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The first and the last word

Critical remarks on Himma's philosophical enterprise

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Abstract

In his book *Coercion and the Nature of Law* Himma proposes a conceptual analysis of law defending what he calls the Coercion Thesis. Himma's approach to conceptual analysis is articulated in two steps. The *first step* is what Himma calls an "empirical observation" of "ordinary intuitions" as they are manifest in the "contingent linguistic conventions for using the relevant concept-term" in "ordinary talk." The *second step* consists in identifying "the philosophical assumptions about the metaphysical nature of a thing to which the corresponding concept-term refers." Our remarks are not intended to question the Coercion Thesis (which, on the contrary, they can possibly corroborate); rather, they intend to show that grounding conceptual analysis exclusively on the canons of ordinary usage of words and on the philosophical assumptions of an undefined and contingent linguistic and cultural community to which the last word is given is not free from risks.

Index terms

Keywords: law, coercion, conceptual analysis, ordinary language, sanction, punishment, retaliation

Full text

When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or "meanings," whatever they may

be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena.[1]

1 Coercion and the law: Two theories

1 The thesis according to which coercion, or recourse to force, is a necessary feature of law is characteristic of a traditional definition of law as "an organized body of coercive rules."[2]

2 There are, in fact, two possible versions of this thesis, as Norberto Bobbio has clarified. In the traditional view, coercion, or recourse to force, is a necessary feature of law because it is considered "as a necessary *means* for [its] realization"; according to a second, more recent, view, coercion is instead considered as the distinctive *content* of legal rules.[3]

3 The traditional view is exemplified by Rudolf von Jhering's definition of law: "Law is the complex of rules of conduct, maintained by a political authority *by means of external coercion* in order to secure the essential conditions of life."[4] According to the traditional view, legal norms can be distinguished from other social norms in virtue of the fact that they are backed by the threat of coercion in the event of non-compliance.

4 To the traditional view, Bobbio contrasts the more recent view, originally proposed by Hans Kelsen, according to which "law is not a body of *rules guaranteed by force*, but a body of *rules about force*."[5] What distinguishes a legal system from other social normative systems, such as religious and moral orders, is "the presence not of sanctions, and therefore of rules that *are sanctioned*, but of rules that *regulate sanctions*."[6]

5 This idea is famously expressed by Kelsen in the formulation of the basic norm itself (the *Grundnorm*) of a legal system: "*Coercive acts* ought to be carried out only under the conditions and in the way determined by the 'fathers' of the constitution or the organs delegated by them."[7]

6 For Kelsen, the law is a specific social technique: the social technique of a *coercive order*, which "consists in bringing about the desired conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct."[8]

7 Kelsen underlines that the law paradoxically *threatens* the use of force in order to *forbid* the use of force among the members of the community. However, legal norms attach specific *conditions* to the use of force in relations among men, thus authorizing the employment of force only by certain individuals and only under certain circumstances. Law thus "makes the use of force a monopoly of the community ..., and precisely, by so doing, law pacifies the community."[9] It is in this specific sense that, according to Kelsen, coercion is the *content* of legal norms and law is a coercive order.

8 However, Bobbio remarks that the theory according to which coercion is the content of legal norms concerns "not the single rules, but the system in its entirety, and consequently the definition of law amounts not to a criterion for distinguishing a legal rule from one that is not legal, but a legal system from other non-legal systems."[10]

2 Himma's Coercion Thesis

(2.1) Himma's Coercion Thesis shows similarities with both the traditional and the Kelsenian theory on the relationship between law and coercion.

10 Similarly to the traditional theory, Himma understands coercion as a *means* for the

realization of law: coercion, for Himma, is not directly the *content* of mandatory legal norms governing non-official behaviour; it is threatened as *a means* to deter and punish non-compliance with those norms.[11]

11 However, similarly to Kelsen, Himma maintains that coercion is a necessary feature not of *single legal norms*, but of a *system of law* in its entirety. According to Himma, for a normative system to count as a system of law it is not necessary that *all* the system's norms are backed by a coercive sanction, but rather that at least *some* of its norms (and, more specifically, some of "the mandatory norms governing non-official behaviour") are backed by a coercive sanction.[12]

12 A second similarity consists in the fact that Kelsen and Himma respectively characterize legal coercive sanctions as "socially organized" and "norm-governed" sanctions.

13 What distinguishes legal systems from other social normative systems, such as moral and religious orders, is not, for Kelsen, coercion as such; it is rather "socially organized sanction."[13]

14 Kelsen recognizes that "every social order is somehow 'sanctioned' by the specific reaction of the community to conduct of its members,"[14] and this is also true of moral systems and religious systems. However, legal systems differ from other social orders in virtue of two peculiar features of *legal sanctions*:

15 (i) in contradistinction to *religious sanctions*, which are characteristically transcendental, sanctions provided by legal systems have a *social-immanent character*;

16 (ii) in contradistinction to *moral sanctions*, which "consist in the automatic reaction of the community not expressly provided by the order," sanctions provided by legal systems are *socially organized*, that is, they are expressly provided by the legal order as definite sanctions that are to be applied only under the circumstances and by the organs determined by the legal order.[15]

17 Kelsen expressly remarks also that "other social orders pursue in part the same purposes as the law, but by quite different means": both law and morality, for instance, forbid murder; but "the law does this by providing that if a man commits murder, then another man, designated by the legal order, shall apply against the murderer a certain measure of coercion, prescribed by the legal order."[16] On the contrary, "morality limits itself to requiring: Thou shalt not kill." Kelsen recognizes that a murderer may also be "morally ostracized" by his fellow men; but, according to Kelsen, "the moral reaction against immoral conduct is neither provided by the moral order, nor, if provided, socially organized," whereas the reaction of the law consists in "a measure of coercion enacted by the order, and socially organized." Bobbio recapitulates Kelsen's concept of law as follows: "Law is the ensemble of the rules or norms that regulate the *when*, the *who*, the *how*, and the *how much* in the exercise of coercive power."[17]

18 (2.2) Aside from the similarities, at least one important difference exists between Kelsen's and Himma's theories: it consists in the methodologies adopted by Kelsen and Himma respectively.

19 Kelsen purports that his "pure theory of law" is a *general* theory of law, that is, a theory of law in general, not of some particular legal order: Kelsen attempts to determine the "essence" of law in order to give an account of the specific features of *all* positive legal orders. To do so, Kelsen starts from an analysis of the common usage of the word "law," and specifically from an analysis of the "broadest possible usage" of this word, and then, on the basis of an empirical comparative analysis of different positive legal orders – from the completely decentralized law of "primitive" societies to the fully centralized law of modern states – he inquires whether a common characteristic distinguishing social phenomena called "law" can be found. His inquiry, though starting from language usage, is thus *oriented to phenomena*, and it attempts to elaborate a

concept that can give an accurate and exhaustive account of those phenomena.

20 When Kelsen asks: "What is the essence of law?", he is not *analysing* a concept; he is rather *elaborating* a concept that can give an answer to questions such as "What is the criterion by which law can be distinguished from other social forms?"[18] and "What could the so-called law of ancient Babylonians have in common with the law that prevails today in the United States?"[19]

21 Despite the fact that Kelsen starts from the common usage of the word "law," his inquiry is not an investigation of the mere *semantics* of the word "law" as it is used in a specific language (English, for instance) in a specific community; it is an investigation of the *phenomena* that are *designated* by the word "law." His inquiry is directed not so much to the *meaning* of the word "law," as to its *denotation*; not so much to the *concept*, as to the *structure of phenomena* for which a proper concept is to be found.[20]

22 The "touchstone" for evaluating Kelsen's theory is thus not "ordinary talk" about legal phenomena; it is rather legal phenomena themselves. Kelsen is not doing a *conceptual* analysis, but rather a *phenomenological* analysis: an analysis that seeks to elaborate a concept that fits and accounts for existing phenomena.[21]

23 Himma's methodology is quite different.

3 Himma's philosophical methodology: A modest conceptual analysis

24 The novelty of Himma's philosophical enterprise consists in the specific methodology he adopts. Himma's intent is to defend the Coercion Thesis exclusively on the basis of *conceptual* analysis, and more specifically on what he calls modest conceptual analysis, which is articulated in two steps.[22]

25 (3.1) The *first step* in modest conceptual analysis is what Himma calls an "empirical observation" of "ordinary intuitions" as they are manifest in the "contingent linguistic conventions for using the relevant concept-term" in "ordinary talk" (with the exclusion of the possibly more rigorous linguistic conventions of the academic and philosophical community). For this first step – which seems to be sociological in character – Himma relies upon the definitions that can be found in English dictionaries, which, according to Himma's oxymoron, "roughly but accurately" express the lexical meaning of the relevant concept-terms "as it is determined by the canons of ordinary usage governing its use."[23]

26 Starting from dictionary definitions is undoubtedly a useful and fruitful practice in philosophical research. However, a philosophical inquiry that starts from a survey of dictionary definitions should not forget that, as George Lakoff remarks, "the human beings who write dictionaries vary in their choices" and "[t]hough choices made by dictionary-makers are of no scientific importance, they do reflect the fact that, even among people who construct definitions for a living, there is no single, generally accepted cognitive model, even for such a common concept as 'mother.'"[24]

27 As J. L. Austin remarks, one of the possible snags in the analysis of ordinary language is the "snag of Loose (or Divergent or Alternative) Usage." Austin asks himself: "Do we all say the same, and only the same, things in the same situations? Don't usages differ?"[25]

28 Himma is aware of this snag, but he remarks that all the different possible conceptual models associated with the different ordinary meanings of the word "law," as referred to normative systems, support the Coercion Thesis. Nonetheless, he chooses to narrow his investigation down to systems of municipal law, since they "constitute the paradigm

cases conditioning the canons of ordinary usage with respect to the concept-term *law* reported in dictionary definitions."[26]

29 The question arises, though, whether the metaphysical nature of law as constructed by Himma may have any relevance also for different systems of law, such as canon law or indigenous law, that may well be studied in law schools or in anthropological research.

30 (3.2) The second step in modest conceptual analysis consists in identifying "the philosophical assumptions about the metaphysical nature of a thing to which the corresponding concept-term refers."[27] This second step is not merely empirical and descriptive; it rather involves a logical analysis that Himma likens to "the project of proving some mathematical theorem in a manner satisfying the favored logical axioms."[28] The identification of shared philosophical assumptions, then, is not merely a survey; it is intended to explicate the relevant assumptions in a more determinate and consistent way than ordinary talk and linguistic conventions usually exhibit, and to make explicit their implications, in order to overcome possible conceptual problems.

31 It is in the explication of these philosophical assumptions, and in the derivation of their logical and metaphysical implications, that Himma fully displays the keenness of his conceptual analysis and of his argumentations. According to Himma, "[c]onceptual problems arise only insofar as [linguistic] conventions are either indeterminate or facially inconsistent with respect to some entity of philosophical interest."[29] Modest conceptual analysis is purported to "explicate the underlying philosophical assumptions grounding these linguistic conventions *with sufficient depth and detail to resolve the indeterminacy or inconsistency motivating the inquiry*."[30]

32 To some extent, Himma's intent to resolve the indeterminacy or inconsistency that characterizes linguistic conventions recalls the methodological project advanced in analytical legal philosophy since the pioneering works of Felix Oppenheim, Norberto Bobbio, and Uberto Scarpelli in the 1950s. Bobbio, for instance, considers the construction of a rigorous language one of the essential features of any science, including the science of law:

> Any inquiry ... which aspires to the status of science, ... is constituted by a *critical* part which consists in the construction of a rigorous language. This only will bestow on the research scientific validity. ... That critical element which is common and necessary to all science, is what is called *linguistic analysis*.[31]

33 Linguistic analysis, though, is *expressly* conceived by Bobbio not as merely *descriptive* or *explicative* but as *critical*: "Ordinary language is rendered more rigorous and less flexible, or indeed entirely supplanted by, scientific language."[32]

34 Modest conceptual analysis, on the contrary, does not *purport* to have such a critical function: it is intended merely to explicate the shared philosophical assumptions that are implied in the canons of the ordinary usage of words.

35 It is important to remark that these philosophical assumptions are not those of academic philosophers, but rather what Himma calls "*our* philosophical assumptions," where it is unclear whom the adjective "ours" refers to – except for the exclusion of the academic philosophical community, whose possible "best theories" are not relevant for Himma, because "what matters is what people believe."[33]

36 This approach seems to expose Himma to a second typical snag highlighted by Austin in the analysis of ordinary language: the "crux of the Last Word." The problem raised by Austin is this: "Why should what we all ordinarily say be the only or the best or final way of putting it? Why should it even be true?"[34]

Modest conceptual analysis seems to avoid this problem in virtue of its own presuppositions, which are based upon the following epistemological remarks:

> We can apprehend the metaphysical nature of things only as they appear to us mediated through the concepts *we* deploy to organize and make sense of *our* experience; we have no reliable way to apprehend things as they are utterly independent of the concepts through which we organize the materials of our experience. It is an exercise in futility to attempt to understand *C as it really is* independent of the empirically contingent linguistic practices that enable us to talk about *C*s to begin with.[35]

38 All a philosopher can do with regard to a concept is *describe* how that concept is contingently used in ordinary talk and *explicate* people's philosophical assumptions that are contingently related to that concept.[36] Therefore, modest conceptual analysis is, for Himma, "the only epistemically viable approach to conceptual analysis."[37]

39 Since modest conceptual analysis is merely a *description* or at most an *explication* of existing philosophical assumptions shared by people belonging to a specific linguistic and cultural community, it does not imply that the philosopher, on the mere basis of a modest conceptual analysis, is *committed* to believing that what we all ordinarily say is or should be the only or the best way of putting it, or to believing it to be true, nor does such an analysis imply that the philosopher is even *entitled* to believe those things. As a consequence, modest conceptual analysis seems not to be affected by the crux of the Last Word.

40 Modest conceptual analysis, in fact, rather than an analysis of *concepts*, appears to be an analysis of historically and culturally contingent *conceptions*, like the analysis that can be made of the historically and culturally contingent conception of combustion positing the necessary presence of phlogiston.[38] In setting out to make a modest conceptual analysis of the conception of combustion based on phlogiston, it would be inconsistent with the aforementioned methodological presuppositions, and even absurd, to not restrict oneself to *describing* that conception, but to also *defend* it.

41 Nonetheless, Himma expressly asserts that his book *defends* the Coercion Thesis.[39] This appears to be a methodological leap, and certainly again raises the crux of the Last Word, which Himma attributes to ordinary talk, the common usage of words, and shared philosophical assumptions, while he expressly rules out the relevance of more rigorous or refined analysis of empirical phenomena made in the context of academic research.

4 The legal phenomenon of retaliation

42 If conceptual analysis is intended to enable us to better understand not only the conceptions but also the phenomenon of law (and its distinctive features), then grounding conceptual analysis exclusively in the canons of the ordinary usage of words and in the philosophical assumptions of an undefined and contingent linguistic and cultural community to which the last word is given is not free from risks. Such an approach raises two major questions concerning the scope of the heuristic and hermeneutic fruitfulness of the analysis of the concept of "law"?

43 The first question is: Can the results of such a conceptual analysis also be valid for non-American English-speaking people, or for non-English speaking people?[40]

44 The second question is: How can a concept that is determined in such a culturally and historically contingent way give an account of legal phenomena that take or took place in different cultural and historical contexts that are not familiar to ordinary people?

45 The following remarks are not intended to question the Coercion Thesis; rather, they intend to show that an acritical adoption of a certain conception of retaliation – which can well be widespread in ordinary talk but may be oblivious to historical phenomena –

may lead one to neglect many relevant legal phenomena.

46 (4.1) In his determination of the concept of "coercive sanction," Himma, relying upon a couple of dictionary definitions of the verb "retaliate," contrasts *retaliation* with *punishment*.

47 According to Himma, punishment has both forward- and backward-looking elements, and consequently instantiates Himma's concept of "coercive sanction":

> [Punishment] is forward-looking in virtue of being contrived to prevent violations by deterring them but it is also backward-looking in virtue of being contrived to respond after a violation by imposing the threatened detriment.[41]

48 Both the forward- and backward-looking aspects of punishment are linked to the fact that punishment is necessarily "norm-governed." The backward-looking aspect consists in the retributive element, which presupposes that punishment "is justified under some set of norms" belonging to the same system of norms "dictating what the subject must do to avoid punishment."[42] But insofar as punishment is norm-governed, it also has, for Himma, the forward-looking aspect of deterrence against non-compliance based on the threat of a detriment in case of non-compliance with a specific substantive norm.

49 Himma maintains two claims about retaliation that exclude that it can be considered a coercive sanction.

50 The *first* claim is that retaliation is generally not norm-governed (or "not necessarily norm-governed"):

> [A]n act *a* is properly characterized as one of retaliation only insofar as the imposition of detriment is motivated by a desire for revenge rather than by considerations having to do with whether doing *a* is morally or legally justified.[43]

51 The *second* claim is that "[u]nlike punishment, retaliation lacks a necessary forward-looking dimension":

> Insofar as retaliation lacks this norm-governed aspect, it is possible to retaliate for acts that rationally competent subjects are not plausibly presumed to know will elicit retaliatory detriment.[44]

52 These two claims are mitigated by Himma's remark that, in some contexts, "depending on the content of the relevant moral or legal norms, something done as an act of retaliation … might be morally or legally justified."[45]

53 (4.2) One could wonder, though, whether Himma's claims about the nature of retaliation are justified.

54 From a *lexical* point of view, by consulting the unabridged online edition of the *Oxford English Dictionary*, one would see not only that the term "retribution" appears in the *definiens* of "retaliation" in the first definition of the word,[46] but also that a third definition expressly refers to the "law of retaliation," that is, "a retributive form of justice whereby an offender's punishment resembles the offence committed in kind and degree."

55 The word "retaliation" indeed derives from the Latin word *talio*, which refers to a specific coercive sanction that appears in the *Twelve Tables* (and precisely in Table 8: "*Si membrum rupit, ni cum eo pacit, talio esto*"). The notion of *talio*, often formulated with the formula "an eye for an eye" (and nothing more) – which can be traced back at least to the Bible (see Exodus 21: 23–25) – refers to one of the most ancient *norms* establishing a *proportionate measure* of the repayment or retribution for an injury or an insult.

From a *phenomenal* point of view, a thorough research cannot ignore that many ancient systems of law (including the Roman law of the Twelve Tables), as well as many

indigenous and traditional contemporary ones, are partly or even exclusively based on revenge and retaliation.

57 Many historical and anthropological studies of vindicatory systems have shown, indeed, that retaliation is not so much motivated by a desire for revenge as it is *normatively imposed* as a social and legal duty. Kelsen, for instance, considers blood revenge the first form of socially organized sanction and underlines the social *preventive effect* of revenge: he accordingly identifies vindicatory systems as the first systems of law.[47]

58 Furthermore, recent anthropological research has drawn attention to the necessity to distinguish a vindicatory paradigm of justice from the penal paradigm of justice and highlights that, contrarily to a widespread view, vindicatory systems of law are "primarily based on the compositional processes" – that is, on legal processes aimed at coming to an agreement on compensation for an injury or insult. Revenge, in such systems, only has a "subsidiary validity" and "actually appears, both ethnographically and historically, ruled by a judicial authority" (see Terradas Saborit forthcoming 2021).[48]

59 The semantic and anthropological recognition of the actual features of vindicatory systems suggests that, from a *conceptual* point of view, retaliation can be considered an intrinsically norm-governed act: retaliation is, indeed, both a normatively determined and a normatively authorized, or even a normatively imposed, sanction.[49]

60 This shows that the conception of retaliation ordinarily associated with the word "retaliation" suffers from important cultural and epistemological biases, and it is not useful as a concept to properly account for the phenomena of retaliation. Independently of the validity of the Coercion Thesis (which may, on the contrary, prove to be corroborated), considering vindicatory systems as systems of law also seems to imply a redetermination of the concept of law that may depart from a naïf view that takes it for granted that law begins when revenge and self-help are supplanted.

61 The preceding considerations bring us back to Austin's warnings about the slogan of ordinary language:

> If a distinction works well for practical purposes in ordinary life (no mean feat, for even ordinary life is full of hard cases), then there is sure to be something in it, it will not mark nothing: yet this is likely enough to be not the best way of arranging things if our interests are more extensive or intellectual than the ordinary. And again, that experience has been derived only from the sources available to ordinary men throughout most of civilized history: it has not been fed from the resources of the microscope and its successors. And it must be added too, that superstition and error and fantasy of all kinds become incorporated in ordinary language and even sometimes stand up to the survival test … . Certainly, then, ordinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word.[50]

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Notes

1 Austin [1961] 1970: 182 (emphasis in original).

2 Bobbio 1965: 321.

3 Bobbio 1965: 321.

4 Our translation and emphasis. The German original: “Recht ist der Inbegriff der mittelst *äußeren Zwanges durch* die Staatsgewalt gesicherten Lebensbedingungen der Gesellschaft im weitesten Sinne des Wortes” (Jhering 1877: I, 511).

5 Bobbio 1965: 321–322. A similar view has been maintained, according to Bobbio, by Karl Olivecrona and Alf Ross.

6 Bobbio 1965: 334 (emphasis added).

7 Kelsen 1945: 116 (emphasis added).

8 Kelsen 1945: 19.

9 Kelsen 1945: 21.

10 Bobbio 1965: 335.

11 Himma 2020: 1ff.

12 As Bobbio (1965: 324ff.) remarks, one of the main objections raised against the traditional theory lies in the existence in every legal system of rules without sanctions. This objection does not apply to Himma’s Coercion Thesis, though, because Himma considers coercion a necessary feature not of single legal norms, but of a legal system as a whole.

13 Himma 2020: vi and n. 2. Himma (2020) has Kelsen (1945) say that the only criterion for distinguishing law from other social phenomena such as morals and religion “is coercion” (see the quotation from Kelsen 1945 in Himma 2020: vi). However, nowhere in the passage quoted by Himma does Kelsen actually say “This criterion is coercion.”

14 Kelsen 1945: 16.

15 Kelsen 1945: 16.

16 Kelsen 1945: 20.

17 Bobbio 1965: 330–331.

18 Kelsen 1942: 16.

19 Kelsen 1945: 19.

20 Kelsen is not unaware of Kant’s “Copernican revolution”: the clarification of the transcendental role of what he calls the “principle of imputation” in the knowledge of legal phenomena is one of the most original contributions given by his investigation of the epistemological status and presuppositions of the science of law (see, for instance, Kelsen 1950; 1960).

21 We use here the adjective “phenomenological” to generally refer to an investigation oriented to phenomena, not in the specific sense of Husserl’s phenomenology.

22 Himma distinguishes modest conceptual analysis from what he calls immodest conceptual analysis drawing inspiration from Jackson 1998.

23 Himma 2020: 46. Surprisingly, though, the English dictionaries Himma relies upon are not the unabridged versions of the *Oxford English Dictionary* or the *Merriam-Webster Unabridged* dictionary, but their simplified online versions.

24 Lakoff [1987] 1990: 75–77.

25 Austin [1961] 1970: 183. It is well known that in ordinary language practices many proverbial expressions express opposite views on the same subject. See, for instance: “Haste makes waste” vs. “Time waits for no man.”

26 Himma 2020: 54.

27 Himma 2020: 46.

28 Himma 2020: 47.

29 Himma 2020: 43.

30 Himma 2020: 43 (emphasis added).

31 Bobbio [1950] 1997: 35. The project launched by Oppenheim (1944), Bobbio (1950 [1997]), and Scarpelli (1953) of re-founding the science of law upon a critical analysis of language and of the main concepts in the theory of law has one of the most thorough outcomes in the axiomatic theory of law elaborated by Luigi Ferrajoli (1970 and 2007).

32 Bobbio [1950] 1997: 32.

33 Himma 2020: 39. Himma does not univocally determine whose philosophical assumptions must be taken into account: he simply asserts that the philosophical assumptions he takes into account are not *his own*, but "*our*" shared philosophical assumptions.

34 Austin [1961] 1970: 183.

35 Himma 2020: 37.

36 To be true, Himma seems to violate his own epistemic standards when he admits that his explication of the compound notion of "coercive sanction" – which is essential in his modest conceptual analysis of the concept of "law" – does not necessarily conform to the canons of ordinary usage. The justification adduced by Himma is that his book is concerned to give a modest analysis of only the concept of law, not of the concept of "coercive sanction."

37 Himma 2020: 37.

38 See Himma 2020: 39–40.

39 See Himma 2020: 1.

40 It is well-known, for instance, that there are many languages in which the term "law" does not have a univocal translation. In Italian, French, and Spanish, for instance, it can be translated either as *legge*, *loi*, and *ley*, respectively, or as *diritto*, *droit*, and *derecho*, depending on the context. The different possible translations involve different conceptual and philosophical implications in ordinary usage. The analysis of transcultural phenomena should not be oblivious of the fact that the terms used to translate a word into another language are not always semantically equivalent to the word they translate (see Conte 2009).

41 Himma 2020: 8

42 Himma 2020: 8.

43 Himma 2020: 8.

44 Himma 2020: 8–9.

45 Himma 2020: 8.

46 The first definition (not considering two preceding definitions concerning an obsolete meaning) is as follows: "Repayment (in kind) for injury or insult; reprisal, revenge; retribution" ("retaliation, n." OED online, 3rd ed., March 2020, as updated Dec. 2020).

47 See Kelsen 1942 and 1943 (remarking, for instance, that only the existence of an obligation to revenge can explain the phenomenon of sham vengeance). For an analysis of Kelsen's philosophy of revenge see Di Lucia & Passerini Glazel forthcoming 2021. On revenge as a duty in the traditional legal system of the Barbagian community in modern Sardinia, see Pigliaru 1959.

48 According to Terradas Saborit – and contrary to a widespread view – revenge in vindicatory systems plays an essential function in deterring and punishing failure to comply with the duty to redress the injured party. For a thorough anthropological analysis of vindicatory systems as systems of law and the distinction between a *vindicatory* and a *vindictive* paradigm of revenge, see Verdier 1980; Terradas Saborit 2008; 2019.

49 One could also remark that, contrary to what Himma maintains, an act of retaliation may "communicate the threat" (Himma 2020: 9) even if the subject to whom retaliation is applied is "not plausibly presumed to know" that his act would elicit retaliatory detriment. Indeed, from a communicative point of view, an act of retaliation may be directed not only at the subject to whom revenge is applied, but also, if not primarily, at the other members of a community upon which it is presumed to exert its deterrent function. On the intrinsic semantic and communicative dimension of revenge see Lorini 2015 and Passerini Glazel 2015, 2020.

50 Austin [1961] 1970: 185 (Austin's emphasis).

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