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On the Essential Contestedness of the Concept of Law

Gallie's Framework for Essentially Contested Concepts Applied to the Law

Abstract

The article examines the inadequacies of different approaches in defining the concept of law in legal theory and suggests that by categorizing the concept of law as essentially contested we can account for permanent conceptual disputes in legal theory. The author argues that the concept of law fits five descriptive criteria for essential contestedness suggested by Walter Bryce Gallie. It is further suggested that by taking this point of view makes us deflate the value of definitions understood in terms of necessary and universally valid explanations of a concept, and emphasize the importance of different conceptions of key concepts in legal theory.

Keywords

concept of law, essential contestedness, legal theory, philosophy of law

> "[T]here are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."
>
> Walter Bryce Gallie, *Essentially Contested Concepts*

Clear and unambiguous definitions of legal concepts in continental systems of law are not only seen as natural, but are often regarded as a necessary condition for matching the precision in legal science with the hypothetic precision in legislation. It seems that without definitions, understood in terms of necessary and universally valid explanations of a concept, the praised legal stringency and taxonomic attitude would remain void of content. Definition thus becomes the main tool for getting rid of vagueness and contestability in legal science, as well as uncertainty in legal practice. Despite the questions of soundness and justification of this esoteric attitude in science and practice, the impression is that various legal disciplines actually manage to solve conceptual problems apodictically. This is certainly not the case in legal theory and philosophy. Concepts of state, sovereignty and even the concept of law have a bad reputation in regard of the possibility of explanation. Introductions to legal theory are often crowded with logical and epistemological considerations almost exclusively concerned with possibilities and modes of definition. So we find ourselves introduced to synthetic, descriptive, conventional and

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prescriptive definitions, instructed in problems encountered in defining concepts of a certain level of generality, or we encounter no attempts to define key concepts even in works whose title clearly suggest that a definition is waiting inside. Even more, main disputes in the 20th century legal theory build around the concept of law; irreconcilability of legal positivism and natural law theories is best understood as a dispute about one single key concept. (Koller 2006, 182)

This paper does not aim at giving answers to questions of defining concepts in legal theory, but is primarily focused on presenting a framework for better understanding of permanent conceptual disputes within this field. We are going to deal with the concept of law in particular – the methodology of defining the concept and different definitions within the frame of two dominant traditions in legal theory and philosophy – legal positivism and natural law theories. It seems that such a matter is worthy of attention for at least one reason: if we still have not succeeded in disputing Immanuel Kant's remark from *The Critique of Pure Reason*,[1] we could at least try to understand the reasons for its validity to date. (Kant 2003, 368–369) Otherwise we should maybe start considering if the result of Wittgenstein's early work on language that proposes silence about things that cannot be clearly said is valid even in legal theory. (Wittgenstein 1987, 189)

Problems with definition

Let us begin with trying to recreate the usual path followed in defining key concepts in legal theory. When we ask, "What is law?" ("What is state?" or "What is sovereignty?"), we are primarily interested in finding out something about the essence (or the nature) of things or entities that the concept refers to.[2] Thus, the first problem of definition would be to identify what we actually think about when having in mind the above-mentioned concepts. In social theory and philosophy this problem seems far more complex than one could reasonably expect. There is no doubt that depending on the perspective we take the concept of law stands for various things (i.e. entities etc.) Praetorian edicts are a part of its reach only from the perspective of a legal historian; for those involved in legal practice natural law is in most cases irrelevant, at least as irrelevant as some minor litigation is for a theorist of law. Yet, let us presume that theoretically, it would be possible to present the entire reach of the general concept of law from every possible perspective, i.e. to determine everything that we have in mind when we say law (sovereignty, or state). But, if we go back to the question previously raised, we notice that, in no way have we shown interest for such a thing; it's quite simple – if we ask what art is, we do not expect to be given a list naming all Phidias's sculptures or Mondrian's paintings, and surely we do not expect to hear about the movements in sculpture or painting. The question about which entities fall under the reach of a concept is even at first sight quite different from the question about its content.

Truth be said, we could put things differently and say that the historian, law practitioner and theorist of law actually define mentioned concepts in different ways. Yet, it is quite obvious that their accounts of law cannot be regarded as various definitions of a single concept. It would rather mean that one word is used to denote different concepts, or at least concepts of a different level of generality. Thus, we would be inclined to interpret a potential disagreement among the three as a case of terminological confusion rather than as a rational

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dispute. If we understand the quest for definition as a search for the essence or nature of the entities that a concept refers to, it seems that the mere enumerating of things that fall under the reach of a concept does not help us much.[3]

If we acknowledge this, the next step of the inquiry leads us usually to a classical method of defining – *per genus proximum et differentiam specificam*, where we assume that the concept of law has its counterpart in the real world, in order to determine a genus (or a species, that is a shared feature of all examples that are part of the concepts reach) and a property that distinguishes it from other items in that category. But this seems to be a dead end; nothing precise or determined is a proper equivalent or corresponds entirely to fundamental concepts in legal theory. It seems that by accepting this approach, we have become victims of a methodology that is inappropriate for determining the content of our concepts. Gerald Gaus summarizes the epistemological position we have come across to three propositions that usually underlie our quest for a clear and precise definition: 1) Most of us are convinced that the words used on a regular basis actually make sense and are important. 2) We are also convinced that, if one word makes sense, we should be able to define it. Finally, 3) we all share the conviction that a word that makes sense and is important refers to something real (Gaus 2000, 8–9).

Of course, not all of us are conceptual realists. In an early article entitled "Definition and Theory in Jurisprudence", Herbert Hart analyzed legal concepts in a way that significantly influenced (for better or for worse) the discourse of legal theory in the latter half of the 20th century. Building on the philosophy of ordinary language Hart holds that jurisprudence is lead into conceptual confusion when attempting to define legal concepts from the perspective of conceptual realism, primarily due to inappropriate methods used to define the concepts in question. In his view, attempts to define the essence of law, sovereignty, justice, equality or freedom are misguided and useless when it comes to understanding legal concepts. The specific character of legal concepts should therefore be matched by a different mode of definition. But the author of *The Concept of Law* assumes somewhat hastily that our disputes are not conceptual but terminological, and can thus be solved in a nominalist fashion – by explaining the use of words that denote the concept (H. Hart 2003, 23–53). And while it could be accepted that the language used by legal practice is actually suitable for such a methodological turn, the same thing cannot be applied to the language of legal theory. Understanding the conditions that render true the propositions in which the term is used can be useful in explaining the concept from "the internal point of view" (Shapiro 2006). However, from the "external point of view" they are of little or no help in

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[1]
A fair share of legal literature mentions Kant in the context of defining the concept of law by referring erratically to his comment that lawyers still have not find a definition of the concept of law. This statement certainly was not meant as an admonishment to the profession. Kant's intention was to give an example for his notion that definitions in a strict sense are only possible in mathematics, and that the explanation of concepts that are dependent on empirical usage could be called explication or declaration. It is also notable that the name of the chapter in which we find this comment is "Discipline of Pure Reason".

[2]
For Joseph Raz inquiry into the essence of law in the form of the explanation of the concept of law is the very core of legal theory, which has to fulfill two tasks in order to be successful: first, provide us with "propositions about the law which are necessarily true, and, second, (…) explain what the law is." (Raz 2005, 324).

[3]
Even if we take a nominal stance and identify concepts with words that denote them, it is possible to differentiate between ambiguity, vagueness and contestability of legal concepts (Waldron 1994, 509–540).

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resolving disputes about the concept. It seems that if we change the method of defining, as Hart would have it, we also change the *definiendum* along the way. Simply put, Hart's detour into the philosophy of language did not contribute much in the understanding of highly contested concepts such is the concept of law (duty, obligation, corporate personality etc.) (Raz 1998, 253).

Hans Kelsen is much more cautious in this matter (despite the fact that the "internal point of view" if often considered to be the greatest achievement in Hart's theory compared to Kelsens's). Kelsen's definition of law implies a standard determination of a genus and differentia, on condition that differentia has heuristic value for the understanding of social life. The meaning of the word that denotes a concept serves as a kind of methodological regulative in the attempt to define the concept of law. The common meaning of the word should, according to him, help us to differentiate between better and worse explanations of a concept – "[a] concept of law whose extent roughly coincides with the common usage is obviously (…) to be preferred to a concept which is applicable only to a much narrower class of phenomena." (Kelsen 2006/1949, 4) But if it really is possible and useful to define law in this essentialist fashion, it is not clear why should we resort to a conventional meaning of the word that denotes the concept. It is even less understandable why should the dictionary definition (or, if obtainable, statistical data on the actual usage of the word) be used as a criterion for differentiation between better or worse definitions of the concept.

In trying to get out of this *circulus vitiosus* of words and concepts Finis refers to Aristotle's notion of focal meaning. His main idea is that by differentiating between central and peripheral cases we arrive at the focal meaning of a concept. A definition obtained in this way should be able to incorporate real and nominal elements. The description of central cases would than allow us to come to prescriptive proposition about law by elimination of those cases that count as peripheral. (Finnis 1980, 9–10) Besides the fact that we made a step backward by meddling again with the reach of a concept, the methodological framework that Finnis puts forward can be contested for at least two additional reasons. Debates about the concept of law are rarely exclusively concerned with peripheral cases. The usual subject of disputes is in fact the core of a concept that remains contested despite the efforts of legal theorists in refining the underlying methodology of definition. Besides that, the criteria for determining centrality of a case are everything but self-evident or universally acknowledged. If we take into consideration Aristotle's examples discussed by Finnis, it becomes evident that centrality of a case is at best a contingent matter, essentially dependent on the cultural, social and historical context in which it is determined. Put somewhat differently, it is not clear why should one case be considered central and another peripheral, and it is even less clear how the description of central cases can lead us to prescriptive propositions about the content of a concept (Raz 1998, 257).

Even if we put the objections aside, with all these twists and turns in methodology, it should be reasonable to expect fewer disputes about the content of an important and well-known concept. This is hardly the case. Latest debates about the concept of law presented in Koller's article "The Concept of Law and its Conceptions," have shown that methodological awareness of legal theorists like Hart, Kelsen or Finnis has only succeeded in changing the central points of the debate, falling short in providing us with an adequate explanation of the concept. Legal moralists like Deryck Beyleveld and Roger Brownsword conclude that the legal order is actually a moral order whose rules and regulations require enforcement. Robert Alexi holds that the law is

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a system of norms that claim moral correctness, that belong to or are based
on an efficient constitution without being extremely unjust, and that the rules
and regulations imply principles that are compulsory in guiding the process of
law application. According to Jules Coleman, the law is a conventional social
practice whose connection with morality is contingent. Joseph Raz supports
a stronger version of legal positivism where he adheres to descriptive meth-
odology, understanding theory of law as an adequate description of a social
institution (Koller 2006, 184–192). It is quite clear that in these cases there
are no quandaries about whether different concepts are referred to using a
single word. It is also obvious that the debate is not primarily terminological,
but conceptual as it does not entail the usage of a word as a point of interest.
The only thing that the participants in the debate seem to have in common is
the fact that they consider their own definition and use of a concept to be the
proper one in terms of explanatory force and methodological assumptions that
underlie it.

If that is so, what are we to make of these endless conceptual debates? One
of the possibilities would be to claim that theoretical disputes are due to a set
of psychological and social factors that cause disputants to stubbornly avoid
finding a middle ground in the debate. (Kekes 1977, 72) The fact that some
debates in philosophy, philosophy of law and legal theory have emotional
components or are intensified by prejudices of participants does not give us
the right to refute every possibility of rational theoretical discourse. Further-
more, if we accept the thesis that theoretical disputes are psychologically and
socially induced and sustained, we would have no choice but to accept that
the entire debate about the concept of law is futile.

It appears that the only reasonable possibility is to take disputes over the con-
cepts in legal theory seriously. Unfortunately, when we actually do that we
are faced with a plethora of different definitions that provide us with various
accounts of the essence, content or nature of things that fall under the reach
of the concept. Following the process of defining, we have seen that legal
theorists are forced to resort to general philosophy, logic or epistemology
in order to resolve conceptual confusion or contestation. Original dilemmas
regarding the reach and content of the concepts can be explained by logic and
general methodology. According to these, the main reason for our difficulties
is that in principle the content of a concept as a set of its fundamental traits
can be explained relatively independently from its reach (Quine 1951). But if
formal logic can help us in clarifying conceptual disputes from the viewpoint
of validity of arguments, it tells us little about their content. A number of dis-
putes can be explained by resorting to epistemology; a vast majority of legal
theorists build their definitions on the grounds of conceptual realism. Others,
like Kelsen and Hart, are drawn to take into account the usual meaning of
the word, supporting a conventionalist standpoint typical for contemporary
philosophy of language. Yet it seems that the conceptual debate cannot be re-
duced to a terminological one. Whereas words we use can be viewed as build-
ing blocks of language, the concepts we use constitute theories. The relation
between a theory and concepts corresponds to the relation between language
and words – in the same way that words acquire their meaning from the per-
spective of a language, concepts acquire specific content from the perspective
of a theory (Freeden 1996, 48). The context in which a particular concept is
used, and it's relation with other concepts enable us to explain the concept in
a way that does not necessarily have to be tied in with the use of the word that
denotes it, and even less with its conventional use (Raz 1998, 255–256). If
we consider words that denote concepts instead of focusing on concepts and

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their definitions, we only manage to say something about the way a particular word is conventionally used.

To sum up, the concepts of legal theory truly appear to be specific, thus the usual ways of their explanation seem inappropriate. Yet, they are not inadequate, as Hart says, because we use wrong methods in defining. This inappropriateness lies in the fact that we assume that the definition is the last word in the process of determining the content of a concept. Let us try to offer arguments for this sophistry.

Law as an essentially contested concept

We argued previously that taking an extralegal or philosophical standpoint in defining key concepts in law is not something new or unusual. Definition of concepts like the concept of law encompasses the engagement of a series of linked concepts that are often problematic themselves. It looks like that the main characteristic of the debates regarding the concept of law is that those who use the concept by trying to define it are also trying to "once and for all determine the criteria of its proper usage" (Gray 1977, 332). Accordingly, it would seem that contestedness is one of the rare characteristics of the concept in question that persists despite the various philosophical and methodological commitments of legal theorists. If that is so, than the understanding of these debates could not only enlighten the efforts of legal theorists in defining law, but also tell us something about the concept in question. It is about time to state the framework that hypothetically could help us explain conceptual debates in legal theory and philosophy of law.

Walter Bryce Gallie was the first to consider contestedness as an essential trait of certain concepts in social theory and philosophy in an article published in the *Meeting of the Aristotelian Society* in 1956. His short work will have immense influence on recent developments in political philosophy and will determine the way of analyzing concepts of political theory and political ideologies to date. This influence was not matched in legal theory; one of the rare theorists that refer to Gallie's paper is Ronald Dworkin in the article "Hard Cases" (Dworkin 1977, 103). The author himself contributed to this neglecting of his work in legal theory by enumerating without an explanation or noticeable criteria the concepts that cannot be characterized as essentially contested (Collier, Hidalgo and Maciucceanu 2006, 215). Despite this, we shall try to figure out if Gallie's framework for the analysis of essentially contested concepts is helpful for understanding conceptual debates in legal theory and philosophy.

Gallie puts forward five conditions that have to be met so that one concept could be characterized as essentially contested: 1) the concept must signify a valued achievement, i.e. the concept must be appraisive (it cannot be purely descriptive), 2) the achievement has to be internally complex, 3) the achievement that the concept stands for has to be variously describable in ways that are not internally contradictory or absurd, 4) the valued achievement has to allow for significant changes in light of changing circumstances that initially can not be foreseen, 5) every user of the concept must acknowledge the fact that his usage is contested by other parties in the dispute (i.e. he has to be aware that his use of the concept has to be sustained against other uses) (Gallie 1956, 171–172). In addition, in order to make the distinction between essentially contested concepts and concepts that are just "radically confused," Gallie proposes two further conditions: 1) every essentially contested concept

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has to be derived from an "original exemplar" whose authority is acknowledged by all competing parties that use the concept, 2) plausibility of the claim that the "competition" aiming at acknowledgement of one usage of the concept as the proper one, leads either to the maintaining of the achievement of the original exemplar or to its optimal development (Gallie 1956, 180).

The very title of Gallie's paper and the terminology that he uses can lead us astray. First of all, he tries his best to avoid any metaphysical assumption in regard of concepts that he discusses. Contestedness is not in fact an intrinsic trait of the concept in question, as the title of the article or the used terminology would suggest, but "every proper use of the concept is … contested" (Gallie 1956, 169). Every single condition that has to be met in order to call a concept essentially contested is primarily connected with the rival uses of it, i.e. it is the conceptual debate and not the concept itself that has to meet those conditions. Furthermore there is no doubt that Gallie hopes that his new categorization of concepts is a step further in their explanation (Gallie 1956, 188), basing his hope on the assumption that the content of the concept becomes clearer by figuring out something about the debates on its proper use. But meeting the conditions for essential contestedness clearly does not explain the contents of a concept. It only leads us to answering the question if a concept can be called essentially contested or not. This interpretation obviously challenges the heuristic value of Gallie's framework, and puts the content of the concept out of reach of his analysis. In addition to that, Gallie's conditions for essential contestedness are themselves contested; his paper is not modeled as a hypothesis in need of verification, but as a framework for understanding conceptual debates in social theory and philosophy (Collier, Hidalgo and Maciucceanu 2006, 215). Interpretations of Gallie's enterprise that fail to take into consideration the above mentioned clearly miss its essence and make it superfluous.

So far the discussion has shown that the concept of law is a contested concept; it is therefore necessary to consider if the concept is essentially contested, i.e. does the concept fit Gallie's framework for essential contestedness. Let us state Gallie's conditions in form of questions and try to answer them. 1) Is the concept of law used to signify a valued achievement? If we follow Gallie's analysis of democracy as an essentially contested concept it would seem so (Gallie 1956, 184). Radbruch's claim that unjust statutory law is not law at all (Radbruh 1980, 281–293) and Fuller's analysis of internal morality of law (Fuler 1999) show clearly that natural law theorists hold that the concept of law accounts for a valued achievement. The matter is more complex when it comes to legal positivism, but it can easily be shown that the concept of law for Kelsen, Hart or Raz is also evaluative (at least when it comes to legal validity and the reach of a concept) despite the separation of law and morality. What else could we make of Kelsen's understanding of law as a set of commands that safeguard peace, or Harts distinction between primary and secondary norms? In both legal positivism and natural law theories the concept of law is thus used to signify a valued achievement.[4] 2) Is the concept of

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In order to exhaust this subject we would have to explain in detail the methodological dispute in contemporary Anglo-American jurisprudence between the proponents and critics of descriptive methodology. One side in this argument claims that law is describable without resorting to value judgments, while the other sees law as interpretative from "top to bottom" (Dworkin 2003, 102). On the position assumed in this paper it is not necessary to take a stance in this dispute, simply because Gallie's criteria are actually descriptions of conceptual debates and not descriptions of the concept in question.

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law internally complex? We have mentioned earlier that different aspects of law are emphasized differently depending on the perspective taken in defining the concept. Austin accents the command of the sovereign (Austin 1832, vii), Radbruch emphasizes its connection to justice (Radbruh 1980), Hart introduces the rule of recognition as a criterion for legal validity of primary norms (H. L. Hart 1961), Fuller regards the processual character of law as one of its key features (Fuler 1999). 3) Is the achievement signified by the concept describable in ways that are not internally contradictory or absurd? The argument of authority is not usually adequate, but it completely serves the purpose in this context. Theoreticians that were taken into consideration in this paper are not only important but also unavoidable in theory of law. Even if this was not the case, both natural law and positivist theories are rigorous and precise in their argumentation especially after the analytical turn in legal theory. Their explanations of the concept of law can be treated as better or worse, but in no way as logically contradictory in themselves. This obviously fits Gallie's third condition. 4) Does the achievement that the concept of law stands for allow for significant changes in light of changing circumstances? If we recall everything that used to have the force of law in legal tradition than our answer to this question has to be positive. The achievement that the concept of law stands for cannot be confined in terms of possibility of its change. The concept itself is therefore in Gallie's terminology open in character. 5) Finally, are the users of the concept aware of differing criteria of use and are they ready to admit that their use has to be sustained against other uses? One Kelsen's remark clearly answers this question:

> "Legal positivism is not finished and never will be, as little as natural law is finished, and never will be. This conflict is eternal. The history of ideas only shows that sometimes one, sometimes the other position comes to the fore" (Koller 2006, 180).

Fulfilling these criteria is *prima facie* evidence that the concept of law fits Gallie's framework and can be regarded as essentially contested. The additional two criteria are not directly linked to essential contestedness but are used as a tool for discriminating between concepts that are essentially contested and concepts that are, in Gallie's words, radically confused. In spite of the fact that the concept of law fits these additional criteria, we will disregard them in our analysis. One of the most important reasons for omitting the additional criteria from this discussion is that they contain the most contestable point of Gallie's article. It is of course the notion of the original exemplar whose authority the participants in the debate should acknowledge. Gerald Gaus states that referring to the original exemplar dragged Gallie back to conceptual realism that he himself was trying to escape from (Gaus 2000, 32). But the notion of the original exemplar does not have to be interpreted in this way. The examples of art, democracy and Christian life that Gallie uses in his article show that he is not trying to avoid mixing confusion and contestedness by postulating a precisely defined achievement whose authority is acknowledged by all parties engaged in conceptual debates. The intention behind the notion of original exemplar is mostly negative and formal – it aids in 1) differentiating between concepts that are denoted by same or similar words by 2) avoiding metaphysical and embracing historical assumptions. In regard of the concept of law the original exemplar does not have to refer to a historical legal system or a tradition in legal theory, it could simply stand for an earlier conception of a concept that is important for the present debate (Waldron 1994, 533). It should be stressed that eliminating these two criteria is not meant to strengthen the notion of law as an essentially contested concept. Despite the fact that the omission does not put in question the essential

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contestedness of the concept of law, this concept meets them at least to the point that Gallie claims the concept of democracy does.[5]

Concepts, conceptions, and definitions

Based on the previous discussion it would seem that from the perspective of legal theory the concept of law fits Gallie's framework. It is also clear that the proposed criteria for essential contestedness are meant to be descriptive; they do not encompass analysis of anything else but the conceptual debate, nor they ask for any kind of evaluation.[6] Then what should we make of different accounts of the concept of law in various traditions in legal theory?

A partial answer to this question can be found in the work of Dworkin (Dvorkin 2003, 102), Rawls (Rols 1998, 27) and many others, in the distinction between concept and conception. It follows from this distinction that we could differentiate between the concept of law and conceptions of law (and further, as Peter Koller suggests, between the "conception of law" and the "conception of the concept of law" (Koller 2006, 182). A concept is in this view characterized by a minimal consensus on its content; a conception represents an interpretation of that content. It could seem that this minimal consensus is a counterpart of Gallie's notion of original exemplar. This is not the case. Michael Freeden is on the right track in assuming that concepts consist of "ineliminable" and "quasi-contingent" components. This ineliminability certainly is not logical or metaphysical in nature, but conventional and linguistic – it concerns the fact that every known usage of the concept encompasses a certain minimal content as a prerequisite of communication and understanding. Ineliminability of those components could be metaphorically described like this: "Even to disagree, we need to understand each other." (Endicott 1998, 283) This claim does not just replicate the discussion on the core and penumbra of a concept. Jeremy Waldron is right in claiming that the "term 'essentially' refers to the location of the disagreement or indeterminacy: it is contestation at the core, not just at the borderlines or penumbra of a concept." (Waldron 2002, 149) Furthermore, dispute about the concept of law is not "merely a dispute about marginal or penumbral cases between persons who are clear about the concepts' core." (Waldron 1994, 529) The theoretical and common usage of the concept will often encompass more shared components

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In the application of these additional conditions to the concept of democracy Gallie states: "(VI) These uses claim the authority of an exemplar, i.e., of a long tradition (perhaps a number of historically independent but sufficiently similar traditions) of demands, aspirations, revolts and reforms of a common anti-inegalitarian character; and to see that the vagueness of this tradition in no way affects its influence as an exemplar, we need only recall how many and various political movements claim to have drawn their inspiration from the French Revolution. (VII) Can we add, finally, that continuous competition for acknowledgement between rival uses of the popular concept of democracy seems likely to lead to an optimum development of the vague aims and confused achievements of the democratic tradition?"(Gallie 1956, 186)

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This is a contested point in literature. John N. Gray holds that the descriptive criteria for essential contestedness lead to nihilism in regard of the possibility of resolving conceptual disputes and proposes a different framework that in his view accounts better for disputes in philosophy. We'll leave aside Gray's criticism in order to state his conditions for essential contestation: 1) the presence of intractable definitional disputes, 2) dispute hinging on conflict of patterns of thought 3) patterns of thought depending on philosophical thesis and reasoning. (Gray 1977, 344–345) Our discussion makes it clear that even on these criteria the concept of law should be considered essentially contested.

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simply because "the established cultural, historical, and social contexts in which the word appears are assumed to impose on most of its users common, or overlapping, fields which they cannot easily shrug off." (Freeden 1996, 52) As it is impossible to restrict the theoretical use of the concept of law to this minimal content, various conceptions of a concept are practically unavoidable. According to Freeden, to eliminate this minimal content "means to fly against all known usages of the concept" (Freeden 1996, 62–63). Of course, this minimum does not explain much. Only a conception of a concept in question renders possible the understanding of the concept.

As a reminder, we should mention that the paper began with the explanation of some approaches in defining concepts by questioning the effectiveness of methodological turns in defining the concept of law, in order to proceed with discussing the fundamental traits of methodological and conceptual debates about the concept. That was obviously done in order to deflate the value of definitions of key concepts in theory of law and emphasize the importance of various conceptions for understanding the concept in question. In order to frame the discussion and leave space for unanswered questions it is important at this point to try to explain the relation between definition and conception. 1) In light of understanding the concept of law as essentially contested, definition can serve a pre-theoretical purpose; it can provide grounds for a kind of consensus about the domain of the discourse about law (Rottleuthner 2005, 8). In this way a definition of law could represent a conception of "ineliminable" components of a concept. A consensus of this sort is possible only as an agreement on the appropriateness of one conception of a concept or its core, without pretending to be the final word in the explanation of a concept. 2) Definition could also be understood as a final result or a summary of a developed conception of law that contains answers to question that are regarded as central in philosophy and theory of law. Rottleuthner's claim that it is essential to make the distinction between theory of law and definition of law makes sense only in this context, without assuming as he does that definition tells us something about which norms should be regarded as legal norms. This kind of definition presupposes a developed conception of law (Rottleuthner 2005, 12). In both cases the heuristic purpose of definition is limited; to assume, as it is often the case, that a definition is the last word in discussing the concept of law usually means to surrender to that esotery of the legal profession that was mentioned in the introduction. Even more, it means devaluing or neglecting the importance of conceptual debates in legal theory.[7]

Consequences of regarding the concept of law as essentially contested

We are left with a few questions that should be answered in order to adequately bring this discussion to an end. First of all, it is questionable what is the use of this kind of analysis of the concept of law, if there is any. Furthermore, the question arises if this account of a concept entails nihilism in regard of resolution of conceptual debates in law. Finally, a few words should be said about the possible harm that he notion of essential contestedness could have in legal theory and law in general.

The most important philosophical consequence of introducing the notion of essential contestedness in theory of law is the questioning of conceptual realism without falling into some kind of terminological conventionalism. Essential contestedness explains the pluralism of conceptions of a single concept

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in legal theory as legitimate and fruitful. In Gallie's view "[r]ecognition of a given concept as essentially contested implies recognition of rival uses of it as not only logically possible and humanly 'likely', but as of permanent potential critical value to one's own usage or interpretation of a concept in question." In addition he states that when the essential contestedness is recognized we could at worst expect "raising of the level of quality of arguments in the disputes of the contestant parties." (Gallie 1956, 193) Even if we take into account a weaker notion of essential contestedness proposed by John N. Gray we are left with the fact that this view emphasizes the importance of "exploring conceptual connections between patterns of thought and the ways of life of specific social groups" and that the abandonment of the notion "would impoverish the study of the central ideas of social and political thought" (Gray 1977, 334–345). These consequences of the recognition of essential contestedness of the concept of law mostly concern conceptual debates. But in Gallie's intention the notion has far reaching consequences on the understanding of rationality that upholds the attempts of determining the content of concepts:

"Reason, according to so many great philosophical voices, is essentially something which demands and deserves universal assent – the manifestation of whatever makes for unity among men and/or the constant quest for such beliefs as could theoretically be accepted as satisfactory by all men. This account of reason may be adequate so long as our chief concern is with the use or manifestation of reason in science; but it fails completely as a description of those elements of reason that make possible discussion of religious, political and artistic problems." (Gallie 1956, 196)

It is of central concern for Gallie to stand against this conception of reason in order to make disagreement legitimate in theory and philosophy. From this perspective the understanding of the concept of law as essentially contested is compatible with Dewey's (Dewey 1924) and Perelman's legal antiformalism (Perelman 1983), as well as with Dworkin's notion of law as integrity (and the interpretative methodology that supports it). Recognizing the essential contestedness of the concept of law is from this perspective another (conceptual-analytical) brick in the building of legal antiformalism, i.e. a step further in understanding law as a dialectic (in Perelman's and classical sense) enterprise.

Let us get to the question of possibility of resolving conceptual debates in determining the meaning of the concept in question. Gallie excludes the possibility of universal agreement on the content of an essentially contested concept on the grounds that we lack a general principle on which to decide which conception of a concept is the best one (Gallie 1956, 189; Kekes 1977, 85).

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It should be noted at the end of this discussion that a categorization of concepts proposed by Searle in his book *The Construction of Social Reality* has been used recently to argue in favor of futility of distinguishing between law and morality by Brian Leiter (unpublished paper entitled "The Demarcation Problem in Jurisprudence: A New Case for Scepticism" presented at a conference on "Neutrality and Theory of Law" at the University of Girona, Spain, May 21 2010). On Searle's account we can differentiate between two kinds of concepts: natural and social concepts. For social facts the "attitude we take toward the phe-

nomenon is partly constitutive of the phenomenon." (Searle 1995, 33) Gallie's view on the contested character of certain concepts could fit Searle's description of artifact concepts in the manner that the debates over a concept constitute part of the social fact that the concept refers to. However, considering Searle's naturalist stance and the view of concepts as determined by their position in conceptions and the relation to other concepts (presented in this article), the relation of contested concepts to artifact concepts could prove itself to be more complex. These issues could at best be a matter for discussion in a separate paper.

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Essential contestedness applied to the concept of law therefore entails that the conceptual debates cannot be definitely resolved by invoking logical, linguistic or even empirical arguments. This is in a way a natural consequence of denying the possibility of analytical reasoning about concepts of social theory and philosophy. Claims that certain authors make that this categorization is best avoided in regard of the concept of law are based on a faith in the adequacy of descriptive methodology to give the best account of law. From this perspective, debates about the concept of law can be resolved by describing empirical facts about law as a social institution. It should be noted that even the positivists that build upon this methodological standpoint are cautious in getting rid of all value consideration, stating only that the explanation of law does not necessarily entail robust value judgments (Ehenberg 2009, 48). This distinction between robust value judgments and value judgments in general can be important if our intention is to criticize Dworkin's understanding of law as an interpretative enterprise, but it does not make much of a case against the characterization of the concept of law as essentially contested. On the contrary, if the contemporary positivists acknowledge that value judgments are necessary in explaining the concept of law, than the concept definitely meets Gallie's criteria for essential contestedness. This is relevant in giving the answer to our question in three ways: 1) The fact that the disputes about the concept of law are not confined to its periphery shows that a universally accepted description of law is not in circulation in legal theory. 2) The fact that descriptive methodology has its place in the understanding of law does not mean that the concept of law is not essentially contested. 3) To sum up, essential contestedness does not necessarily entail nihilism in regard of resolution of conceptual disputes in legal theory, but rather leaves the decision about resolution of conceptual debates in the hands of the community of jurists and legal theorists. If we carried the issue further we could follow Gallie and say that "the use of some appraisive concepts may appear to be predictive; but this appearance is, I think, always deceptive" (Gallie 1956, 197), i.e. that the concept of law is evaluative even when an empirical explanation of the concept becomes widely accepted in legal theory.

The insistence on an accurate, adequate, noncircular and clear definition of the concept law is legitimate only if we assume that a definition is the last word in answering the question of the nature or essence of law. This is certainly not the case. Definition as well as the entire methodology that we use in legal theory is susceptible to criteria of heuristic utility. Instead of talking about the nature, essence, meaning and usage we have seriously taken into account conceptual debates about the concept of law, understood them as debates about an essentially contested concept and avoided the hypothesis of conceptual realism that one universal definition of law is possible and probable. Authors of introductions to law often get carried away by that supposed precision and taxonomic attitude of the legal profession when they try to provide students of law with a clear and precise, all encompassing definition. If the concept of law is essentially contested, then these attempts are shots in the dark. This leaves us with an important question whether the notion of essential contestedness is bad for law and legal theory. The answer of most jurists would be positive – legal certainty entails determinacy in regard of terms and concepts used in legal norms and provisions. Contestedness should therefore be not only undesirable in law but also harmful in regard of one of the most important legal values – legal certainty. Even if we disregard Waldron's opposition to this view that concludes with "sometimes the point of a legal provision may be to start the discussion rather than settle it" (Waldron

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1994, 539) the entire argument in this paper shows that, if we are guided by reasons of scientific correctness, the essential contestedness of the concept of law is incontestable.

In the end, it should be noted that the consequences of understanding law as an essentially contested concept are far reaching for legal theory as a discipline, as well as for its connection with familiar disciplines. If the debate in legal theory holds a central position in defining key legal concepts than legal theory must rely more on general and political philosophy, and less on legal dogmatics. Methodological monism proposed by Kelsen's pure theory of law and by the descriptive methodology of contemporary positivists reduces the scope and reach of legal theory to the scope and reach of one among many legal disciplines attempting to describe or explain law, dogmatically denying the fact that theories of law necessarily entail interpretation and understanding. The fact that the understanding of law always entails philosophical assumptions, makes legal theory dependent on the resolution of fundamental problems in general philosophical disciplines. But the possibility of conclusive solutions of problems in epistemology and logic is everything but certain. If we still (mis)understand jurisprudence as a quest for certainty, necessity, universal consent we finally have to admit with late Husserl that the dream about legal theory as a rigorous science is over.

Bibliography

Austin, John. *The Province of Jurisprudence Determined*. London: University of London, 1832.

Collier, David, Fernando Daniel Hidalgo, and Andra Olivia Maciucceanu. "Essentially Contested Concepts: Debates and Applications". *Journal of Political Ideologies* 11, no. 3 (2006): 211–246.

Dewey, John. "Logical Method and Law". *Cornell Law Quarterly*, no. 10 (1924): 17–28.

Dvorkin, Ronald [Dworkin, Ronald]. *Carstvo prava* [Law's Empire]. Translated by Vesna Knežević-Predić and Nikola Krznarić. Beograd: IP "Filip Višnjić", 2003.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

Ehrenberg, Kenneth M. "Law is Not (Best Considered) an Essentially Contested Concept". *ExpressO*. 2009. http://works.bepress.com/kenneth_ehrenberg/1.

Endicott, Timothy A. O. "Herbert Hart and the Semantic String". *Legal Theory* 4, no. 3 (1998): 283–300.

Finnis, John. *Natural Law and Natural Rights*. Oxford: Claredon Press, 1980.

Freeden, Michael. *Ideologies and Political Theory: A Conceptual Approach*. Oxford: Oxford University Press, 1996.

Fuler, Lon [Fuller, Lon]. *Moralnost prava* [The Morality of Law]. Translated by Milorad Ivović. Podgorica: CID, 1999.

Gallie, Walter Brce. "Essentially Contested Concepts". *Meeting of the Aristotelian Society* 56 (1956): 167–198.

Gaus, Gerald. *Political Concepts and Theories*. Oxford: Westview Press, 2000.

Gray, John N. "On the Contestability of Social and Political Concepts". *Political Theory* 5, no. 3 (1977): 331–348.

Hart, Herbert. "Definicija i teorija u jurisprudenciji" [Definition and Theory in Jurisprudence]. In *Ogledi iz filozofije prava* [Essays in Jurisprudence and Philosophy]. Translated by Sanja Todorović Stepanović. Beograd: Plato, 2003: 23–53.

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Hart, Herbert Lionel Adolphus. *The Concept of Law*. New York: Oxford University Press, 1961.

Kant, Imanuel [Kant, Immanuel]. *Kritika čistog uma* [The Critique of Pure Reason]. Translated by Nikola Popović. Beograd: Dereta, 2003.

Kekes, John. "Essentially Contested Concepts: A Reconsideration". *Philosophy and Rhetoric* 10, no. 2 (1977): 71–89.

Kelsen, Hans. *General Theory of Law and State*. New Jersey: Transaction Publishers, 2006/1949.

Koller, Peter. "The Concept of Law and Its Conceptions". *Ratio Iuris* 19, no. 2 (June 2006): 180–196.

Perelman, Haim [Perelman, Chaim]. "Pravno rasuđivanje" [Le raisonnement juridique]. In: *Pravo, moral i filozofija* [Droit, morale et philosophie]. Translated by Dušica Guteša and Vera Mihajlović, 95–104. Beograd: Nolit, 1983.

Quine, Willard Van Orman. "Two Dogmas of Empiricism". *The Philosophical Review* 60 (1951): 20–43.

Radbruh, Gustav [Radbruch, Gustav]. *Filozofija prava* [Rechtsphilosophie]. Translated by Dušica Guteša. Beograd: Nolit, 1980.

Raz, Joseph. "Two Views of the Nature of the Theory of Law". *Legal Theory* 4, no. 3 (1998): 249–282.

Raz, Joseph. "Can There be a Theory of Law?" In: Martin P. Golding & William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Malden – Oxford – Carlton: Blackwell, 2005: 324–342.

Rols, Džon [Rawls, John]. *Teorija pravde* [A Theory of Justice]. Translated by Milorad Ivović. Podgorica: CID, 1998.

Rottleuthner, Hubert. *A Treatise of Legal Philosophy and General Jurisprudence*. Dordrecht: Springer, 2005.

Searle, John. *The Construction of Social Reality*. New York: The Free Press, 1995.

Shapiro, Scott J. "What is the Internal Point of View?" *Fordham Law Review* 75, no. 3 (2006): 1157–1171.

Waldron, Jeremy. "Is The Rule of Law an Essentially Contested Concept (In Florida)?" *Law and Philosophy* 21 (2002): 137–164.

Waldron, Jeremy. "Vagueness in Law and Language." *California Law Review* 82 (1994): 509–540.

Wittgenstein, Ludwig. *Tractatus Logico-Philosophicus*. Translated by Gajo Petrović. Sarajevo: IP "Veselin Masleša", 1987.

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O bitnoj spornosti pojma prava

Galliejev okvir bitno spornih pojmova primijenjen na pravo

Sažetak

U članku se ispituju manjkavosti različitih pravno-teorijskih pristupa u definiranju pojma prava, te se tvrdi da kategoriziranjem pojma prava kao bitno spornog možemo objasniti stalne konceptualne sporove u pravnoj teoriji. Autor smatra da pojmu prava odgovara pet deskriptivnih kriterija za bitnu spornost koje je predložio britanski politički i društveni teoretičar Walter Bryce Gallie. Nadalje se tvrdi da zauzimanje ovog stajališta dovodi do devalvacije vrijednost definicija shvaćenih kao nužna i općevažeća objašnjenja pojma, te se naglašava važnost različitih poimanja ključnih pojmova pravne teorije.

Ključne riječi

pojam prava, bitna spornost, pravna teorija, filozofija prava

Bojan Spaić

Zur wesentlichen Umstrittenheit des Begriffs des Rechts

Gallies Rahmen für wesentlich umstrittene Begriffe – angewandt auf das Recht

Zusammenfassung

Der Artikel untersucht die Unzulänglichkeiten differenter Ansätze bei der Definition des Begriffs des Rechts innerhalb der Rechtstheorie und lässt darauf schließen, dass wir durch die Kategorisierung des Begriffs des Rechts als wesentlich umstritten anhaltende konzeptuelle Unstimmigkeiten in der Rechtstheorie erklären können. Der Autor vertritt die Ansicht, der Begriff des Rechts erfülle fünf deskriptive Kriterien für die wesentliche Umstrittenheit, die von Walter Bryce Gallie aufgestellt wurden. Es wird weiter suggeriert, dass ein solcher Standpunkt uns den Wert der Definitionen herabsetzen lässt, die als notwendige und allgemeingültige Erklärungen des Begriffs angenommen werden. Darüber hinaus lässt er uns die Wichtigkeit der verschiedenartigen Vorstellungen von Schlüsselbegriffen in der Rechtstheorie hervorheben.

Schlüsselwörter

Begriff des Rechts, wesentliche Umstrittenheit, Rechtstheorie, Rechtsphilosophie

Bojan Spaić

Du caractère essentiellement contestable du concept de droit

Le cadre chez Gallie des conceptes essentiellement contestés appliqués au droit

Résumé

Cette article interroge les faiblesses des différentes approches dans leurs définitions du concept de loi dans la théorie juridique, et suggère qu'en catégorisant le concept de droit comme essentiellement contestable, nous pouvons expliquer les permanentes disputes au sein de la théorie du droit. L'auteur estime que le concept de droit correspond à 5 critères descriptifs qui sont essentiellement contestables, comme l'a remarqué Walter Bryce Gallie. Plus loin, l'article suggère que l'acceptation de ce point de vue diminue la valeur des définitions d'un concept, comprises comme des explications nécessaires et universellement valides, et souligne l'importance des différents concepts clés de la théorie du droit.

Mots-clés

le concept de droit, constestabilité essentielle, théorie du droit, philosophie du droit