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THE INFLUENCE OF LINGUISTIC PHILOSOPHY ON ANALYTICAL JURISPRUDENCE THROUGH THE PERSPECTIVE OF H. L. A. HART

A INFLUÊNCIA DA FILOSOFIA DA LINGUAGEM NA JURISPRUDÊNCIA ANALÍTICA ATRAVÉS DA PERSPECTIVA DE H. L. A. HART

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ABSTRACT

This article discusses the influence of emerging linguistic philosophy theories in the 20th century on the development of analytical jurisprudence through an examination of the way those theories influenced the legal philosopher H. L. A. Hart. Although Hart is significantly influenced by linguistic philosophy, his legal theory could not have been developed solely with it. This is evidenced by Hart's disownment of his own essay *Ascription of Responsibility and Rights*, which was his earlier attempt to employ ideas from ordinary language philosophy in the context of law. Hart's theoretical development shows that, above all not, he was not a linguistic, but a legal philosopher; and that analytical jurisprudence, albeit influenced by linguistic philosophy, depends on aspects beyond it.

Keywords: Philosophy of Law. Analytical jurisprudence. Jurisprudence. H. L. A. Hart. Linguistic Philosophy.

RESUMO

This article discusses the influence of emerging linguistic philosophy theories in the 20th century on the development of analytical jurisprudence through an examination of the way those theories influenced the legal philosopher H. L. A. Hart. Although Hart is significantly influenced by linguistic philosophy, his legal theory could not have been developed solely with it. This is evidenced by Hart's disownment of the essay *Ascription of Responsibility and Rights*, his attempt to employ ideas from ordinary language philosophy in the context of law. Hart's theoretical development shows that he was above all not a linguistic, but a legal philosopher; and that analytical jurisprudence, albeit influenced by linguistic philosophy, depends on aspects beyond it.

Palavras-chave: Philosophy of Law. Analytical jurisprudence. Jurisprudence. H. L. A. Hart. Linguistic Philosophy.

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1 INTRODUCTION

In this article, I shall examine how 20th century linguistic philosophy affected analytical jurisprudence, analyzing both the extent and limitations of the former on the latter. Specifically, I will deal with certain ways in which linguistic analyses of concepts influenced the concept of legal rules within analytical theories of law, and the restraints which arise when we employ linguistic methods on legal phenomena. For this purpose, I will look into the theoretical development of H. L. A. Hart¸ a legal philosopher who discussed at length the insights that linguistic philosophy could carry to analytical jurisprudence. Hart represented a great shift in analytical jurisprudence that can also be felt in jurisprudence as a whole. Hence, examining the impact of linguistic ideas in his legal theory will aid my intention of studying their influence in analytical jurisprudence.

With that being the case, I will first contrast classical analytical jurisprudence with Hart's attempt to introduce linguistic philosophy to the domain of analytical jurisprudence. I will then show the limitations of linguistic tools through a discussion of the reasons why Hart disowned his essay *Ascription of Responsibility and Rights* (1949), one of his earlier applications of linguistic philosophy in the context of law. Finally, I will examine the changes in his approach to linguistic theories with a comparison between *Ascription* and his theory of law, *Concept of Law* (1961).

2 THE STATE OF ANALYTICAL JURISPRUDENCE IN THE 20TH CENTURY

2.1 Austinian tradition in analytical jurisprudence

In the beginning of the 20th century, England found itself amidst a great divorce between jurisprudence and philosophy attributed to philosophy's loss of interest in jurisprudence and jurisprudence's historic lack of interest in philosophy (POSTEMA, 2011, p. 29). Classical analytical jurisprudence was dominated by the doctrine of John Austin. The jurist supported that jurisprudence should focus only on the core concepts of law, analyzing the basic concepts of legal discourse in its ordinary and professional use. In this way, Austinian theories were able to offer definitions of concepts such as rights, sovereignty and duty in pragmatic contexts, but not as philosophical theories concerned with understanding how these

concepts are systematically related or defined (POSTEMA, 2011, pp. 31-32). There was no interest in studying the social structure from which these concepts derived their existence and meaning.

Common law jurisprudence remained in that pragmatic and conservative state until the first half of the 20th century. The intellectual shallowness of jurisprudence pointed to its extreme distancing from philosophy and reconciliation between both fields would only take place with H. L. A. Hart. After Hart, legal theorists started to redefine legal problems and articulate methodologies which enabled the emergence of persuasive legal theories with a degree of philosophical sophistication not seen in a long time in England (POSTEMA, 2011, p. 261).

In the following section, I will further explore how the philosopher borrowed ideas from the 20th century linguistic philosophy to break with classical analytical jurisprudence. Through an examination of his essay *Definition and Theory of Jurisprudence* (1953), I will demonstrate one of the ways in which linguistic theories affected analytical jurisprudence.

2.1 Hart's influence on analytical jurisprudence: the importance of linguistic philosophy

In *Definition and Theory of Jurisprudence*, Hart introduces his concern about reshaping jurisprudential debates with emerging linguistic theories, particularly those stemming from the ordinary language philosophy. The philosopher criticizes the tendency of analytical jurisprudence to approach discussions as if they were requests for definitions. Behind questions such as "what is a contract?" or "what is a society?" lies a traditional method of definition known as *per genus et differentiam*. It is the simplest form of definition, for "it gives us a set of words which can always be substituted for the word defined whenever it is used" (HART, 1983, p. 31). For instance, there are no doubts as to what a "chair" means, because there are no doubts as to the general class (i.e. that of furniture) to which a "chair" belongs (HART, 1983, p. 32). The word "chair" has also a clear counterpart in the real word, the object chair. Furthermore, we differentiate the word within this general category from other words that also belong to it through the examination of its specific characteristics. In this way, a chair is different from a locker, because the former's main function is that of sitting, whereas the latter's is that of storing objects. Therefore, our main concern with this type of definition is not to inquire about the general category, but to outline the difference between specific objects within it.

In spite of its simplicity, the definition *per genus et differentiam* is not suitable to all cases. When dealing with legal concepts, our confusion arises in the characterization of the general category. We are not asking ourselves which place a certain term occupies in a given category – we are not certain of the category itself. For these cases in which we cannot define the characteristics of an anomalous category, this type of definition is "at the best unilluminating and at the worst profoundly misleading" (HART, 1983, p. 32). Questions such as "what is the State?" cannot be reformulated as "what is the meaning of the word 'State'?", for there is no group of words that is capable of translating, or giving a proper dictionary definition, of what "State" means. There is an essential difference between asking for the meaning of "chair" and "State". Likewise, "right", "duty" or "obligation" are not intelligible in the same way "chair" (or "'chair' is a furniture") is. Compared to ordinary words, those used in legal contexts are anomalous and "do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words" (HART, 1983, p. 23). To keep defining such concepts through the specification of kinds of persons, things, qualities, events, and processes, material or psychological is to ignore that these will never be precisely the equivalent of legal words, despite both being connected in some way (HART, 1983, p. 23).

The perplexity faced by analytical jurisprudence arises from the lack of an obvious counterpart in the material world and neglection that the "language involved in the enunciation and application of rules constitutes a special segment of human discourse with special features" (HART, 1983, p. 26). The insistence on shaping entire debates on these kinds of questions led to analytical jurisprudence's attachment to definitions. This created a vicious cycle in which imprecise and obscure definitions would have to be further explained by even more imprecise and obscure definitions. In spite of jurists' efforts to define notions closer to legal practice, this rarely translates to something useful or lucid. We should foster theories about legal concepts, but reject those backed by definitions (HART, 1983, p. 25). The latter does not succeed for it aims "to a form of answer that can only distort the distinctive characteristics of legal language" (HART, 1983, p. 26).

Classical analytical philosopher Jeremy Bentham approached the definition *per genus et differentiam* with useful insights. According to him, the traditional definition was not suitable to concepts such as duty and obligation, and much of the ordinary language was "fictitious" in the sense that it could not simply refer to natural objects in an intelligible manner (POSTEMA, 2011, p. 265). To tackle this issue, he devised the method of

paraphrase. A word like "right" had to be placed in a sentence where it has a characteristic function, such as "you have a right." Then, we would look for a translation of it into factual terms. Rather than giving word for word, we give phrase for phrase. Bentham was correct when calling attention to the importance of context and sentences in which terms normally function, but his method of paraphrase still fell into the trap of "finding" terms for legal concepts and associating them with facts of the ordinary world. Even if we should take the context and the use of such terms into consideration, a paraphrase of these legal words to factual terms "is not possible" (HART, 1983, p. 34).

Much of the philosophy of pre-war years made the same mistake of assuming that only empirical "fact-stating" discourse or statements of definitional or logically necessary truths were meaningful. It is linguistic philosophy who shed light on the previously dismissed uses of language, claiming that the multiple functions of language were not restricted to boundaries of subject-matter (HART, 1983, p. 3). Instead of treating words as "nouns" and investigating what they "stand for", it was more elucidating to regard them as "adjectives". We should not ask what "reality" is, but what are the distinctions between things we call "real" and "unreal"; or even in which cases calling something "real" is considered true. Many of our utterances are "performative", in the sense that words are used to change the normative situation of individuals, taking into account a background of social rules and conventions (HART, 1983, p. 4). This means that to execute some action, we must utter certain words, so that any utterance of words is in fact a "speech act", a performance of an act such as the act of making a statement, of promising, of conferring powers (MACCORMICK, 2008, p. 26). Therefore, we should no longer try to define words through their association to factual counterparts, but think about when the use of a word is considered true or false in a given sentence and social background.

A similar concern with the study of concepts in their usage is manifested in *Ascription of Responsibility and Rights*, to which I will turn in the next section. However, it would be not correct to place *Definition* and *Ascription* in the same category even if both share similar concerns, since the former was explicitly rejected by Hart in his Preface to *Punishment and Responsibility* (1968). For this reason, I shall devote a separate section to *Ascription*. More than reiterate Hart's concerns in *Definition*, I will explore the criticisms *Ascription* received in order to lay the foundation of my analysis of the limitations of linguistic philosophy in a theory of law.

3 *ASCRIPTION OF RESPONSIBILITY AND RIGHTS*: HART AND LINGUISTIC PHILOSOPHY

3.1 The influence of linguistic philosophy on the *Ascription of Responsibility and Rights*

In *Ascription*, Hart points out the inadequacy of traditional philosophical analysis of the concept of human action in our attribution of responsibility in the context of law. Hart observes that "there are in our ordinary language sentences whose primary function is not to describe things, events, or persons or anything else, […] but to ascribe rights […] or make accusations of responsibility" (HART, 1949, p. 171). Sentences of the type "He did it" are not primarily descriptive as traditionally held, but "ascriptive", i.e. that they ascribe responsibility for actions much as the main role of sentences like "This is his" is to ascribe rights in property (HART, 1949, p. 171). Legal concepts have two often ignored, but extremely important characteristics explained through the terms "etcetera" and "unless".

Firstly, judges have to decide by reference to past cases or precedents whether, from the facts that were brought to court, a legal concept like a "contract" was formed; and whether the current case is sufficiently close to the precedent. Because of the reliance on past cases, there are no explicitly formulated general criteria which define a concept like "contract". Attempts to adequate legal expressions under the theoretical model of descriptive sentences and their translation into terms of necessary and sufficient conditions would be unsuccessful, for the own nature of judicial decisions brings a certain vagueness to legal concepts. We can only give answers to questions like "What is a contract?" with reference to past cases, using the word "etcetera" (HART, 1949, pp. 173-174). In a precedent tradition, for legal concepts to be accepted in the courts (and thus hold legal validity), they must have a characteristic that allows for unforeseen situations which bear enough similarity to the lead cases. This openness – which in turn reflects the vagueness – of such concepts is embodied in the word "etcetera".

Secondly, we must also pay attention to a particular way in which legal claims can be opposed. Although we can deny the facts on which an accusation is based, we can also challenge it by admitting that, despite all the circumstances on which it could succeed being present, in this case the accusation should nonetheless fail. Here, there are other exceptional circumstances which defeat or reduce the original claim to a weaker one (HART, 1949, p. 174). A plea of self-defense is an accepted exception that reduces or defeats altogether a charge of murder, even if all of the elements that constitute it are present. Given this character

of legal concepts, we cannot define them by specifying the necessary and sufficient conditions for its application, as there are conditions which may satisfy certain cases but not others. Therefore, such concepts can only be explained with exceptions or negative examples which repel or weaken their application. Even though a law student may learn the positive conditions required for the existence of a valid contract, this understanding is still incomplete. These conditions are necessary, but not always sufficient. The student still has to learn what defeats the claim that the contract is a valid one despite all required positive conditions being met (HART, 1949, pp. 174-175). In this sense, instead of "a contract is valid if this set of requirements is fulfilled," we must say that "a contract is valid *unless* this list of exceptions happens."

Hart attributes the legal word "defeasible" to this latter characteristic. Defeasibility in the context of law is defined as "a legal interest in property which is subject to termination or 'defeat' in a number of different contingencies, but remains intact if no such contingencies mature" (HART, 1949, p. 175). Defeasibility shows that the nature of a judgment in the context of law is not descriptive, but ascriptive. Smith was guilty of hitting someone but, in the light of new facts, it is revealed that it was an accident. The first verdict must be altered so that the act of hitting is qualified as an accidental one. We refuse to say that Smith hit someone, at least without further qualification. If our initial judgment were a description of facts, why would we have any reason to withdraw it? The actual fact, the act of hitting, was not contested by the discovery that it was an accident (D'ALMEIDA, 2016, pp. 10-11). Saying that Smith hit someone is "an ascription of liability justified by the facts" (HART, 1949, p. 190), because the observable physical movements, in the absence of some defense, support the ascription of liability. Yet, when a valid defense emerges, altering the initial judgment, it does not mean that a false declaration about facts is being withdrawn; but that the initial ascription of responsibility is not justified anymore given the new circumstances brought for consideration. It is necessary to judge again, not describe again (HART, 1949, p. 194).

The logic of the language employed by lawyers resembles more that of ascriptive sentences than of descriptive ones (or of theoretical models of descriptive sentences). These logical peculiarities are better observed as they appear in legal practice rather than in the theoretical discussions of legal concepts (HART, 1949, pp. 171-172). A judgment is a "compound or blend of facts and law" (HART, 1949, p. 172), in the sense that it is first observed that certain facts are true; and if that is the case, then certain legal consequences will follow this observation. This is different from a mere description of facts. Even

though we must verify the occurrence of certain facts in reality so that they can support our legal claims, it does not follow that when a judge decides, what he actually does it to describe those facts. Instead, he decides whether or not a legal concept exists based on the facts presented before them. The existence of such concept is not an inductive or deductive inference from factual statements. Hence, a legal decision can be good or bad, but never true or false (HART, 1949, p. 182). In a similar way, when we utter sentences of the type "This is his", where possessive terms like "his" or "mine" are grammatical predicates and derive their meaning from legal or social institutions despite not being technical words, we are not describing, but performing or effecting an action. These words are related to the facts that support them in the same way as in the judge's decision (HART, 1949, p. 185).

Thus, in *Ascription*, Hart defends the idea that "the concept of human action is an ascriptive and a defeasible one, and that many philosophical difficulties come from ignoring this and searching for its necessary and sufficient conditions" (HART, 1949, p. 187). This is reflected in the use of sentences such as "I did it," for they are "primarily utterances with which we confess or admit liability, make accusations, or ascribe responsibility" (HART, 1949, p. 187). Traditional philosophical analyses of the concept of an action make the crucial error of identifying the meaning of non-descriptive, ascriptive utterances with the factual circumstances which back them. The concept of action is a social one, and it is a fundamentally ascriptive, not descriptive one. Hence, it is logically dependent on the socially accepted rules of conduct. As a defeasible concept, it has to be defined in terms of exceptions. Any attempt to explain them through necessary and sufficient conditions is useless (HART, 1949, p. 189).

3.2 Criticisms on *Ascription*

When disowning *Ascription*, Hart refers to Peter T. Geach's *Ascriptivism* (1960) and George Pitcher's *Hart on Action and Responsibility* (1960) as his reasons for such decision. Both articles make relevant criticisms to different aspects of *Ascription*, notably his concepts of ascription and responsibility. However, I will mainly turn to Peter Geach's criticism, for it deals directly with an insufficiency in Hart's own notion of ascription, the aspect of his theory that draws the most from linguistic philosophy. Geach's main objective is to attack what he calls "theories of non-descriptive performances", which claim that "predicating some term 'P' – which is always taken to mean "predicating 'P' assertorically" – is not describing an object as being 'P' but some other 'performance'" (GEACH, 1972, p. 266).

Among the theories that fit in this description is Hart's own ascriptivism.[2] The term "ascriptivism" is coined by Geach to designate certain Oxford philosophers who defend the idea that to call a certain act voluntary is not to describe it as a causal statement, i.e. as caused in a certain way by the agent who did it, but to hold them responsible for that act (GEACH, 1960, p. 221). The common pattern among such theories is "to account for the use of a term 'P' concerning a thing as being a performance of some other nature than describing the thing" (GEACH, 1960, p. 223). For instance, an ascriptivist would claim that whenever someone says "it is bad to get drunk," they are condemning, not describing drunkenness. Similarly, in "what the policeman said is true," they are corroborating, not describing his statement (GEACH, 1960, p. 222). In short, ascriptivists take the use of a term "P" concerning a thing as being a performance different from a description of such thing. This pattern ignores the fact that calling a thing "P" is not the same as predicating "P" of a thing. We may predicate a term "P" of a thing in an if or then clause, or in a clause of disjunctive proposition[3] without ever calling the thing "P". In the case of the policeman, we may say "If the policeman's statement is true, the motorist reached 60 mph." While we are not calling the policeman's statement true (GEACH, 1960, p. 223), we are still predicating "true" of his statement. This type of predication is often ignored by theories of non-descriptive performances, for they often only consider as a use of a term "P" to call something "P" (GEACH, 1960, p. 223).

Geach's attack on non-descriptive performance theories is essentially a clever use of "the Frege point" (or "the Frege-Geach point"). To acknowledge that we may predicate "P" of things without calling them "P" is to acknowledge that predication and assertion[4], or that a propositional content and an assertoric force (D'ALMEIDA, 2014, p. 6), are two different things. This distinction allows us to account for the fact that "a proposition may occur in discourse now asserted, now unasserted, and yet be recognizably the same proposition" (GEACH, 1972, pp. 254-55). We may have two assertions of proposition: (i) *p* and (ii) if *p*, then *q*. Both (i) and (ii) are put forward for consideration, but only in (i) is *p* put forward as true. Therefore, it is possible to put forward a proposition for consideration without putting it forward as being true (D'ALMEIDA, 2014, p. 1). If it is possible to predicate "P" of a thing in

2 "To say 'He hit her' is not to state what happened, but to ascribe the act to him as a matter of legal or moral responsibility; and such an ascription is a verdict, not a statement, about him" (GEACH, 1972, p. 267)
3 According to J. L. Austin, "the ordinary use of the term 'proposition' in philosophy is to refer to the content of sentences independently of the context of utterance" (D'ALMEIDA, 2014, p. 4)
4 Assertion is considered here as "to put forward a proposition for consideration as being true" (D'ALMEIDA, 2014, p. 1)

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an if or then clause without making an assertion, then it is also clear that when we want to predicate "P" of a thing by calling it "P," we must use the sentence assertively (GEACH, 1960, pp. 223-224). If I say "if gambling is bad, inviting people to gamble is bad," I am not, with this sentence, condemning neither the act of gambling nor that of inviting people to gamble, though I am still predicating "bad" of both (GEACH, 1960, p. 224). If I want to assert "bad" of gambling, then I would have to do so in an assertive utterance, e.g. "Gambling and inviting people to gamble is bad." Thus, we cannot explain predicating "P" of a thing in terms of calling a thing "P", for the former is a more general notion than the latter. We can explain the condemnation of gambling by calling it "bad" through the notion of predicating "bad" of gambling without the actual condemnation of gambling (GEACH, 1960, pp. 223-224).

3.3 The influence of *Ascription* criticisms on the Hartian theory

Notwithstanding Hart's acceptance of both criticisms, I will evaluate to which extent *Ascription* and his subsequent theories were affected. I had previously noted that Geach positioned himself against theories of non-descriptive performances, in which the philosopher also included ascriptivism. If we contrast ascriptivism with other theories in the same group, we observe that his ideas about the non-descriptive uses of sentences carry only a superficial resemblance to more sophisticated ordinary language philosophical theories (D'ALMEIDA, 2014, p. 13).[5] As D'Almeida suggests, Hart's non-descriptive claim is phrased in a way that resembles J. L. Austin's idiosyncratic formulations, and his approach contained many of the rhetorical mannerisms of the ordinary language philosophy. A great part of this can be owed to *l'esprit du temps* and *l'esprit du lieu*, since these theories were blooming in Oxford back then. Hart's speech-act-theoretical claims are argumentatively inconsequential, and Geach should have not focused his criticisms on the ascriptivist thesis (D'ALMEIDA, 2014, p. 14).

The aspect from *Ascription* that Hart fully abandons in his subsequent theory is his ascriptive thesis. However, can the same be said about the defeasibility of concepts? Although Pitcher deemed Hart's notion of responsibility flawed, he nonetheless held that defeasibility "can be retained by maintaining that it is the concept of being deserving of censure or punishment which is really the relevant defeasible one, not that of a human action" (PITCHER,

5 Due to this article's limitations, it will not be possible to expound in this article the ways in which Hart's ascriptivism was not in touch with other theories of non-descriptive performances. See: D'ALMEIDA, L. Geach and Ascriptivism: Besides the Point. *Journal for the History of Analytical Philosophy*, Vol. 4., n. 6, 2016.

1960, p. 235). This means that defeasibility can survive independently of the ascriptive thesis, which was observed later in *Concept of Law* through the former's adaptation to Hart's notion of law and the latter's altogether disappearance. This was only possible because Hart, albeit influenced by linguistic philosophy, was never himself a linguistic philosopher. Hart opens *Concept of Law* stating that his objective "has been to further the understanding of law, coercion and morality as different but related social phenomena" (HART, 1961, v). Hart evidently shifts his theoretical focus from a linguistic analysis to a more sociological approach, while his object of scrutiny is not human action but law (and more specifically, legal rules) and its relation to other social spheres. He did not intend to create, elaborate or defend a particular general linguistic theory. He wanted to examine descriptively and prescriptively the way in which rules are and should be applied. In short, when Hart writes about language, he was writing it in the context of law (particularly in their application and interpretation), and his ideas were responses to problems stemming from that specific context (BIX, 1991, p. 66). These considerations will be brought to the next section, where I will analyze how they stand in Hart's mature legal theory, *Concept of Law*. Particularly, I will determine how defeasibility was adapted in the legal system envisaged by the author.

4 EXTENT OF LINGUISTIC PHILOSOPHY'S INFLUENCE IN THE *CONCEPT OF LAW*

4.1 Limitations of the application of linguistic philosophy on law

Hart admits that, while some of the insights of modern linguistic philosophy were of "permanent value" and that analytical jurisprudence owes its great advancement to them, there are, in his early works, a number of defects in his deployments of these ideas in his early works. The idea of different "uses of language" needed more clarification, as there are many different senses of "use" (HART, 1983, p. 4). Hence, in his early works, Hart had ignored the "important distinction between the relatively constant meaning or sense of a sentence fixed by the conventions of language and the varying 'force' or way in which it is put forward by the writer or speaker of different occasions" (HART, 1983, pp. 4-5). Whether or not these sentences are put forward as inferences, they still retain the same meaning. Putting them forward as inferences only tells us about the force of the utterance in that context, not about

the meaning of the sentence. In the case of the sentence "There is a bull in the field", although the force of the utterance may vary whether it is a warning or a request for information, its content is still the same (HART, 1983, p. 5).

One of the most important characteristics of legal concepts is that they may still be puzzling even when they are applied in uncontroversial cases, where those employing such terms have fully mastered their daily usage. A great number of controversies in legal philosophy arise not from the confusion over the meaning of certain concepts, but "from the divergence between partly overlapping concepts reflecting a divergence of basic point of view or values or background theory, or which arise from conflict or incompleteness of legal rules" (HART, 1983, p. 6). Linguistic philosophy could only be significantly helpful for jurisprudence in cases where we could not identify the manner in which particular uses of language deviated from a tacitly accepted paradigm, or where we wrongly assimilated extremely different forms of expressions to familiar ones (HART, 1983, p. 5). For those problems stemming from the difference between background values, linguistic philosophy cannot be of much aid, since its methods are "neutral between moral and political principles and silent about different points of view which might endow one feature rather than another of legal phenomena with significance" (HART, 1983, p. 6).

4.2 Open texture and defeasibility

"Open texture" is a vastly explored idea in *Concept of Law*, and Hart implicitly attributes it to Friedrich Waismann (HART, 1994, p. 297). For Waismann,

> Material object statements cannot be reduced to a long (or even an infinite) list of sense-datum statements and that our concepts always have the possibility of vagueness because we do not know how they would be applied in unforeseen (unforesseable) situations. (BIX, 1991, p. 62)

Upon the emergence of new circumstances, we would always be forced to redefine our concepts. Because of their characteristic vagueness, we would be trapped in an endless process of redefinition. Therefore, description of material objects is never complete (BIX, 1991, p. 59). The difference between Waismann's open texture and Hart's adaptation lies in the type of unforeseeability, i.e the type of exceptional circumstances, that is taken into consideration. Waismann had in mind new, ground-breaking facts such as cats

growing to enormous proportions, whereas Hart discussed what kind of things could be validly accepted as "vehicles" in parks (BIX, 1991, p. 64). In spite of certain considerations about language, Hart's approach is not a linguistic one, nor it is based on a theory of language, i.e. about the meaning of particular terms. Instead, he was engaged in the use of language in the problems of law, which come from practical and ethical considerations rather than epistemological ones, and whose artificial restrictions are not applied outside the legal context. Whenever we use language in the context of law to direct and coordinate behavior, the problems of interpretation and meaning will be fundamentally different from those arising in the use of language as a way for people to express their own thoughts and to communicate among themselves (BIX, 1991, p. 67).

Before inquiring into the nature of rules and their relation to language, we must first ask ourselves what makes them a fundamental element of a legal system. Rules, standards and principles are formulated as ways of social control in large groups, and they must be communicated in a general manner. These general standards of conduct must also be communicated in a way which is understandable to a great number of individuals without the need of any further instruction. Thus, law must predominantly refer to classes of persons and to classes of things, and its successful application depends on a wide capacity to recognize particular things as instances of the general standards which law creates (HART, 1994, p. 124). And how can we communicate such standards to individuals? There are two ways which differ in their use of general classifying words. On the one hand, there is precedent, which makes a minimal use of such words; and on the other hand, legislation, which makes a maximal one (HART, 1994, p. 124). Precedent works predominantly with examples set by the conducts adopted by authorities, which in turn become the standard to be followed. However, the use of examples gives rise to doubts about the standard itself, for there are a number of possibilities that may satisfy a given precedent. Legislation seems to solve the problem by providing clear and predictable standards through an explicit use of language. Still, it does not eliminate our doubts, for legislation cannot exhaust all unpredictable situations that may nonetheless emerge from real life. As it can be seen, the distinction between precedent (communication by authoritative example) and legislation (communication by authoritative general language) is not clear-cut. Both suffer from the inherent and natural limitation of language and of the extent which general language can provide guidance. There are paradigmatic cases where we may apply general expressions in a clear and constant way, but we must also account for those where their application is not evident. A motor-car is, without any controversy,

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a vehicle. Could we say the same about airplanes, bicycles or roller skates? These latter examples are fact-situations which constantly arise from natural or human invention. While they may share some characteristics with the plain cases, they fundamentally lack some others. Even the use of canons of "interpretation" cannot solve these uncertainties, for they are themselves general rules for the use of language which would in turn require interpretation and suffer from the same problem they attempt to solve (HART, 1994, p. 126).

If both communication by authoritative example and by general language share the same spectrum of uncertainty; and if canons of interpretation are themselves in need of interpretation, then general terms cannot be of much help in dispelling this perplexity. Hart suggests that the solution lies on a choice between open alternatives made by whoever has to resolve the problem. Thus, they are left with a sphere of discretion where what matters is whether the uncertain case resembles the plain case "sufficiently" in "relevant aspects". Even if the reasoning behind this decision is neither arbitrary nor irrational, it is still in effect a choice (HART, 1994, p. 127). The use of general language when communicating matters of the factual world inherently comes with uncertainty. It is not possible to devise rules so precise that their application to a deviation would be already settled in beforehand. We, as human beings and not gods, suffer from both relative ignorance of fact and relative indeterminacy of aim (HART, 1994, p. 128). Legal rules are characterized by what Hart calls an open texture, possessing a duality of core of certainty and a penumbra of doubt. Precedent or legislation are used to communicate general standards of behavior, and the majority of cases fall under the core of certainty without any problem. However, there will be cases in the penumbra of doubt whose application will be uncertain, as they may share enough traits with the paradigmatic examples for them to be considered relevant, but lack in crucial aspects which cast doubt on their suitability. In these cases, we must make a choice based on certain criteria of relevance.

The idea of open texture bears some similarities to the notion of defeasibility while retaining some fundamental distinctions. What was essentially maintained in *Concept of Law* was the notion that general use of language has natural limitations which render impossible to predict all cases in advance. The distinction lies in the fact that defeasibility essentially deals with claims, and open texture, rules. In the case of legal claims, there are certain exceptions which may weaken or defeat altogether claims that would otherwise be accepted. With legal rules, the existence of exceptions does not imply in their weakening or defeat. This is evident when the nature of legal claims is considered. Differently from legal rules, legal claims are not general standards of conduct, acting rather as utterances based on

facts which may or not may not fit in those standards. Thus, legal claims derive their validity from their accordance to legal rules. If they are defeated or weakened by an exception, they cannot be utilized in that context, or only after going through changes. Conversely, legal rules, due to their open texture, can support exceptions in their penumbra of uncertainty without being defeated by them. When deviations occur, the judge or another competent authority does not discard the legal rule. Instead, they have a sphere of discretion where they must choose whether or not it is sufficiently similar to the plain cases.

5 CONCLUSION

The influence of 20th century linguistic philosophy can be felt throughout Hart's theoretical development. However, his theory of law encompasses other aspects which lie outside of the scope of linguistic theories. I explored how linguistic ideas such as defeasibility and open texture influenced a relevant aspect of our understanding of legal rules while maintaining that legal rules are not linguistic phenomena. As I had shown, legal rules have a penumbra of doubt which allows an area of discretion. In order to make a decision, a judge may draw his criteria of relevance from other social spheres, and a group of judges with different values may disagree about the best decision to make in perplexing cases. Being neutral towards values, linguistic theories cannot account for these types of legal facts.

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