rationality of the surrounding reality or assume that the limits of such reality are expressly defined by the limits of logic. Yet another norm imposes objec-

tivism as it assumes that philosophy may be of an objective nature and postulates that those who go in for it should give up a subjective attitude. Each of these rules may be (and, as shown by the history of analytic philosophy, actually have been) brought to the extreme; hence, they would fail to be fully representative. Radicalization of the first principle would result in the impossibility of any consistent philosophy or coherent synthesis – as in the therapeutic writings of Wittgenstein. When the other rule reaches its ceiling, philosophy becomes a purely linguistic analysis, where the main objective is to make concise contributions to dictionary entries (longer texts would go out of fashion). On the other hand, giving primacy to logic in philosophy may result in philosophy becoming equated with formal logic. As for the effect of full implementation of the last rule, this would eliminate any differences between philosophy and scientific analysis – which was the case of the Vienna Circle and logical positivism (Bocheński, 1993, pp. 38–41).

Jerzy Stelmach proposes a similar catalogue of rules that are canonical to analytic philosophy, with the following essential postulates: 1. philosophy has to reject metaphysics in order to avoid being given a marginal role to play, 2. as a discipline, philosophy is not of a systematic, but of a methodological character, 3. the principal aim of philosophical reasoning is to work out an effective method of analysis, 4. philosophy has to be objective if it aspires to be considered as science (1999, p. 96).

The emergence of the analytic trend in philosophy marks the beginning of a new era and is a turning point in the development of philosophy, as it made a break with the preceding tradition that made up almost everything known as "modern philosophy". Analytic philosophy introduced ideas that had barely been present before, such as logic, linguistic analysis, or ontology. The trend draws on and follows pre-Cartesian tradition: it appears to be a return to classical reasoning in the spirit of Plato, Aristotle, or the Scholastics (Bocheński, 1993, pp. 42–44); characterized by an immense creative potential, analytic philosophy would contribute to the development of other, non-philosophical, disciplines and its outcomes may now be used by scholars representing different branches of science, as the achievements of the scholastic thinkers were used in the past, when philosophy offered an example of a method that was applicable elsewhere. The results of philosophical analyses were employed by physicians, lawyers, and theologians alike, and this kind of practice was both popular and widespread. Today, analytic philosophy has a full potential to become an ancillary discipline to, for example, sociologists, or political scientists. It is also a philosophy with a certain social responsibility to fulfill. Although it does not build great systems, does not construct or sell worldviews, does not aspire to the role of a life mentor, or

does not have a mission of answering metaphysical questions, it has an important role to play – analytic philosophy makes its followers the guardians of reason, the advocates of rationality who defend it against any irrational ideologies (Bocheński, 1993, pp. 45–49). The goals that are currently set for analytic philosophy correspond with Hart's mindset – having been strongly influenced by not only the analytic, but also by the utilitarian trend, he determined specific objectives for his work, with the accumulation of "benefit", "advantage" or "well-being" of societies and individuals given special prominence.

3. Trends in analytic philosophy

Hart's predecessor was John Austin, both a lawyer and a philosopher (1790–1859), widely recognized as the creator of legal positivism[4] and the author of the command theory of law. Austin, who strived after putting English legal terminology in order, decided to analyse basic concepts of British legal theory. Austin's significant contribution is an attempt to precisely define the notion of law and to decisively separate metaphysical statements about it from scientific accounts. The methodology that he adopted is based on the analysis of legal terms by using logic-based tools. Austin built definitions of concepts with the aim of producing a homogeneous and coherent system (Stelmach, Sarkowicz, 1999, p. 26). However, Austin's belief in the reliability of logical apparatus on the ground of jurisprudence was not blind, and his trust in formalist methods was limited; the British lawyer was well aware of the fact that legal reasoning does not always fit into the frames of the deductive process (Pietrzykowski, 2012, p. 209).

Hart appeared to be a follower of Austin's approach to jurisprudence and at the same time was its constructive critic[5]; he thoroughly revised Austinian theory while referring to the concurrent trend of analytic philosophy: the variant that had the strongest influence on Hart's legal and philosophical beliefs is ordinary language philosophy, sometimes dubbed "the Oxford school of philosophy", whose main representative was John Langshaw Austin[6], a namesake of John Austin, the lawyer. Ordinary language philosophy originated from the thought of the already mentioned G. E. Moore, one of the founders of analytic philosophy and a representative of Oxford realism. Moore assumed – as, in his opinion, any other person of common sense would – that most importantly, physical objects exist independently of reason and are cognizable. Moore polemicized with the supporters of the opposite view, who questioned the feasibility of the cognition of physical

reality and allowed for the existence of non-physical entities[7]. Philosophical problems should be, according to Moore, solved by the principles of reason and common sense, and by using common-sense language, i.e. ordinary, colloquial, non-philosophical language. Moore adopted the method of analytic procedure under which "strange" philosophical theses should be accessed via the study of their consequences, which would reveal how such a "strange" thesis was originally conceived of by its author. Another step in this procedure is confronting the said thesis and its consequences with common-sense convictions and rejecting it if it fails to be compatible with those convictions. On the other hand, if common-sense convictions are not clear enough, analysis can also be used to clarify them[8]. An important feature of Moore's philosophy was the source it stemmed from: from being amazed by philosophical paradoxes, as the material for his analyses was taken from other authors' texts[9]. Moore himself did not say that his studies were of a linguistic character – although he examined concepts and formulated normal definitions consisting of *analysans* and *analysandum*, he never declared the object of his analysis to be language or linguistic facts: this was first done by the supporters of logical atomists led by Bertrand Russell (Woleński, 1980, p. 34). (For them, analysis would become an operation on the very language, with the discovering of its logical structure seen as the discovering of the structure of the world; atomists believed in structural isomorphism between language and the world). Moore's thinking – the first stage of analytic philosophy – reveals a number of issues that it has to face: one of them is about the status of philosophy and its relation to science; another – the object of its analyses; yet another – the relation of the claims resulting from analyses to ones that are well-established in philosophical tradition (Woleński, 1980, p. 35). Moore's analysis, informal and descriptive in character, corresponds to the views of "late" Wittgenstein, another thinker who had an impact on Hart's method of examination and description of legal phenomena.

Later works by Ludwig Wittgenstein resulted in the break in the supremacy of formalism in analytic philosophy[10] that coincided with the flourishing of the Vienna Circle. Wittgenstein, having given up his earlier views based on formal logic, showed that true understanding of the meanings of expressions is only possible through the examination of particular contexts in which these expressions are used. In later Wittgenstein, logic can no longer remain on a pedestal: it is no longer the very fabric of language and the world. The philosopher discovers that sentences by no means reflect the structure of reality and that language is a human tool for acting in the world (Brożek, 2014, p. 88). To know the meaning of an expression is no longer to know its definition; rather, it is to know how to adequately use this ex-

pression in different situations. The concept that Wittgenstein developed to describe this operation was that of a "language game". As the thinker put it, "the meaning of a word is its use". The former "picture theory of meaning" was superseded by the "use theory of meaning" (Woleński, 1980, p. 40). There does not exist one universal language whose analysis would produce irrefutable knowledge about the world; instead, there co-exist many intertwining languages – or "language-games" where words function in a normal way (Wittgenstein, 1986). Importantly still, a language-game, although language-based, involves also an extra-linguistic aspect: the actual situation of a "player". The real meaning of a given word can be established only after one has determined the specific area in which this word functions (its "family of uses") (Wittgenstein, 1986).

Wittgenstein recognized a norm postulating the acceptance of ordinary language, which resulted in lending philosophy a new role: philosophy would have a therapeutic function and be on guard that words are not out of their specific games (1986). Here, a philosopher's task is to identify philosophical errors resulting from words having been placed in inappropriate language-games, to identify situations where words have been abused or used in an unjustified, inappropriate way – such language abuse or misuse seems to occur quite often as we have a natural, innate inclination to them. Using a language seems to be the underlying reason for philosophizing understood as a therapy of linguistic errors.

Although Wittgenstein himself was not a lawyer and the examples he gave in his writings are not about legal phenomena, it seems that the methods he developed may be easily applied to the study of law (Brożek, 2012, pp. 128–129). This question was raised by Hart himself, who spoke about both Wittgenstein and J. L. Austin:

> They were not specifically concerned with law, but much of what they had to say about the forms of language, the character of general concepts, and of rules determining the structure of language, has important implications for jurisprudence and the philosophy of law (...) (1986, p. 274).

It was Hart who went from the implications of Wittgenstein's popular concept of a "language-game" to the domain of law, thus providing ground for another revisiting of informal linguistic analysis. A staging-post between the later Wittgenstein and Hart was the solutions offered by the founders of the Oxford school of philosophy – J. L. Austin, G. Ryle, and P. F. Strawson, who took up the challenge of responding to the objections raised against Wittgenstein: that he limited the role of philosophy to a purely therapeutic dimension and hence made it almost indistinguishable from philology. It

was they who gave a precise account of the object of philosophical analysis and established that philosophy focuses its interest not on words, but on their use[11].

The uses of linguistic expressions fell within the scope of interest of Hart, who absolutely agreed with the "appeal to ordinary language in philosophical analysis" – the most prominent idea of the supporters of the Oxford philosophy. Following J. L. Austin, Hart considered ordinary language as the primary and basic language of a philosopher, the one that is the origin of any philosophising. Austin assumed that if ordinary language reflects the experience of all generations (i.e. irrelevant, useless, and obsolete elements are evacuated from the language so that only the functional ones are left to be found by another generation; language may be improved, modified, and supplemented as specific needs arise), it should become a point of departure in a philosophical analysis. "Certainly, ordinary language has no claim to be the last word, if there is such a thing: ordinary language is the first word" (Austin, 1956–1957, p. 11). Even though ordinary language does not necessarily bring reliable knowledge, it is surely the source of philosophy. When we wonder which words to use, our observations are not only of a linguistic character and not only about words or meanings; while thinking about a particular use of language, we in fact examine a given fragment of reality. Language and the world to some extent correspond to one another and seem to be complementary; linguistic analysis, as Austin believes, is a factual analysis. When analysing ordinary language, we are in fact using a "sharpened awareness of words to sharpen our perception of the phenomena" (Austin, 1956–1957, p. 8).

One of the key concepts for analytic philosophers is presupposition. It was first used by G. Frege, who analysed a pair of sentences: "Kepler died in poverty" and "Kepler did not die in poverty" – both of them containing a presupposition that there existed a person named "Kepler". A characteristic feature of presupposition is the fact that it is identical for both a sentence and its negation. This issue was studied further by B. Russell and P. F. Strawson; while Russell used tools based on formal logic, Strawson drew on ordinary language philosophy[12]. Strawson examined the famous example from Russell: "The present king of France is bald" to prove that the sentence presupposes that "There exists a king of France". The term "presupposition" is defined by Strawson as follows: sentence B is presupposed by sentence A if and only if the truth condition of B is a prerequisite for the truth condition of both A and "this not the case that A". Presupposition is the condition of a truth-value of a sentence; when the sentence "There exists a king of France" is false, then the sentence "The present king of

France is bald" is truth-valueless. Here, Strawson assumes that truth and falsity can be ascribed to assertions or utterances rather than to sentences; if the sentence "There exists a king of France" is false, then the sentence (in a grammatical sense) "The present king of France is bald" is not an assertion and thus it cannot have a truth value. For Strawson and other ordinary language philosophers, presupposition is the central notion of informal logic, free of any connotations imposed by formal logic. This is exclusively the case of assertions, not sentences as understood by formal logic; assertion means that the use of a sentence and the correctness of a given use can only be determined on condition that all presuppositions have been identified that are related to this particular use, with its broadly understood context also taken into account (Strawson, 1950; Woleński, 1980, pp. 51–52). Saying "The present king of France is bald", one only presupposes the existence of a king of France rather than asserts it. The aim of studying presuppositions is in fact to make a distinction between what is asserted from what is presupposed. For Hart, as is shown further in this paper, the identification of suppositions is a valuable tool for the description and investigation of law[13].

4. The application of methods and objectives of analytic philosophy to the domain of law

The works of H. L. A. Hart introduced some reformatory ideas to the philosophy of law; his thought is seen as an attempt to employ analytic methods in the explanation and description of legal phenomena. Hart's writings abound in examples of the application of research procedures developed by representatives of the analytic school, in particular by the ordinary language philosophers; Hart makes references to broadly understood explication[14], presupposition, or argumentation from reference cases. Jan Woleński dubbed Hart's legal philosophy "applied analytic philosophy" and notes in passing that this was approved of by Hart himself in a private conversation. Woleński further observes that the application of ordinary language philosophy to jurisprudence fits into the British tradition of legal studies and seems to be a natural operation – the system of common law is decidedly less formalized than the continental systems, and so British judges are inclined to refer to folk knowledge and use informal argumentation (2001, pp. XIII–XIV).

As a novel idea, the methodology of interpretation of law as proposed by Hart received a sceptical reception from outstanding philosophers and

those less known alike. One of the contemporary critics of Hart's thought is Brendan Edgeworth, who challenges the very foundations of Hart's concept that is based on ordinary language philosophy. According to Edgeworth, there is no such thing as "purely ordinary language" as it is always encrusted with scholarly terms as well as with the fallacies and successes of the present time. Besides, since it appears impossible to examine linguistic phenomena in their totality, there can be no way of differentiating between those that are important and those that are not. Also, the ordinary language philosophers do not present any arguments why a particular language use is considered a "reference" case, whereas the other is seen as "peripheral". Edgeworth follows with a claim that there does not exist any definite and absolute "common use" of a given term; thus, research carried out by the "Oxford school" of linguistic philosophy is in fact pointless (Edgeworth, 1986).

Besides ordinary language philosophy, Hart was also influenced by an American jurist, Wesley Newcomb Hohfeld, and this influence can be seen in his texts. Hohfeld, who represented a different trend in analytic philosophy and was a follower of John Austin, the lawyer, was a master of analysis and clarification of legal concepts[15]. Drawing heavily on Austin and Hohfeld, Hart wrote his first important work titled *Definition and Theory in Jurisprudence* (1954) that offered not only references to both his masters, but also constructive criticism of their thought. Here, Hart categorically claims that, when it comes to legal concepts, traditional descriptive definitions do not work, which in part results from a multi-dimensional anomaly of legal terms and their difference from ordinary words referring to everyday human experience. Legal terms are characterized by the fact that although most people know them, they do not comprehend them. Questions of "what" a particular legal concept is (i.e. "what is a *right*", or "what is *possession*") may be frequently asked, but they are misformulated and inadequate. According to Hart, the previously used manner of giving answers to such questions resulted in a material hiatus between legal theory and the study of law at work, and led to the entanglement of basic legal terms in a "forbidding jungle of philosophical argument" (Hart, 1983, p. 21).

The traditional approach to definition that was typical of legal theoreticians was not possible to verify until the linguistic turn in philosophy that enabled them to formulate theories that are not "hanging on definition's back". The factual and full discovery and comprehension of a legal term comes from the observation of its behaviour in particular statements falling within both legal and non-legal discourse – getting to know its essence is painstaking and requires a profound analysis of how a given term functions in various texts. Legal terms may and should be elucidated through the

examination of conditions under which they are true and of the distinctive manner in which they are used (Hart, 1983, p. 47); they should be described rather than constructed.

Despite the fact that the history of law had seen, as Hart believed, numerous instances of inadequately formulated definitions of legal terms, there are still some thinkers characterized by perfect intuitions about the proper way of describing legal words. In this respect, the analyses by J. Austin, J. Bryce, D. Pollock, F. Maitland, A. Kocourek, and H. Kelsen appear to be of paramount importance. Hart even assumes that there is a reason why a chapter on possession in Digests does not give any answer to the monumental question of what possession is – this absence would be an expression of the author's belief that classical definitions are of no use for the description of legal terms (1983, p. 47).

One of the first legal philosophers who drew attention to the problems connected with the elucidation of legal terms was Jeremy Bentham, a utilitarian, Austin's teacher, and another of Hart's mentors whom he called "the great mind" (Hart, 1971). Bentham, who took a critical stance on his contemporary practising lawyers and whose aim was to reform the British legislature[16], realized that legal terms are special and differ from ordinary language, and therefore they should be treated differently: they do not accept definition by genus and difference (*per genus proxiumum et differentiam specificam*). The analysis of terms of this type cannot be an examination of particular words in isolation from their context – rather, it has to consider whole sentences in which these words normally function. The analysis of the word "right" itself will therefore have no effect, quite unlike an examination of the sentence "You have the right"; similarly fruitless would be analysing the word "State" unless it appears in a sentence such as "He is a member or an official of the State" (Hart, 1986, p. 26). It is only in sentences that legal words play their characteristic roles. Bentham's warning was largely disregarded; it was not until Hart's times that the traditional method of elucidation of legal rules ceased to be in use. For Hart himself, a close examination of how the statements about e.g. the rights of a limited company relate to the world in conjunction with legal rules is a basic method of analysing the concept of a "right". The important first step to take here would be to ask under what conditions statements containing the term "right" have a truth value and are true (1986, p. 3).

Hart, pondering the specificity of legal terms and the problems that we face when trying to clarify them, on many occasions employs analogies with the rules of various games; in his opinion, the rules of a game and the rules of law have the same logical structure at many vital points. Legal words,

e.g. a "right", as Bentham had seen it, should be examined in their natural contexts and in the sentences they appear most often. When a judge says "A has the right to be paid 10 pounds by B", they silently assume a very complicated setting, i.e. the existence of a legal system with all it implies by way of general obedience, the operation of the sanctions of the system, and the general likelihood that it will continue. Although a judge's use of the formula "A has the right to be paid 10 pounds by B" presupposes the aforesaid circumstances, it does not determine that they actually exist[17]. Similarly, when in the course of a game of cricket one says "He is out", it should be interpreted in its proper context, that is, in playing this particular game. "He is out" is an expression used to appeal to rules, to make claims, or give decisions under the laws of cricket, but not to talk about these laws to the effect that they will be enforced or acted on in a given case, nor to make any statements about them. It would be erroneous to assume that the sentence "A has a right" is a prediction about a judge's decision, or to assume that the sentence "Player A is out" is a prediction about an umpire's decision in the game of cricket. Undoubtedly, having a legal right normally justifies certain predictions but, according to Hart, we must not regard the two statements as being identical (1986, pp. 27–28).

The sentence "A has the right to be paid 10 pounds by B", aside from the fact that it presumes (although does not state) the existence of the law, has a special connection with a particular rule of the system. This connection would be made explicit when we ask about the reason why A has that right. An appropriate answer to this question should consist of two components: first, the statement of the rules of law under which given certain facts certain legal consequences follow; secondly, a statement that these facts have actually occurred. Importantly still, the statement "A has a right" *does not state* any relevant rule of law. If a sentence of this kind is used in an adequate manner, i.e. it relates to particular facts, then the person who produces it is not describing these facts or stating them. To Hart, by saying the sentence under discussion, a person is drawing conclusions from a relevant but unstated rule, and from the relevant but unstated facts of the case. Sentences of this kind result from legal calculations; they are called conclusions of law. They are not used to predict the future; they refer to the present although they do not describe present facts. The above argumentation frustrates the definition of the term "right" since the word does not correspond to such terms as "expectation" or "powers", even when these are supplemented by a phrase "based on law". A terrified person who is paralysed with fear, when watching the thief's hand over his gold watch, does not have any powers to avoid the loss of his

property (in an ordinary sense of the word "powers"), yet he undoubtedly has *a right* to retain it. The term "right" in this case does not mean powers or expectation; it has meaning only as part of a sentence whose function is to draw a conclusion of law from a specific kind of legal rule (Hart, 1986, p. 28).

One of the most problematic and notoriously ambiguous legal terms that Hart studies using his characteristic method is the word "law" itself. The term is applied to such a wide range of diverse cases that this baffles the initial attempt to extract any principle behind the application, yet it is commonly believed that such a principle can be formulated. The elucidation of a principle according to which there are a number of different men called "Tom" would be absurd – but it would not be absurd to ask why we use one term "law" to cover a variety of different types of rules within municipal or international law (Hart, 1986, p. 22).

Hart proves that international law is really "law", and that in this case using the term "law" is not an arbitrary convention (analogically, patience is a "game" despite being different from a game of polo). One of the arguments for the claim that international law is really "law", as Hart believes, is the intuition shared by most people that in this respect the term "law" has been used aptly rather than arbitrarily. Other arguments were formulated based on the principles of ordinary language philosophy and the instructions given by J. L. Austin and later Wittgenstein. Hart sought a reference case of the use of the term "law" and referred to the concept of family resemblance in his attempt to determine the limits of its extension; previously, conceptual analysis (which Hart rejects) led to the classification of the term "law" as a specific name, with the adjectives "municipal" and "international" treated as generic names. Having considered municipal law to be a paradigmatic case of law, Hart was puzzled by the question in what way it is similar to international law. The philosopher saw formal analogy in the very structure of international law, for it imposes rights and duties on certain individuals, which is enough for international law to be conclusively called *law* (Hart, 2012, pp. 213–237). International public law is *law* despite a number of salient differences with the reference case, i.e. municipal law: it lacks a legislature, courts with compulsory jurisdiction and officially organized sanctions; also, international law does not respect Hart's principle of the "minimum content of natural law" under which any law should observe certain rules that ensure the biological survival of individuals.

One of the most important reasons why legal terms would not be defined in a traditional way is the fact that they do not have a straightforward

connection with counterparts in the world of facts[18]; there is nothing which corresponds to a given legal word. It appears that the expressions used in the *definiens* to specify kinds of persons, things, qualities, events, and processes, are not precisely equivalent to the *definiendum*, even though they are often connected with them in a significant way. So far, legal theorists had tried to cope with the difficulties with defining legal words by drawing on one of the three competing theories – the Realist, Fiction, or Compromise theories (Hart, 1986, pp. 23–24).

> Some say that the difference is that the things for which these legal words stand are real but not sensory; others that they are fictitious entities; others that these words stand for plain fact but of a complex, future, or psychological variety. So this standard mode of definition forces our familiar triad of theories into existence as a confused way of accounting for the anomalous character of legal words (Hart, 1986, p. 32).

Hart polemicizes with John Austin and his proposed three theories for the clarification of the issue of personality "status" – he rejects using it as a collective name for a specific group of rights and duties, disapproves of understanding it as a fictitious basis for these rights and duties, finds it unsuitable to present it as an "occult quality" in the person who has status, distinguishable both from the rights and duties and from the facts engendering them. According to Hart, if we assumed that legal words may be defined by giving such synonyms that would not pose problems, then legal words would have to be regarded as indefinable (1986, p. 25).

One of the notoriously problematic legal terms that Hart made the object of his analysis is the "legal person". The philosopher makes it clear that the term in question can be defined as neither sequences nor aggregates of individuals; also, he repudiates the theories where "legal person" is conceived of as a collective name, the theories that give accounts of its peculiarity as a recondite or fictitious entity (a kind of legal fiction), or assume that it is a real person who has life and will, but does not have a body. The concept of legal personality may only be elucidated when one puts aside the question "What is a corporate body?" and asks instead: "Under what types of conditions does the law ascribe liabilities to corporations?" (Hart, 1986, pp. 43–44).

Hart observes that when words used normally by individuals are applied to companies as well as the analogy involved, we speak of a *shift in meaning*, i.e. a radical difference in the mode – the words are now functioning in a new context.

> Hence any ordinary words or phrases when conjoined with the names of corporations take on a special legal use, for the words are now correlated with the facts, not solely by the rules of ordinary language, but also by the rules of (...) law, much as when we extend words like 'take' or 'lose' by using them of tricks in a game they become correlated with facts by the rules of that game (1986, p. 45).

For example, there is a shift in meaning in the word "will" when it is used for a company: the sense in which a company has a will is not that it wants to do legal or illegal actions but that certain expressions used to describe the voluntary actions of individuals may be used for it under conditions prescribed by legal rules. An analogy with a living person and a shift of meaning are therefore of the essence of the mode of legal statement which refers to corporate bodies. However, analogy is not identity, so though we can justifiably say that a company has intended to deceive, this has no theoretical consequences.

The above considerations constitute Hart's argument in support of a thesis that basic legal terms may be elucidated only in a manner proposed by ordinary language philosophy, i.e. through the examination of conditions under which they are typically used and are true (Hart, 1986, p. 46).

Hart frequently highlights the salient feature of general terms that characterize legal norms – namely, their openness and specific ability to cover new and unclear cases. The idea of "open texture" and "porosity" of language that was later adopted, developed, and popularized by Hart was introduced by Friedrich Waismann, one of the members of the Vienna Circle, a theorist of logical positivism and a follower of Wittgenstein's thought[19]. Definitions of empirical terms cannot by nature be finite and absolute due to the open-endedness of human experience. Experiences existing *in potentia* may reveal cases that would raise doubts as to whether they fall within the scope of a particular term (Waismann, 1951, p. 122). Hart, following Waismann emphasizes that

> however complex our definitions may be, we cannot render them so precise that they are delimited in all possible directions and so that for any given case we can say definitely that the concept either does or does not apply to it (1986, p. 275).

He argues that due to the "open texture" and "porosity" of linguistic expressions there can be no final and exhaustive definitions of concepts, even in science (1986, pp. 275–276). The "openness" and vagueness of the classifying terms in natural languages affect legal reasoning and adjudication;

it seems that these features are particularly emphasized in the language of law. There are several reasons for that. First, legal rules (norms) are established for future cases, as it is impossible for the legislator to have full factual knowledge and there may always appear cases for which it is impossible to say with certainty whether they fall under a specific general rule containing general terms. There may also be factual cases to which two different legal rules may be applied (Hart, 1986, p. 103, pp. 269–270). Secondly, the axiological aim behind a given norm is by no means absolute; there are often several such aims whose hierarchy is not necessarily in a fixed order; "all legal rules and concepts are 'open', and when an unenvisaged case arises we must make a fresh choice, and in doing so elaborate our legal concepts, adapting them to socially desirable ends" (Hart, 1986, p. 270). Therefore, a given *casus* is not obviously subject to a particular legal rule; it is only by judicial decision that the "openness" is eliminated and hence enables the application of law to facts. A judge needs to decide whether the meaning of terms used in a given rule allows for this rule to be applied to a given new case that is different from its precedents (Zirk-Sadowski, 2001, p. 87).

As a follower of J. L. Austin and Wittgenstein – both of them the supporters of ordinary language philosophy – Hart on many occasions criticized the opposing current in analytic philosophy: logical formalism[20]. He was particularly critical of the idea (propagated mainly by the Vienna Circle) that it is solely tautological or empirically verifiable statements that deserve the status of being sensible. In particular, Hart is polemicizing with the views of Alf Ross and his version of legal formalism. What ensued from Ross's assumption is that neither normative nor evaluative statements are sensible; Hart rejects this belief and proves that there exist other criteria of sensibility than that of empirical verifiability (1986, pp. 161–178). Hart also criticized Kelsenian formalism despite all the respect he had for Hans Kelsen. Kelsen's theory, carefully elaborated and based on rigorous definitions, must have provoked Hart's disagreement since Hart rejected the idea of rigorous definitions in law (1986, pp. 286–342).

Yet another concept developed by ordinary language philosophers and introduced by Hart to the study and description of law is "performative use of language"; as Hart put it, the use of language "where words are used in conjunction with a background of rules or conventions to change the normative situation of individuals and so have normative consequences and not merely causal effects" (1986, p. 4). Performative use of language serves to clarify the idea of legal powers, contracts, and conveyances; Hart emphasizes the fact that performative uses are involved not only in the enactment of legislation, but also in various legal transactions or so-called

acts-in-the-law (1986, pp. 88–98). Like all ordinary language philosophers with J. L. Austin at the forefront, Hart clearly sees that performatives have always been in common use. The same was observed by practicing lawyers themselves, who spoke of the fact that phrases voiced in the context of, say, taking out something in lease, were used differently than in a mere description of a contract between parties – such expressions were referred to as "operational words". Hart notices that to some philosophers (including the Swedish positivist, Axel Hägerström) expressions of this type seem to be mysterious, if not magical – they appear as a kind of "legal alchemy" because their effect is to change the legal position of individuals, or even to change or revoke formerly binding laws. These "magical" formulas would include "it is hereby enacted...", or "the parties hereby agree..."; they exhibit a certain affinity to non-legal formulas, e.g. the words of a promise or those used in a christening ceremony (Hart, 1986, p. 94). Hart argues that it is impossible to understand the general character of legal acts without making reference to the performative use of language. This function, as he claims, underlies the convention that uttering some words makes certain rules come into effect (1986, pp. 275–277).

Saying that these peculiar expressions are a form of "acts-in-the-law", Hart indicates that there are important resemblances between the execution of legal transactions and more obvious cases of human actions. The relevant rules provide that a transaction shall be invalid if the person purporting to affect them was insane, mistaken, or acting under duress or undue influence. There is an analogy here with the ways in which similar psychological facts may, in accordance with the principles of criminal law, excuse a person from criminal responsibility for their actions (1986, p. 95).

The research methods of ordinary language philosophy are present in Hart's *Essays in Jurisprudence and Philosophy* as well as in his *The Concept of Law*, but it is in *Causation in the Law* that they appear particularly prominent. *Causation...*, published in 1956, was written in collaboration with Anthony Honoré, an Oxford-based outstanding expert on Roman law.

One of the main objectives of the book, as the authors claim, is to clear up and clarify any doubts that have arisen around the application of methods developed by linguistic philosophy to the study of law (in the second edition of the work, published in 1985, they admit that, despite a lapse of almost twenty-five years, these methods still stand the test of time) (Hart, Honoré, 1985, p. XXXIV). The principal object of analysis here is the concept of causation and its use by lawyers. The analysis itself is broad in scope and has a comprehensive character as it covers various branches of law, allows for philosophical tradition and contemporary discussions about

the concept in question, and the authors' investigations relate both to the system of common law and to the continental legal systems.

Hart and Honoré observe that the concept of causation has been seen as problematic by many thinkers, from D. Hume and J. S. Mill onwards. Some of them, while emphasizing its notorious ambiguity and the resulting myriad of doubts claim that it actually has no meaning. This view is sometimes accepted by lawyers, who reduce causation to a merely conventional embellishment that may appear in the justification of judicial decisions. In many countries, particularly in the U.S., discussion about causation has died out completely: according to Hart and Honoré, the concept is treated there as a "ghost idea" unworthy of theoretical deliberation (1985, pp. 3–4). The authors feel that such a stance is absolutely groundless; causation is a notion of paramount importance to both the theory and practice of law.

The analyses of causation delivered by philosophers seem to be of no use to lawyers, whose practical needs require that the concept should be investigated from a special perspective. Lawyers feel that theories elaborated by thinkers prove useful in natural sciences, whereas law at work demands such understanding of causation that is grounded in the principles of common sense since legal issues that they face are not of a scientific character (1985, pp. 8–9). Philosophers strive to discover general relations between particular kinds of phenomena; lawyers use ready-made, commonly adopted types of causal relations to investigate particular, individual events or phenomena, their task being the application of already known generalizations to specific cases. A quest for the cause of these events or phenomena must in every single case account for a certain context and for the accompanying circumstances in their entirety. The authors of *Causation in the Law* believe that there exist principles that designate a given circumstance as being a cause, and that such principles may be indicated, named, and described (1985, pp. 10–11).

Lawyers with a flair for the analytic method should focus on the search for a specific cause of a particular event, using a wealth of devices offered by ordinary language philosophy and adopting a common-sense view and grassroots perspective on the questions of causation (which, as held by the authors, is what British courts rightly do quite often) (1985, p. 1). The *cause* of a given event is conceived of in ordinary language as the difference between the normal course of events and the course of the event under scrutiny (Hart, Honoré, 1985, p. 29); however, more often than not, it may be very difficult to establish what the cause in a certain case is, and what makes the said difference.

Hart and Honoré, having proceeded in accordance with the directives set by ordinary language philosophy distinguish the following three varieties of the concept of causation:

> We attempt (...) to trace the outline of three different concepts latent in ordinary thought from which the causal language of the lawyer and also the historian very frequently draws its force and meaning. The first of these has a claim to be considered the central concept; it is that of the contingency, usually a human intervention, which initiates a series of physical changes that exemplify general connections between types of event; and its features are best seen in the simplest cases of all where a human being manipulates things in order to bring about intended change (1985, p. 2).

In the other approach, causation is presented far differently than in Hume's classic proposal: it is about interpersonal relations and applies to cases in which one person, by using actions or words, causes another person to do something. The last type of the concept – popular mainly among lawyers and historians – is connected with the idea of creating a certain opportunity to be seized later in the future – "its main application in the law is where an opportunity is provided for harm by the neglect of a common precaution" (1985, p. 2).

5. Summary

Legal theorists and legal philosophers are still debating the existence of a systematically understood analytic philosophy or theory of law. This question continues to spawn controversy (though, as it seems, the dominant view is that we should at least speak of some jurisprudential issues requiring the use of the analytic method). The opponents of the idea of an analytic philosophy of law would rather refer to it as a certain methodology of law that lacks legal ontology (Stelmach, Sarkowicz, 1999, p. 140). Hart himself touched on the question of analytic theory or philosophy of law on many occasions. Irrespective of its actual status, Hart may undoubtedly be regarded as a leading exponent of the analytic orientation in legal philosophy. He was firmly convinced of the vital importance of analytic philosophy to the theory of law and this conviction showed through all his writings; he unshakably believed that analytic philosophy is of lasting value in the study of law. Although in later works he gave up some of his early ideas on linguistic philosophy, the thinker always did so for the sake of seeking alternative solutions within the same field (as was the case when he dropped his as-

criptive language theory in favour of the theory of performatives). Hart described his methods of linguistic philosophy as general and neutral towards moral principles and politics, yet independent of different viewpoints whose adoption would mean that a given aspect of legal phenomena was being favoured.

NOTES

[1] It seems that distinguishing philosophy of law or any other philosophy of "something" – philosophy of language or philosophy of mathematics is not only a fashionable but also legitimate procedure. On the other hand, distinguishing legal logic as special logic is misleading – there is only one logic, the same for lawyers, physicists, or linguists (see Woleński, 1999, p. 20).

[2] Analytic philosophy is oftentimes thought of as British philosophy and it is referred to as such. And although the English deserve credit for its development, we should remember about the analytic philosophers from the Continent and the New World; Bocheński, writing about the origins of analytic philosophy, recalls the achievements of R. Carnap, K. Ajdukiewicz and T. Kotarbiński as well as American philosophers (1993, pp. 41–42).

[3] In *The Concept of Mind*, Ryle writes that to determine the logical geography of a concept is to reveal the logic of the propositions in which they are wielded, that is to say, to show with what other propositions they are consistent and inconsistent, what propositions follow from them and from what propositions they follow (see Ryle, 1949, p. 39). Various theories of knowledge such as ethical, aesthetic, or logical attempt to create these conceptual 'maps'. These maps, however, differ from one another and are not free from mistakes, with the notable exception of mathematical logic (see Hempoliński, 1974, p. 97–98).

[4] Austin was named 'the father of legal positivism', although the name actually belongs to someone else. The basic theses of this theory had been formulated by Jeremy Bentham, Austin's teacher. Bentham's works lay in manuscript for over 100 years and were not published until 1945 when they appeared under the title *The Limits of Jurisprudence Defined*. Before that, however, lawyers already knew Austin's lectures to be the book's developed version.

[5] Hart blamed positivists, Austin's followers', for their excessive formalism and for their 'overly use of logic'.

[6] The two thinkers who exerted the greatest influence on Hart, bear the same surname. The first one, whose views were referred to here, was John Austin, the 19th century lawyer and the second one was John Longshaw Austin, Hart's contemporary, his teacher and philosopher. D. C. Dennett, one of the greatest contemporary philosophers of mind, wrote that Austin 'more or less invented' *ordinary language philosophy*. Contrary to most of his students, he deserves to remain in our memory; he became a philosopher of influence (Dennett himself is the follower of Gilbert Ryle's school) (see Dennett, 2014, p. 423).

[7] G. E. Moore was critical of G. Berkeley's immaterialism as well as the idealism of A. E. Taylor, J. McTaggart, and F. H. Bradley (see Hempoliński, 1974, pp. 39–40).

[8] Bradley's idea that *time is not real* was one of these strange, philosophical claims. If time was indeed fiction, then, according to Moore, we would not be able to reasonably claim that there is temporal relationship between events, e.g. that eating breakfast occurred before eating dinner. Common sense tells that this is not so, and dictates rejecting both the statement in question and its consequences (Hempoliński, 1974, p. 40).

[9] Confusion about paradoxes as a catalyst for contemplative attitude and the beginning of philosophizing would be later turned into a principle of analytic philosophy by

the followers of Moore, Wittgenstein, and Ryle. This involved treating philosophy as meta-discipline, where philosophers' statements do not directly concern reality, but other statements about reality (Woleński, 1980, pp. 34–35).

[10] Wittgenstein replacing Moore as professor of philosophy at Cambridge was seen as a symbol of the supremacy of formalism in the thirties.

[11] G. Ryle made the distinction which helped to indicate an area of interest for philosophers and philologists. In his work *Ordinary Language* (1953), Ryle introduced the terms "the use of language" and "the usage of language". The author claims that the phrases – "the ordinary use of expression", "the ordinary usage of language", "the ordinary use of language", need to be contrasted. "The ordinary use of expression" means ordinary, standard or stock. When people speak of the use of ordinary language, 'ordinary' means 'common', 'colloquial', 'vernacular'. Accordingly, one may find ordinary use of expression in non-standard or non-stock language, for instance in technical, specialist terminology on the condition that the explanation of the ordinary use of technical language involves the ordinary use of expression. Therefore, the role of the ordinary use of expression cannot be underestimated, ordinary language is the foundation for all other languages. The ordinary usage of language means the same as "fashion" or "style" and, as sociologically determined, is of far lesser value to philosophers. As Ryle had it, the object of philosophical analysis is the standard use of expression, in particular the expression of ordinary language (Woleński, 1980, pp. 41–42).

[12] It was Strawson who coined the term "presupposition"; however, this specific relation between sentences had been discussed earlier by G. Frege and B. Russell. Using modern terms, we can define Strawsonian presupposition as a special kind of pragmatic reasoning (Levinson, 2003, p. 172).

[13] Examination of supposition in a legal text may be helpful in establishing facts about the social reality in which the text is functioning, as well as about its addresser (a lawmaker), its addressee, and their system of beliefs and axiology (Sarkowicz, 1995, p. 67).

[14] Broader understanding of explication is less rigorous and less formal than as it was originally presented by R. Carnap, and should be seen as conceptual re-engineering (Stelmach, Sarkowicz, 1999, pp. 136–137).

[15] Hohfeld's idea is presented in the following works: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* of 1914, and *Fundamental Legal Conceptions as Applied in Judicial Reasoning* of 1917, both of them published in *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, 1923).

[16] While considering the nature of the unity and completeness of a legal system, Bentham observes that the postulate of completeness has not been satisfied, particularly when it comes to the British system. The basic part of this system, *common law*, Bentham sees as a fictitious creation whose author is unidentifiable – and neither is its substance. Bentham compares *common law* to ether, thought up by scientists who refused to accept the idea of vacuum and believed to be a space-filling field and a medium necessary for the propagation of electromagnetic or gravitational forces. Just as ether is a kind of background to celestial bodies, the fictitious *common law* is a skeleton for the real, codified law; shreds and scraps of real law are stuck upon that imaginary ground. Bentham claims that those who want to examine or reform a legal system in its entirety must first create it (Bentham, 1907).

[17] Hart examined the concept of a "right" using presuppositions: the statement "x has a right" presupposes the existence of a legal system that bestows this right upon x. On the other hand, the existence of a legal system is a condition of assigning truth value to "x has a right" and to its negation.

[18] There is a substantial difference between "institutional facts" and "raw facts", such as states of affairs, events, or behaviours. "Institutional facts" such as legal norm (rule), contract, possession, promise, culture, or sports games exist in a different way than "raw

facts": they lack physical dimension and do not exist in space although they do exist in time. However, the existence of institutional facts is beyond any doubt. The "existential" difference between these two types lies in the fact that institutional facts require principles by which we can identify them. Such principles, as well as the conventions of human behaviour ascribe the meaning of "institutional facts" to particular events and arrangements of objects (MacCormick, Weinberger, 1986; Dyrda, Gizbert-Studnicki, 2014, pp. 289–290).

[19] In 1938, F. Waismann immigrated to Great Britain, where he initially taught the philosophy of science at Cambridge, and later the philosophy of mathematics at Oxford. His lectures were published posthumously in two volumes: *The Principles of Linguistic Philosophy* (1965) and *How I See Philosophy* (1968).

[20] Despite numerous critical views on "excessive formalism" it was inevitable for Hart to be influenced by the supporters of logical formalism and to use some of the solutions they had developed. The conflict between formal and informal logic is considered artificial by some of the Oxford thinkers; for example, G. Ryle claimed that each discipline has its own area of interest: while formal logic deals with concepts that are established by their meanings, informal logic represents a dynamic approach; both groups of scholars should mutually benefit from each other's findings (Ryle, 2015).

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