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PROMOTING THE RULE OF RATIONALITY OVER POSITIVE LAW AND LEGAL THINKING

The paper makes the following claims. First, the most important problem for contemporary legal philosophy is contrasting the morally disgusting state of the world. Second, qua jurisprudents, the problem must be dealt with indirectly. Third, the indirect way of dealing with the problem requires pursuing the goal of promoting the rule of reason, the dominance of rationality, over law and legal thinking. Fourth, such an overall goal is to be pursued by breaking it down into five more specific goals: namely, promoting the epistemic, methodological, conceptual, instrumental, and substantive rationality of law and/or legal thinking. Fifth, pretentious and idle ways of doing jurisprudence must be put aside.

Key words: *Epistemic rationality*. – *Methodological rationality*. – *Conceptual rationality*. – *Instrumental rationality*. – *Substantive rationality*.

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1. "WHAT IS THE MOST IMPORTANT PROBLEM IN CURRENT LEGAL PHILOSOPHY?"

What is the most important problem in contemporary legal philosophy? The question posed by the organizers of the discussion panel, our colleagues and dear friends Miodrag Jovanović and Bojan Spaić, is simultaneously *momentous* and *ambiguous*.

It is *momentous*, since it is about nothing less than "the *most important problem* in contemporary legal philosophy".

It is *ambiguous*, since it may be understood in (no fewer than) two different ways: namely, as a question asking for a piece of *information*, or, alternatively, as a question asking for a piece of *direction*.

As a question asking for a piece of *information,* the question commands an answer that belongs to the *sociology of* ("our") *legal culture*; more precisely, to the sociology of ("our") legal philosophy as an intellectual enterprise, as a (millenary) discipline, inside of that culture.

In this first reading, the appropriate answer to Miodrag and Bojan's question is one that brings to the fore *which problem*, if any, is *in fact, here and now, regarded* as *the most important one* by legal philosophers as a whole, or, at least, by a large majority, or the most influential part, of them.

As a question asking for a piece of *direction*, contrariwise, the question commands an answer that belongs to *prescriptive meta-philosophy of law* (prescriptive meta-jurisprudence): i.e., to the second-level line of philosophical investigations that purports to establish what the goal(s), the matter(s), and the tools of (a certain branch of) legal philosophy *should* be.

In this second reading, the appropriate answer to Miodrag and Bojan's question is one that *tells* legal philosophers *what* the most important problem for contemporary legal philosophy *should be*: what (we) the jurisprudents, here and now, *should aim for*, and *how*.

Of the two alternative readings of Miodrag and Bojan's question, I will adopt the latter. In what follows, therefore, assuming the standpoint of prescriptive meta-jurisprudence, I will state *what we*, the legal philosophers, *here and now*, *should regard* as *the most important problem* we should deal with.

2. PROMOTING THE RULE OF RATIONALITY OVER POSITIVE LAW AND LEGAL THINKING

The age we live is not only a (very) busy age,[1] it is also, and still, and for an immense number of humans, be they dwelling in the "first", the "second", or the "third" world, a morally disgusting age.

This remark of mines may sound outrageously trivial – and perhaps, even a bit off the mark. Nonetheless, it allows me to fix a first, basic, point in my normative proposal:

We, the jurisprudents, *should* consider the *moral nastiness* of our age as the paramount problem we should deal with, here and now, *qua* jurisprudents.

But *how* can we do this? *In which way* should we, *acting in our capacity of* jurisprudents, contribute to alleviating the moral nastiness of our age?

Upon reflection, I submit that we, *qua* jurisprudents, cannot cope with the moral nastiness problem *directly* (cannot pursue the goal of alleviating the moral nastiness of our age *directly*), but only *indirectly*.

Our *most important problem* (and our most important *goal*), therefore, must be a different, though related, one. Taking stock of the analytic tradition and of the glorious experience of post WWII "neo-enlightenment" movements,[2] I take that our *most important problem* (our most important *goal*), here and now, should be the following: promotion of *the rule of reason*, promotion of *the dominance of rationality*, over positive law and legal thinking.

Obviously, promotion of *the rule of reason*, promotion of *the dominance of rationality*, over positive law and legal thinking, is a too broad and vague a goal to pursue. It must, therefore, be broken down into narrower and more manageable goals. Five conspiring (more) *specific goals* come to the mind, which correspond to as many dimensions of rationality, to wit:

1. Promotion of the rule of *epistemic* rationality;
2. Promotion of the rule of *methodological* rationality;
3. Promotion of the rule of *conceptual* rationality;
4. Promotion of the rule of *instrumental* rationality; and, finally,
5. Promotion of the rule of *substantive* rationality.

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1 Bentham ([1776] 1988, 3).

2 For a clear instance of the "neo-enlightenment" outlook see, e.g., Bobbio (1998).

The *first specific goal*, promotion of *the rule of epistemic rationality*, requires jurisprudents to further true and reliable knowledge about positive law and the doctrinal study thereof. Two different tasks are to be carried out in view of this goal.

On the one hand, jurisprudents should work out *realistic theories* of positive law, of the doctrinal study thereof, and of (assumedly) scientific investigations about it. They should provide, in sum, true and dispassionate descriptions of the law world. This task, it must be noted, has both a *constructive* and a *deconstructive* side. Providing realistic theories requires engaging in a relentless critical assessment of extant ones. In particular, it asks jurisprudents to *detect* (conscious or unconscious) *mystifications*, whenever they are afoot, and do away with them by means of *demystification*.

On the other hand, jurisprudents should also assume the role of *legal epistemologists*. They should enquire about the better conceivable ways of making positive law a matter of truly scientific investigation, putting the outcomes of this line of investigation into the form of prescriptive legal epistemologies.

The *second specific goal*, promoting *the rule of methodological rationality*, requires jurisprudents to further the accuracy and correctness of legal reasoning, as performed by jurists, judges, officials of the legislative and executive branches, attorneys at law, etc. Accuracy and correctness are to be measured from the standpoint of logic, rhetoric, and sound theories about legal interpretation and legal argumentation, both as to matters of law and as to matters of fact. The rule of methodological rationality over legal reasoning presupposes, accordingly, the working out of realistic theories of adjudication and "legal science" (as doctrinal study of law) in their argumentative dimensions. Its pursuit turns jurisprudents into the controllers and reformers of how jurists, judges, and lawyers at large (should) reason.

The *third specific goal*, promoting *the rule of conceptual rationality*, requires jurisprudents to further the conceptual and terminological precision and articulation of legal thinking.

Any sort of knowledge lawyers may have about the law, as well as their everyday practice as jurists, judges, attorneys, etc., inside of a legal experience whatsoever, necessarily depend on (is fatally mediated by) some terminological/conceptual apparatus: a scheme, framework, or set of terms and corresponding meanings.

Conceptual rationality invites jurisprudents to be distrustful about the extant terminological–conceptual apparatus their legal culture happens to (have inherited from previous generations and) make use of at any station in its temporal progression. It suggests that there is always room for moving

from (fatally) less fine (poorer, obscurer, obsolete) terminological/conceptual apparatuses to (ever) finer (richer, clearer, updated) ones, containing a larger set of more precise concepts tied to a more articulated set of terms.

Jurisprudents should achieve this goal, it must be emphasized, by the constant, relentless, carrying out of a variety of "conceptual", "philosophical" or "linguistic" "analyses", which I shall call *reconstructive conceptual investigation*. This should be proceeded by enquiries articulated in three related stages of *conceptual detection*, *conceptual reconstruction*, and *conceptual therapy*.

At the stage of *conceptual detection*, or conceptual investigation in a narrow sense – what J. L. Austin proposes to call "linguistic phenomenology"[3] – the extant terminological and conceptual apparatus that is the subject matter of the enquiry is identified, analysed, and its rational virtues and flaws dispassionately brought to the fore. Here, several tools for the analysis of legal discourses are put to work.[4] Conceptual detection paves the way for the two following operations.

At the stage of *conceptual reconstruction*, the extant terminological and conceptual apparatus is modified into a new one, that is capable of replacing it, but does, and should do, roughly the same job of the extant one, though in a better, more rational way – for instance, through its finer articulation in a larger, more comprehensive, set of terminologically distinct and semantically clearer and more exact concepts. Here, the several tools for conceptual and terminological refinement are to be put to work.[5]

Finally, at the stage of *conceptual therapy*, the use of the reconstructed and replacing conceptual and terminological apparatus set forth in the second stage is recommended and carried out, as a way out from the (supposed) rational flaws of the ongoing one.[6]

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[3] Austin (1956–57, 130).

[4] Such as those derived from the analytic theory of words (the distinctions between logical and descriptive terms, concrete and abstract terms, emotively neutral and emotively laden terms, etc.) and the analytic theory of sentences (the distinction between the grammatical and the logical form of a sentence, between ontic, deontic and imperative sentences, between descriptive, prescriptive and constitutive sentences, etc.).

[5] Such as the analytic theory of concepts, the analytic theory of definitions, and the twin tools of explanatory and reformatory imagination. For an overview of the tools considered in the present and preceding footnote, see Chiassoni (forthcoming 2021).

[6] The view of conceptual investigation adopted here may look like a piece of eclecticism, where suggestions from Bentham, Russell, Carnap, Quine and Strawson, among others, are put together in a sort of mental patchwork. It is so indeed. In

The *fourth specific goal*, promoting *the rule of instrumental rationality*, requires jurisprudents to contribute to making the law an instrumentally rational enterprise. In view of such a purpose, jurisprudents should instruct jurists: (a) to check whether extant sets of legal norms (at the national or international level) are instrumentally adequate for the goal(s) they are presumed to serve (if any); and (b) in the negative case, to devise norms that would be instrumentally (more) adequate for such goal(s).

Finally, the *fifth specific goal*, promoting *the rule of substantive rationality*, requires jurisprudents to promote positive law's adequacy regarding the values of *ethical rationalism*. In view of such a purpose, jurisprudents should perform two tasks. First, they should check whether the content of extant laws (at the national or international level) is *acceptable to rational agents*: namely, from the standpoint of individuals that are (assumed to be) conscious, both of their dignity as rational, free, and equal moral persons, and of their (not necessarily selfish) interests. Secondly, in the negative case, they should bring to the fore the unbearable character of extant laws and set forth reform proposals.[7]

3. PROMOTING THE RULE OF RATIONALITY AND THE JURISPRUDENCE JOB

After Bentham, we are used to distinguishing between expository (descriptive) and censorial (normative) jurisprudence. How do the several tasks above relate to the Benthamite distinction?

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fact, I do not care for strict philosophical allegiance. I care for (hopefully) smoothly working tools for (hopefully) fruitful jurisprudential investigations.

[7] In his account of the "critical" branch of jurisprudence, Hart presents the evaluation of law as a two-stage process. In the first stage, the only one that is relevant here, any positive legal system should be assessed from the standpoint of it being "acceptable to any rational person" individually considered. Acceptability depends, in turn, on meeting three conditions. To begin, the legal system must contain "certain rules concerning the basic conditions of social life": namely, "rules restricting the use of violence, protecting certain forms of property, and enforcing certain forms of contracts". Furthermore, these rules must satisfy the "procedural requirements" appropriate for "the rule of law": i.e., "the principles of legality" (the rules must be general, fairly determinate, publicly promulgated, easily accessible to knowledge, not *ex post facto*), and "the principles of natural justice" (the rules must be applied by impartial judges through fair trials). Finally, the person (the rational agent) who is evaluating the legal system must be among the beneficiaries of the protections and capabilities that its rules provide (Hart 1967, 109–116).

In very rough terms, promoting the rule of reason over law and legal thinking requires jurisprudents to play both games.

On the one hand, the goal of promoting *epistemic rationality*, insofar as it requires jurisprudents to provide true descriptions of the law world (and general theories of law), and the goal of promoting *conceptual rationality*, insofar as conceptual reconstruction serves a strictly explanatory or theoretical purpose, can be located within the field of "descriptive" jurisprudence.

On the other hand, the goal of promoting *epistemic rationality*, insofar as it requires jurisprudents to work out prescriptive legal epistemologies, together with the goals of promoting *methodological rationality*, *instrumental rationality*, and *substantive rationality*, can be regarded as identifying as many goals of a *censorial*, *prescriptive*, or *normative* variety of jurisprudence, though with different, rising degrees of ethical commitment on jurisprudents' part.

To conclude, I would like to say a few words about the style that should be deemed appropriate to jurisprudential investigations aimed at furthering the rule of rationality over positive law and legal thinking.

These – I submit – should abide by two basic principles of an analytic approach to legal philosophy: namely, the *principle of simplicity* and *principle of austerity*.

The *principle of simplicity* urges jurisprudents to avoid any magniloquent phrasing while pointing to the purpose of their investigations. It sees expressions like "enquiring about the nature", "the essence", or "the character" of law, as being laden with unnecessary (and possibly obnoxious) ontological suggestions. It requires, therefore, that they be put aside in favour of simpler, ontologically uncompromised ones, like "enquiring about the law in general", "about legal norms", "about adjudication", "about legal interpretation", etc. The principle, accordingly, stands up to any non-naturalistic, pre-analytic, conception of jurisprudence; to any view that still entertains, perhaps unconsciously, the idea of legal philosophy as vested with the role of the "first philosophy" (*philosophia prima*) about the law: as the only enterprise capable of disclosing those "necessary truths" about the law world, which empirical legal science, and its servant, analytic jurisprudence, cannot even imagine coming close to.

The *principle of austerity* sets a standard of non-exaggeration in the formulation of jurisprudential theses (e.g., those concerning the actual role legal rules, interpretation, adjudication, etc., play in the life of a legal system). It suggests to jurisprudents the proper way of putting into words the theses they stand for. Such a wording, it claims, should not indulge either in metaphors, or, even worse, in forms of expression where the descriptive

content is overwhelmed, disguised or altogether dissipated by the use of combinations of words meant to be shocking for the audience. The principle of austerity admits of no *succès de scandale*; it tolerates no "*pour épater les juristes*".

To sum up: jurisprudence should be no literary exercise. It should not be words-magic for the amusement of jaded intellectuals and other leisured people. If rationality is to rule over law and legal thinking, jurisprudential claims should be couched in the severe, tightly controlled, language of conceptual precision and empirical content.

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