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Is the Analysis of the Concept of Law a(n) (Im)modest Conceptual Analysis?

Conceptual analysis in jurisprudence is usually supposed to provide an account of properties that distinguish things that are law from things that are not law. Law is supposed to exist in virtue of social facts and collective intentionality, but it cannot be simply reduced to them. Moreover, the way in which analysis of the concept of law should be performed is specified by the 'hermeneutic' character of the concept, that strongly relies on folk beliefs and intuitions about what law is. Thus, some theorists (e.g. Joseph Raz) argue that the main aim of analysis of the concept of law is to reveal social "self-understanding". Conceptual analysis in this case is concerned with OUR concepts, constructed by OUR social practices. Legal theorists also typically characterize analyses of the concept of law as 'giving the explication of the nature of law'.

These two contentions – about the role of analysis as means to identify the social understanding of a concept and about revealing the true nature of its object – may however bring some confusion within the domain of general jurisprudence. For it is quite common to apply Jackson's famous distinction between "modest" and "immodest" conceptual analysis in this domain. The analysis in its modest form aims to reveal (and rationally reconstruct) the folk theory of the object of analysis (i.e. of denotation of the concept-term) and the analysis in its immodest form is supposed to reveal the essential nature of the referred object, as independent from linguistic usage and social frameworks.

The task of this paper it is to scrutinize the common assumption that the analysis of the concept of law is an exercise of analysis in its modest form. It seems that due to the hermeneutic character of the concept of law and the metaphysical dependence of law on various facts, the analysis is rather immodest (since it reveals the true nature of the analyzed object that is determined by collective intentionality). This line of argument develops the suggestion provided by Jackson himself. However, the more detailed inquiry suggests that the Jacksonian distinction may be actually useless with respect to 'law'. We will devote the second part of our paper to justify that claim.

Eventually, we will discuss the other possibility that the concept of law is bi-analyzable, what means that the analysis of the concept is in a certain part modest, and in part immodest. The latter option gains some plausibility if one can differentiate the platitudes of the folk theory of law into two sets: one containing only these platitudes which are both true about law and reflect common beliefs that play a performative (constitutive) function with respect to legal phenomena, and the second one containing platitudes that, although commonly shared, are false and do not reflect the way law really is. In the end, we will point some theoretical difficulties that arise in the latter case.