WHAT IS LAW?- IN SEARCH OF METHOD

Shankar Narayanan[*]

Abstract

In Part II, the paper discusses three aspects of methodology. The paper briefly deals with the major points of tension between various methodological claims in the theories discussed in Part I. The paper goes on to suggest that rather than construct grand theories of law attempting to explain all that is associated with law, we might be better off attempting to uncover the mysteries of law, little by little. Second, the paper questions the claim that a theory of law if successful must be true of all legal systems. The paper argues that the claims that a theory makes should ordinarily be thought of as valid only for the normative systems that it has considered. Last, the paper comments on the extent to which empirical inputs must be considered necessary in building a theory of law. It is suggested that imposing a condition that theories must be empirically justified does not necessarily mean theorising has to be preceded by some act of scientific data gathering.

"Natural science does not simply describe and explain nature; it describes nature as

[*]Shankar Narayanan is an advocate practising in the Supreme Court of India. The author may be reached at lawyershankar@gmail.com.

exposed to our method of questioning."- Werner Heisenberg.[1]

I. INTRODUCTION

Early theorists of law such as Austin and Bentham were moved by the object of recasting law as a science by producing universally valid propositions. As we have found out over the last two hundred years, every discipline cannot and need not be transformed into a scientific enterprise by adopting some kind of scientific method.[2] However, in the matter of theorizing, there is still much to learn from science. Science's privileged position as the cornerstone of modernity has much to do with its emphasis on method. At its heart, science demands that we subject every hypothesis that we build about the world to the test of experience.[3] And science has managed to make this search for knowledge about nature a collective pursuit. Bit by bit, vast bodies of knowledge have been built which display a kind of universal validity. This is possible because of a culture where new propositions are verifiable and can be confirmed by epistemic standards accepted as valid within the scientific community.

By analogy, is there such a thing as a jurisprudential method? This is the question that I pose in this paper. In Part I of this article, I analyze the modes in which well-known legal theories have navigated methodological issues over the last two hundred years. Regrettably, (for someone writing in India) the elite category of notable theories does not include an Indian theory. Not that India has not produced a theory of law. Chhatrapati Singh's work, which is perhaps the

[1]WERNER HEISENBERG, PHYSICS AND PHILOSOPHY 43 (Penguin Reprint 2000) (1958).
[2]Susan Haack, *Six Signs of scientism,* 3 (1), LOGOS AND EPISTEME 75 (2012), https://philpapers.org/archive/HAASSO.pdf.
[3]PETER GODFREY-SMITH, THEORY AND REALITY 224 (2003).

onlymodern example of an Indian theory of law, has almost been completely forgotten even within India.[4] Amongst prominent theories discussed in Part-1, I include Chhatrapati Singh's work drawing from his book 'Law from Anarchy to Utopia'.[5] In reductively summarizing the methodology of theories (and some of their substantive claims), I stand open to the charge that I have been unfair with these grand theories.

In Part II, I discuss some of the learnings from this summary tour. It is almost evident that methodology can be seen only as a broad set of aims and methods displaying wide divergences. Theories are aimed at widely differing ends; some aiming to describe, while others aiming to evaluate. Equally, there are clear disagreements on the methods that legal theories must adopt. In the course of identifying some of these issues, I offer the suggestion that legal theory may be better off attempting to uncover the workings of the law through more modest insights rather than through grand theories attempting to describe all that is associated with law. I also claim that it would help if theories identified the normative systems that form the subject matter of the theory and that such a limitation does little damage to aims of legal theory. Last, I discuss briefly the troubled relationship between theory and fact and suggest that while theories cannot hope to uncover the mysteries of law by light of reason alone, empirical inputs necessary for the erization may widely vary. It is not necessary that every act of theorization be preceded by some scientific data gathering.

[4]UpendraBaxi, *Chattrapati Singh and the Idea of Legal Theory*, 56(1) JILI 1 (2014).
[5]CHATTRAPATI SINGH, LAW FROM ANARCHY TO UTOPIA (1985).

II. FROM AUSTIN TO RAZ

Western philosophy has a strong tradition of reflecting on the law going as far back as Plato.[6] But what sets the modern legal philosopher apart is the exclusive focus on theorizing the law. Bentham and Austin were the first philosophers to devote themselves largely to this task in their attempts to come up with scientific accounts of law. Though Bentham's ideas (which continue to be influential) predated Austin, it is the latter's work which is often thought of as the starting point for modern analytical jurisprudence.[7]

III. AUSTIN AND KELSEN: IDENTIFYING COMMON FEATURES

As was characteristic of his times, Austin's work reveals an urge to cast law as a science.[8] General and particular jurisprudence, he believed, are sciences aimed at differing ends.[9] The rules or laws of a particular community which is a self-contained system are the subject matter of particular jurisprudence. However, general jurisprudence aims higher. Amongst differing systems of law, Austin thought, common principles can be located.[10] Not all commonalties are to be analyzed. Only those analogies of refined systems are to be analyzed, which may involve understanding various notions such as duties, rights, natures of rights and obligations etc.[11] However, jurisprudence

[6]BRIAN TAMANAHA, A REALISTIC THEORY OF LAW 38 (2017).
[7]Bix, Brian, *"John Austin"*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed. Spring 2018 Edition), https://plato.stanford.edu/archives/spr2018/entries/austin-john. (Feb. 25, 2019)
[8]JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 365 (Indian Reprint 2012); JOHN AUSTIN, LECTURES IN JURISPRUDENCE 147 (1875).
[9]JOHN AUSTIN, LECTURES at 148.
[10]*Id.*
[11]JOHN AUSTIN, PROVINCE, *supra* note 8, at 370.

has a different function as well, to accurately determine certain basic terms involved in the science.[12] Central amongst this is the term 'law' which he believed must be carefully analyzed to separate those that must be the subject of the science of law from those that resemble positive law, and are bracketed under the common name law.[13] To determine this province of jurisprudence he sets out his method:

"*But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related by way of analogy: with objects which are also signified, properly and improperly, by the language and vague expression law.*"[14]

Three features of the jurisprudential method are clearly visible from Austin's position. First is an attempt to identify uses of the term law in different fields. Second, is the attempt to confine the field of jurisprudence to a particular subset of the usage by identifying certain features of the subset as the essence of law. The third strand in the method of Austin relates to the choice of legal systems, which is also pertinent. Only analogies or resemblances across mature legal systems are to be the subject matter of general jurisprudence. These three ideas continue to resonate in different forms to this day.

Austin's conclusion based on this exercise is well known. From his work, we can cull out a crisp definition that laws are commands backed by sanctions that emanate from a determinate sovereign.[15]However, the reduction of the whole of his work into this

[12]*Id.*, at 371.
[13]*Id.*, at 2.
[14]*Id.*, at 10.
[15]Bix, Brian, *"John Austin", The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2018 Edition), https://plato.stanford.edu/archives/spr2018/entries/austin-john/(Feb. 25, 2019).

slogan like definition[16] (particularly popular in our country) is unfair to Austin who anticipated and dealt with quite a few objections to his views.[17]

Much like Austin, Kelsen also begins theorizing by suggesting that the analysis of the concept of law must take for its starting point the common usage of the term.[18] However, unlike Austin's stipulation that certain usages are proper and others improper, Kelsen wonders whether the social phenomena generally called law exhibits any common characteristic in comparison with other social phenomena of a similar kind.[19]

While he may have had only legal systems in mind, this linguistic approach, if applied to the broadest possible use of law, can be immensely problematic. A number of unrelated fields employ rules and laws. Would we be justified in including those in our enquiry into the concept of law? To accommodate such extreme cases, Kelsen conjectures that "*the actual usage may be so loose that the phenomena called 'law' do not exhibit any common characteristic of real importance*".[20] On the range of legal systems, he is much clearer in his choice. Any attempt must aim at coinciding with actual usage with the result that one must not construct a theory of law which excludes legal orders on the basis of some political bias.[21] Thus, excluding Stalinist Russia, Nazi Germany or Fascist Italy is not a choice open to his pure theory of law.[22]

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[16]Lon L Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 (4) HARV. L. REV. 630 (1958).
[17]Brian Bix, *John Austin and Constructing Theories of Law* in MINDUS, THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE 3 (Freeman ed., 2013).
[18]HANS KELSEN, GENERAL THEORY OF LAW AND STATE 4 (1945).
[19]*Id.*
[20]KELSEN, *supra*note18, at 4.
[21]*Id.*, at 5.
[22]*Id.*

Like Austin, Kelsen's theory is also understood in a minimalist form in India. Indeed, as is widely believed, the core of the theory is the hierarchy of norms which takes us back to the grund-norm, the basic presupposition which lends normativity (in the Kelsenian sense) to other norms. However, some of the complexity of Kelsen's ideas has clearly been lost in creating a Kelsen-lite which has attained wide popularity.[23]

IV. HART AND RAZ: FROM THE EXTERNAL TO THE INTERNAL

The publication of Hart's 'Concept of Law' changed the landscape of jurisprudence both substantively and methodologically. In the introduction to the Concept of Law, he outlines the questions he thinks a theory of law must answer. For Hart, these are: the relationship between law and sanctions, distinguishing a legal obligation from a moral obligation and third, the nature of a rule.[24] For answering these questions, Hart relies on methods of linguistic philosophy that were particularly influential at that time.[25] The concept of law, he believed, could be unraveled by an analysis of language associated with the law. For instance, in Hart's view, there is a world of a difference between being 'obliged' and having an 'obligation'.[26] The former implies a situation akin to when one is under the threat of a gunman whereas the latter is an accurate description of the sense of duty that a rule creates.

In constructing his theory (while dismantling Austin's) through such devices, Hart attributes a central role to the nature of a rule. And by a

[23]*See Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 720.
[24]H.L.A.HART, THE CONCEPT OF LAW 7(3rd ed. 2012).
[25]*Id.*, at 14.
[26]*Id.*, at 82.

rule, Hart does not refer to a legal rule alone. Rules within the legal system are not very different from rules of games say chess or cricket for that matter.[27] All these rules, Hart says, in a big advance in jurisprudence, have an external aspect and an internal aspect. Apart from regularities of behavior which result from rule-following, rules have an internal dimension. In following a rule, one recognizes the rule as a standard, deviation from which could lead to justified criticism or disapproval in some form.[28]

Hart's explanation of rule-following conceivably addresses rules generally. But Hart's theory is not expressed at this level of generality. At least not all of it. The superstructure built on this understanding of rules, classifies rules into primary rules and secondary rules.[29] Primary rules are duty bearing (such as criminal laws), while secondary rules allow for persons within the legal system to alter their position vis-à-vis others. Examples of the latter include the law of contracts or a law regulating the making of wills. Such laws are power conferring. An important secondary rule in Hart's scheme is the rule of recognition which serves the function of identifying other rules or laws in a legal system – a kind of foundational norm.[30] Now, Hart believed this entire structure that he had described to be the scheme of a legal system. For evidence that such a system exists, he prescribed two conditions- first, that the people at large must obey the primary rules, and second, officials who are in charge of the legal system accept, from the internal perspective described above, the rule of recognition as a common standard of official behavior.[31]

[27] *Id.*, at p.89.
[28] *Id.*, at 90.
[29] *Id.*, 91-99.
[30] *Id.*, at 100.
[31] *Id.*, at 116.

This reduction of Hart's theory is necessary to bring out how detailed and specific the theory is at various points in its prescription of the elements of a legal system. However, this led Hart to some odd conclusions. Societies without an explicit rule of recognition or complex secondary rules, surviving happily with duty bearing primary rules alone do not, in Hart's view, have full-fledged legal systems.[32] Similarly, Hart advanced the claim that international law is only a set of rules, and not a legal system displaying the complete union of primary and secondary rules with a rule of recognition.[33]

Hart's position raises interesting questions. A theory whose aim is to uncover the concept of law, implies that some systems which appear to be legal systems are not full-fledged legal systems.[34] It is hardly surprising that this idea that international law[35] or legal systems branded primitive are not really complete legal systems may not be readily acceptable to those intimately familiar with these systems.[36] Now, the troubling feature is that Hart's work was not based on any detailed study of legal systems across the world. Yet, it has conclusions which unmistakably imply that some systems are incomplete legal systems when judged on his yardstick of a union of primary and secondary rules. Can a theory based on a few legal systems, contain truth propositions by which all legal systems are to be judged by?

[32]*Id.*, at p.92.
[33]*Id.*, at 116-137.
[34]*Id.*
[35]Waldron, Jeremy, *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?*, NYU SCHOOL OF LAW, Public Law Research Paper No. 13-56 (October 2013), https://ssrn.com/abstract=2326758, http://dx.doi.org/10.2139/ssrn.2326758 (March 4th, 2019); TAMANAHA, A REALISTIC THEORY OF LAW, 181(2017).
[36]TAMANAHA, *supra* note 6, 89.

Raz has articulated interesting arguments on these methodological issues.[37]Hisreflections, while interesting, are far from straightforward. Raz sets out clear indicia for a theory of law; it must set out propositions about law that are necessarily true, and these propositions must explain the nature of law.[38] Drawing from Hart's idea of an internal attitude towards law, Raz notes that only an account of law that explains the binding nature of law as it occurs to a participant in the social institution can be successful. This exercise, therefore, relies on some parochial concept of law. To this extent, his theory is agreeable. Where the claim turns problematic is when Raz asserts that while a concept of law may indeed be parochial, a theory of law which derives from this concept can nonetheless be universal.[39] Legal theory may grow only in cultures which have a concept of law, however if any theory is valid, it contains a claim to truth that is universal, Raz's argument goes.[40] Quite obviously, this viciously complicated argument has its set of doubters.[41] It is not immediately clear from Raz's argument how one can arrive at a necessary feature of the law true of all legal systems from an (admittedly) parochial concept of law.

Irrespective of the merit of this claim, in many ways it exemplifies the bind in which legal theory, at least the analytical tradition, finds itself in. It employs a method of reflection where philosophers attempt to elicit necessarily true claims about the law. Ordinarily, no part of this task involves any data gathering or any other form of empirical study. Most theorists arrive at the core of their theory through conceptual analysis - by reflecting about the legal system that they find themselves in and a few other legal systems that they are familiar

[37]Joseph Raz, *Can there be a theory of law* in BETWEEN AUTHORITY AND INTERPRETATION 17 (2009).
[38]*Id.*, at 17.
[39]*Id.*, at 36.
[40]*Id.*, at 41.
[41]TAMANAHA, *supra* note 6, at 67.

with.[42] By its very nature, the method is unlikely to yield necessary truths about all legal systems or law in its entirety. Not all influential theories, however, traverse this route. In the next section, I consider two theories that are explicitly evaluative and do not seek to be universal in the sense that theories considered thus far aspired.

V. FINNIS AND DWORKIN: NORMATIVE JURISPRUDENCE

In 'Natural law and Natural Rights', Finnis begins his rediscovery of the classical natural law tradition with an account of methodology where he argues that any useful theory of law must necessarily be explicitly evaluative. Finnis regards the methodology of Austin and Kelsen as naïve, in particular, the attempt to find a common factor in a pre-theoretical set of legal systems, the choice of which is inadequately justified, to explain the entire subject matter of law.[43] To Finnis, the choice of some legal systems, as relevant to legal theory while banishing those that appear primitive or underdeveloped to some other discipline is unnecessary.[44] Instead, invoking Aristotle, Finnis argues that the theorist must focus on the focal meaning by studying a central case of what constitutes a legal system. Once this choice is made, there appears no reason to be restrictive in the study of this central case. A complete picture of the central case can illuminate the peripheral or watered-down cases through analogies and differences.[45]

Finnis then builds on Hart's internal point of view to take the claim in an interesting direction. Hart suggested that mere regularity in conduct is not a sufficient explanation of rules, one must pay attention

[42]Kenneth Einar Himma, *Conceptual Jurisprudence*, 26 REVUS 65 (2015).
[43]JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 6 (2d ed. 2011).
[44]*Id.*, at 11.
[45]*Id.*, at 11.

to the internal aspect. This internal aspect, Finnis notes, distinguishes between a person who obeys rules out of fear of sanctions and those who accept rules as a standard. Now there may several viewpoints, including that of an unthinking participant, who accepts rules as a standard. To Finnis, amongst these, the only viewpoint that can be the central case of value to a theorist is that of a person who treats the law as a morally good guide for conduct, or in other words imposing a moral obligation.[46] It is that viewpoint that a legal theorist must build on. Now, Finnis recognizes that this might lead to subjectivity, but in his view, this subjectivity is inescapable if jurisprudence is to be more than a rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.[47]

This shift attempts to break down the wall erected between natural lawyers and positivists. The claim of the relevant viewpoint makes all the difference in Finnis's theory, as from the morally neutral 'descriptive sociology'[48] that Hart thought he was undertaking, Finnis moves to a legal theory which focuses explicitly on a viewpoint that makes law morally valuable. This method, once again, has its fair share of critics.[49]To understand the criticism, it necessary to return to the internal point of view. In directing the attention of theorists to the internal point of view, Hart required a theorist to take the role of a participant in a legal practice. This requirement brings an element of evaluation into the act of theorizing: a theorist can theorize validly only about a legal system where she grasps the internal point of view. Now, Finnis's point is that any useful legal theory should not stop there. If legal theory can be evaluative to the extent that Hart has suggested, the stable solution is to go the whole way with an

[46]*Id.*, at 15.
[47]*Id.*
[48]HART, *supra* note 24,at vi.
[49]JULIE DICKSON, EVALUATION AND LEGAL THEORY, 75 (2001); Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS 17 at 29.

evaluative theory that investigates the requirements of practical reasonableness.[50] However, it is not clear from Finnis's account that it is impossible for legal theory to investigate legal systems in way that does not involve moral evaluation of the sort he suggest. For instance, Hart was content with describing rules as having an internal aspect and showing that they are not sanction-based threats. This has some explanatory value in itself having uncovered an important feature of rules. There is no real reason as to why it is necessary then that a theorist must choose amongst various internal viewpoints except where she wishes to explicate a particular viewpoint (as Finnis does) or in other words, produce a normative theory of law. But that was not what theorists such as Hart or others in the analytical tradition were after. They merely intend to sufficiently describe the concept of law. Finnis's position does not make clear why they must undertake the task of identifying what makes law a morally valuable practice.

The most influential objections to Hart come not from Finnis, but Dworkin. Dworkin's work, in a sense, suggests that all of positivism has fundamentally misidentified the nature of law. In Dworkin, methodology and substantive theory form one coherent narrative as he thought should be the case with legal theory and the practice of law that it intends to study. In a famous claim called the semantic sting, Dworkin contends that positivists who build semantic theories around the meaning of law do not have an adequate explanation of disagreements about the law, particularly disagreements evident in adjudication.[51] In particular, he focuses on cases where despite there being clarity in the ordinary sources of the law, lawyers disagree on what the law is a sort of theoretical disagreement about the law.[52] This, according to Dworkin, reveals something fundamental about the nature of law and how we must understand it. What it reveals, per

[50]FINNIS, *supra* note 43, at 15.
[51]BRIAN BIX, JURISPRUDENCE, THEORY AND CONTEXT 87 (4th ed. 2006) George C. Christie, *Dworkin's "Empire*", 36 DUKE. L.J. 157-189 (1987).
[52]RONALD DWORKIN, LAW'S EMPIRE 5 (1986).

Dworkin, is the fact that we cannot hope to understand law through some set of criteria which participants in the practice use to identify it.[53] Rather, the theorist must also be a participant in the practice, adopting an interpretive attitude to the practice.[54] An important point in the methodology of Dworkin is the blurring of the line between legal theory and any practice of the law. The theorist, lawyer, legislator, a citizen and a judge, Dworkin's paradigm example, are all involved in the constructive interpretation of law.[55]

An interpretive practice of this nature always has a function or a purpose, asserts Dworkin. The purpose of law is limiting the use of collective force or coercion by the State as required by rights or past political decisions.[56] Constructive interpretation requires that legal materials are interpreted in a manner that shows them in their best light having regard to this purpose of law. It is interesting to note that in doing so, Dworkin is making a claim about the nature of law and not merely advocating some method of deciding cases or following rules. The nature of law as an interpretive practice aimed at a particular purpose, that is, justifying state coercion necessitates normative jurisprudence showing it in its best light.[57]

Dworkin's theory has been immensely successful. In particular, his claims about adjudication are taken to be true of constitutional adjudication in legal systems with liberal constitutional frameworks. Interestingly, Dworkin's theory has travelled far and wide, well in excess of the local limits he set for it. Dworkin's view was that legal theory is necessarily local and belongs to the interpretive culture of the author of the theory.[58]

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[53] *Id.*, at 31.
[54] *Id.*, at 45, 87.
[55] *Id.*, at 90.
[56] *Id.*, at 93.
[57] JULIE DICKSON, *supra* note 49, at 102.
[58] *Id.*

Despite the success of Dworkin's theory, substantial doubts have been raised regarding his claims on methodology. This was inevitable given that Dworkin disagrees with almost the entire canon of western jurisprudence. Some of the criticism can be quickly noted. First, the characterization of all positivist theories as semantic has been questioned widely.[59] There is a difference between identifying the meaning of a term and an enquiry aimed at understanding a phenomenon. For example, a scientific enquiry to discover the true nature of a physical force may yield a theory. This theory may also inform what we come to understand as the meaning of 'force.' However, one would not make the argument that the scientific enquiry was directed at some semantic goal. Of course, the position with respect to Hart and other positivists is not as clear cut as the example above.[60] Second, Dworkin's claim that the purpose of law is to limit coercion of the state is an appealing notion. However, there is no argument or reason for this assumption, and it is not an uncontroversial pre-interpretive identification as Dworkin suggests. It is a substantive claim for which there is no real argument that Dworkin offers.[61] Third, the view that we must view legal theory, jurisprudence and any other activity involving the identification of law as intrinsically the same activity is needlessly broad. This blurs a useful practical distinction,[62] even if one might concede that legal theory and the practice of law need not be seen as separate domains marked by clear boundaries.[63]

[59]HART, *supra* note 24 at 244; Joseph Raz, *Two views of the Nature of the Theory of law* in BETWEEN AUTHORITY AND INTERPRETATION 53 (2009).
[60]*See* Nicos Stavropoulos, *Hart's semantics* in HART'S POSTSCRIPT 59 (Coleman ed. 2005) (for the complex relationship between semantics and the concept of law in Hart's theory).
[61]Leiter, *supra* note 49 at 9,10; DICKSON, *supra* note 49 at 108.
[62]RUTH GAVISON, ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF HLA HART, (1987).
[63]Raz, *supra* note 59, at 81.

VI. SINGH'S ANARCHY TO UTOPIA - AN INDIAN THEORY

Chattrapati Singh is the author of an interesting theory of law which has been, sadly, almost completely overlooked.[64] As the only Indian legal philosopher to have made such an ambitious attempt, his work deserves more attention than it has received. One should not be surprised that an Indian contribution to the field has received scant attention. The world of jurisprudence is dominated by thinkers from the West and even within that space, there are complaints that it has been unfairly dominated by select faculties.[65]

Singh clearly sets out the predicament that an Indian theorist faces. In any attempt to create an Indian theory of law, one has to be ready to face up to the entire western tradition of philosophical thought.[66] This is what Singh attempts to do, travelling beyond legal theory well into the world of analytical philosophy. It is not unfair to say that he did not fully succeed in his aim of outgrowing the epistemic dominance of the West. Singh befriends Kant and Leibniz, and his theory has a Kantian soul.

Singh's method, in his quest, is one of exposition and not of discovery. He starts with a premise about the nature of law and attempts to identify essential properties of the law that the premise entails. Law, Singh asserts, is a normative system created to sustain just conditions for society.[67]This gives him various openings into the concept of law: first that it is a system, second that it is normative in nature and last, the substantive properties that the law must possess to

[64]CHATTRAPATI SINGH, *supra* note 5.
[65]Brian Leiter, *Naturalizing Jurisprudence: Three Approaches* in THE FUTURE OF NATURALISM, J. Shook & P. Kurtz eds.2009) https://ssrn.com/abstract=1288643. (March 30th, 2019).
[66]SINGH, *supra* note 5 at v.
[67]*Id.*, at 9.

be just.[68] Based on these, he builds an entire system explicating the qualities and properties law must possess.

How does this elaborate theory then conform to reality? Singh does not expect it to do so. The idea of law in his work, he says plainly, is not as it exists in any particular legal system.[69] Yet, Singh believes his work to be a definition of elements which apply universally to all legal systems and on which all jurisprudence must eventually be based.[70] And where reality does not accord with his theory, it is the law that must change, claims Singh. His theory must be taken to be reformative and normative in these situations.

It is difficult to summarize Singh's ideas or tersely state objections to the theory. Singh's theory has been neglected and there is hardly any secondary literature on the theory.[71] Nevertheless, if one were to point out Singh's important ideas, it would have to begin with his view that the legal system is a normative system that is 'systemizable', complete and consistent.[72] Singh derives an array of features of a normative system from these three requirements. However, the set of features are not exhausted by those derivations. A legal theory must additionally identify those features of law that set it apart from other normative systems as all normative systems are not legal systems. It is here that Singh presents his core idea, the epistemological foundation of law as a normative system. He puts forward the suggestion that basic legal propositions are *synthetic a priori* propositions, heavily influenced by Kant's classification of propositions as *analytic/synthetic* and *a priori/a posteriori*. Singh does not hesitate to challenge some Kantian assumptions, say, for instance the possibility of *analytic a posteriori* propositions (which Kant ruled out). Neither

[68] *Id.*, at10.
[69] *Id.*, at 12.
[70] *Id.*, at 12.
[71] Baxi, *supra* note 4.
[72] SINGH, *supra* note 5, at 12.

does Singh dither while questioning and rejecting (though not persuasively) the influential argument of Quine that the analytic/synthetic distinction is a meaningless dogma. In fact, Singh goes further and divides propositions into *factual synthetic a priori* and *normative synthetic a priori* propositions. This distinction is necessitated by Singh's belief that legal propositions do not exist in nature; rather they are created by us, in the creation of normative worlds.

Such normative worlds could include associations, clubs or even the mafia, Singh says.[73] Singh argues that as agents with free will, humans are charged with the duty to create the best normatively possible world.[74] Singh does not bind or chain every individual to a common vision of a perfect world. Rather as creative agents with free will and dignity, each individual is entitled to chart her own path by creating her own best possible world. If all creative agents with free will and dignity were to create the best possible worlds that appeal to them, would there be harmony in the world? This gives rise to a transcendental argument (as Singh puts it) that makes a legal order absolutely necessary, so that a cooperative social system can be put in place. The legal order is the only normative system that can enable humans to function as creative agents in building their own best possible worlds: making the world metaphysically richer and pushing it towards utopia. Singh marries this picture with ideas from Indian philosophy with the result that the legal system which promotes cooperative social activity becomes *dharma,* the finite human agent who creates her own best possible world, the *ataman* and the law's task is to ensure that *karma* of the human does not stray from the *dharmic* path.[75]

[73] *Id.*, at 124.
[74] *Id.*, at 140.
[75] *Id.*, at 229.

Singh's theory is impressive for the sheer range of ideas it propounds. It paints a picture of a system that helps human beings realize their freedom in a harmonious way while not insisting that they must all pursue the same goals. Of course, the system as such may have its own goals, but it must create a cooperative world where each individual is free to essay and create her own best world. As the name of the work suggests, this is a utopian picture. It is here that doubts creep in as to what extent Singh's work succeeds in its aim of uncovering the workings of the law. The system that Singh expounds is some kind of ideal legal system with no parallel in the real world that we inhabit.

Consider for instance, Singh's insistence that coercion is not part of the law. Singh's conclusion that the law is a voluntary system of cooperation, leads him, in turn, to propose that coercion has no proper place in the legal system. The role of coercion in the enforcement of law, Singh believes, is attributable to the political system with which the law intersects.[76] Singh's position, evidently, is (by design) in stark contrast to Austin. While Austin claimed that coercion was essential to any law, in Singh's theory, we find coercion is not a part of law at all.

Singh's claim is, no doubt, a result of his methodology. Expounding the concept of law, Singh enumerates a set of necessary properties of law. The necessary properties are derived through a set of logical arguments.[77] Resultantly, it appears that it makes no difference to the theory whether any legal system in the world possesses the features. If so, on what basis do are we to assess whether the claim of the theory is right or wrong? This is not unlike the problems posed by various theories considered above in this whirlwind tour of theories of law. In

[76] *Id.*, at 162
[77] *Id.*, at 12.

the next section, I build on the analysis in this section to outline a framework for thinking about these issues.

VII. THE METHODOLOGY OF LEGAL THEORY

Can we sketch the outlines of a methodology from the theories and works that we have rifled through in the previous section? Theorists, as we have seen, have investigated the law from diverse perspectives. These diverse perspectives raise a number of questions. What should the aim of theorizing be, should it be to identify the essential features of law in the form of necessarily true propositions? Or should it be an explicitly normative theory? Another kind of question that arises is the class of things that should be theorized about. If a theorist begins from linguistic usage, the class of things called law or rules is pretty vast. Should a theorist then focus on laws which originate from the state or should the theory account for other systems which bear the name law and exhibit similar features? This would include any activity which has a codified set of rules or any other prescription which is normative, that is, in the sense it prescribes a course or courses of conduct. For instance, the rules of a University may contain several features in common with a legal system.

The choice of jurisdictions is equally fascinating. Should a theory of law provide an insight into the legal system of the theorist alone, or should it be a theory of all law, whichever jurisdiction one can find it in. This could have a temporal dimension. Should the theory then meet the requirement of all such legal systems that have ever existed and may exist in the future?

Then comes the question of method. What material should a theorist rely on: will her intuitions about legal systems suffice or should she embark on a data gathering quest?

These are weighty questions that have no easy answers even in the theories that we have considered. Instead, what we are left with are varying approaches to methodology, none of which is conclusive. It would be more fruitful to construct a space that accommodates these diverse views rather than pitting one against another to pick a winner.

A. The aims of theorizing:

The first aspect that stands out is that legal theories can be aimed at widely differing tasks. What should a theory do: should it explain the concept of law, or should it embark on an evaluation of law? As we have seen above, a theory is explicitly normative, where it adopts a clear moral position and evaluates law from that standpoint.[78] A theory, by contrast, is said to be descriptive where the theorist aims to describe the law and does not intend any evaluation of the moral ends of the law.[79] There is also the argument that there are spaces in between that are occupied both consciously or otherwise. Even a theorist such as Hart, the exemplar of a descriptive approach, may be indirectly evaluative.[80] Description involves focusing on significant features of a concept, and determining what is an important feature of our concept of law involves an evaluation, as Raz puts it.[81] This is but one way in which evaluation creeps into jurisprudence that otherwise seeks to be morally neutral. This begs the question why evaluation of this sort should be seen as distinct from moral evaluation of the law. Quite possibly, this is a result of the significance that modern jurisprudence attributes to the separation between positivism and natural law. Moral evaluation of the law done explicitly is thought to belong a school of thought distinct from those who evaluate the law

[78]Himma, *supra* note 42, at 66.
[79]Andrei Marmor, *Legal Positivism, Still Descriptive and Morally Neutral* 26 (4) OXFORD JOURNAL OF LEGAL STUDIES 783 (2006).
[80]Dickson, *supra* note 49.
[81]Joseph Raz, *Authority, Law and Morality* in ETHICS IN THE PUBLIC DOMAIN 237 (1994).

from other standpoints. Given the success of both descriptive and normative theories, there should be room to explore whether these can co-exist. There is fundamentally no reason why an attempt to expound the essential features of law cannot stand alongside enquiries that are, by design, not morally inert. However, normative and descriptive jurisprudence are pitted against each other, often, as a result of a further claim that only one of these properly belongs to the province of jurisprudence. Normative theorists can be heard asserting that all jurisprudence is normative while those on the analytical side continue to emphasize the value-neutral purity of their enquiries.[82] This tension cannot be resolved completely here.

However, it might help to think of these issues in terms of explanatory adequacy of insights. It seems jurisprudence values both normative and descriptive insights into the workings of the law provided these insights are explanatorily adequate. Hart's discovery of an internal aspect to the law or Dworkin's revelations on constitutional adjudication (in the US) are paradigms of successful insights. Imagining theories in terms of insights also helps scale down unrealistic ambitions which have been a feature of jurisprudential theories since the time of Austin. Can one theory hope to explain the entire subject of law? Hart, in his introduction to the Concept of law wondered why questions such as 'what is chemistry' are not asked so often as the question 'what is law'?[83] Maybe, it is because, questions as wide as what chemistry is or what is law cover vast expanses of human activity. Only some kind of theory of everything can hope to completely answer and explain the phenomenon of law in its entirety. But we can uncover large parts of it, bit by bit. And possibly, we already have, as the quick tour in Part I indicates. Though large parts of these ambitious attempts to uncover the entirety of law through one single theory have been falsified, strands that are significant or

[82]Marmor, *supra* note 79. (For a consideration of arguments of this nature.)
[83]HART, *supra* note 24, at 1.

successful survive. And through the diverse insights that survive, we know more about the law than we did before.

B. The choice of normative systems

Rules and laws are ubiquitous. Every jurisdiction, even 'primitive' communities, has laws. And most spaces where human activity occurs have rules that govern them. Universities, games, music-it is not difficult to think of fields where rule bound activity is expected. And some of these figures prominently in legal theory. It is hard to miss the references to chess or cricket while reading the Concept of Law.[84]Hart thought this to be a novel feature of his theory.[85] The fact that rules and laws find such widespread use poses a problem for legal theorists. What part of this vast expanse must one tread? As Raz notes, though theorists have always focused on State-law, they are aware of the existence of other laws including categories such as canon law, Sharia law, Scottish law, laws of voluntary organizations and even neighborhood crime gangs.[86] Why omit these?

This problem has two dimensions. Should one choose only State-law as the subject of theorization and if State-law, what are the jurisdictions one should focus on? We have no definitive answers. Austin decided that only some categories of rules are to be the subject of his theory. Some categories he thought were based on analogies and others simply improperly so called.[87] Kelsen, too similarly, focused on a narrow set. However, he left it open for the possibility of discovering something common across vastly dissimilar usages of the

[84]*Id.*, at 89.
[85]NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM, 527 (2006).
[86]Raz, Joseph, *Why the State?* (October 12, 2013) KING'S COLLEGE LONDON LAW SCHOOl Research Paper No. 2014-38; Columbia Public Law Research Paper No. 14-427; Oxford Legal Studies Research Paper No. 73/2014. https://ssrn.com/abstract=2339522http://dx.doi.org/10.2139/ssrn.2339522 (April 10th, 2019).
[87]*See* Section 1.A above.

term law.[88]This method of thinking that all laws belonged to a genus soon fell out of favor. Hart's take on this wide use of the word law was that the term had an open texture resulting in extensions of a great variety. So, any sort of definitional attempt, Hart thought, would not answer the problematic questions that the concept of law poses.[89] Despite Kelsen and Austin thinking that linguistic use was a good place to begin, the acknowledgment of the widespread use of law was almost tokenistic. The focus has really always been on law emanating from the state. It is only really late in the day that theorists such as Raz have suggested that legal theory must move beyond the exclusive concentration on state law which was never justified and even less so today.[90]

The second aspect of focus on select jurisdictions has puzzling results for jurisprudence. The jurisdictions that Austin's theory accounted for were not too many. Maine, while critiquing Austin, noted that analytical jurists had observed only legal systems of their civilization and age and those for which they had some intellectual sympathy. Other systems remote from their civilization and epoch had been ignored, he lamented.[91] This position continues even today where writers within the western tradition are primarily concerned with explaining features of the law as found in select jurisdictions in the West. Having said that, there is something odd about expecting philosophers in the West to account for Indian law. That task rightly belongs to Indian theorists.

However, legal theory continues to labour in the mistaken belief that an analytical theory can be successful only if its findings are valid for all legal systems. The sequitur, often, is that a successful theory is taken to be true of all legal systems. But the simple fact is that there

[88]KELSEN, *supra* note 18, at 4.
[89]HART, *supra* note 24, at 15.
[90]Raz, *supra* note 87.
[91]MAINE, ANCIENT LAW, 115 (1906).

is no warrant for such an assumption. It is not clear why a theory that surveys a limited set of rule systems should even claim validity beyond that. Is it true that for a theory of law to be objectively successful it must make a universal statement about all laws? Not necessarily. A proposition can be universally valid and yet be about a particular phenomenon, process or object. A claim that the population of a country Y demonstrates heightened susceptibility to X disease is evidently not about all human beings. It is not universal in that sense. Yet, if the study is otherwise scientifically valid, it is a universally valid claim. It is not as if it is open to a researcher in India to dispute the claim or disregard the finding in the paper vis-a-vis the population of Y except by questioning the validity of the study. In many ways, this example gives us the limits of theorising. A theory should ideally identify the normative systems that it studies, and the reach of a theory should ordinarily be limited to that set.

Limiting a theory in this manner does very little damage to the ambitions of legal theory. There is no reason to think that Indian law, for instance, crossed Hart's mind while authoring the Concept of Law. So, from an Indian perspective, while we need not discount the theory entirely, it is possible to view it as a set of theoretical statements about the legal systems that primarily influenced Hart. Where one sees analogies, a mediating argument can then be made as to why the theory apples to some aspect of Indian law.

C. Facts and Theory

The most serious criticisms of the methodology of analytical jurisprudence in recent years relate to its non-empirical character. At the heart of this criticism is the charge that conceptual analysis, the chief method of analytical theorists, is epistemologically bankrupt.[92] From the perspective of a critic, conceptual analysis seems to rely on

[92]Brian Leiter, *supra* note 49, at 38.

intuitions to seek out what are essential properties of law. Two lines of attack are worth noting. First, following Quine's challenge to the understanding of an analytical statement, the claim that the term law itself somehow entails some necessary truths is doubtful.[93] Second, conceptual analysishas a complex relationship with language and meaning. Linguistic methods have long fallen out of favor and invoking meaning in trying to identify the essential features of the law leaves one vulnerable to challenges such as the semantic sting.[94]

Whatever one may make of these arguments, it seems fairly clear now that a theory cannot hope to succeed by *a priori* reasoning alone. Even defenders of conceptual analysis point to the empirical component which may be latent in the intuitions of theorists who are participants in legal systems and members of linguistic communities.[95] But this empirical content will not meet the standard expected by those who suggest that jurisprudence should now take a naturalistic turn. However, it would be wrong to think that theorising relying on limited empirical resources is of no value and only propositions proved through some kind of experiment are of some worth. In the previous section, I have set out, almost as a continuous narrative, some of the more successful insights about law that we have from legal theory. Most of these evidently have been arrived at with almost no direct empirical enquiry.

Yet, in the course of argument and counter-argument, legal theory has the resources to test and falsify propositions that are not empirically justified. Austin made the claim that all laws are necessarily linked to sanctions. This claim has not survived Hart's critique (amongst others) because of counter-examples in the form of power-conferring rules. Hart's account on adjudication has similarly been challenged by

[93]Himma, *supra* note 42.
[94]JULES COLEMAN ET AL., METHODOLOGY IN THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 2 (2004).
[95]Himma, *supra* note 42 at 75.

Dworkin by citing decided cases involving kinds of disagreements between that lawyers and judges that Hart's theory cannot account for. Raz questions Hart's postulation of a single rule of recognition by pointing to cases where such a stipulation could be problematic, for example, a case that involves conflict of laws.[96] Baxi questions Singh's insistence that legal propositions are *synthetic a priori* statements by pointing to changes in attitudes towards human rights post 9/11.[97]

Now, does that mean that theories in the first place, are mere hypotheses which are to be tested thereafter? Not necessarily. It is a mistake to believe that empirical inputs for theorization can only be obtained through some data gathering exercise. That would be too a narrow a view. Close observation of phenomena need not always take a mathematical form or be structured or organized in a scientific way. That scientific study yields empirically valid theories must not lead one to conclude that is the only way of arriving at empirically valid claims. A theorist is, after all, a participant in a legal system, very often with privileged access to the intricate workings of the law. Close observations of the legislative process or the judicial process can yield insights that don't need further empirical justification if all that such conclusions rely on are assumptions undoubtedly shared by participants in the legal system. But in doing so, conceptual analysis has to proceed with a level of modesty.

It would be helpful to integrate two thoughts expressed earlier with the present claim. I have already suggested theories cannot or should not aspire to explain the entirety of the law. It is unlikely that any theorist has access to empirical inputs (even in the indirect fashion suggested above) that can justify theories which purport to cover and

[96]Scott Shapiro, *What is the Rule of Recognition (and Does it Exist)?,*THE RULE OF RECOGNITION AND THE US CONSTITUTION, (Adler et al eds. 2009), https://ssrn.com/abstract=1304645 (March 30th, 2019).
[97]Baxi, *supra* note 4 at 22.

explain every aspect of the legal system. Second, I have claimed that theories must identify rule systems and jurisdictions that they are investigating. Identifying legal systems or rule systems that are the subject of a theory would certainly aid subsequent conversations as to whether the theory holds within the stated field and whether they can be extended to other jurisdictions or rule systems. These limitations would serve well to ensure that a theorist does not stray beyond assumptions that underpin her theory.

An attempt to defend theorisation of this nature is not to suggest that it is better or superior to other methods. If an empirical study of rule-following drawing from mathematical methods can contribute to the theoretical understanding of law, there is no reason to be apprehensive of such a project. In fact, in most such cases, it is the more traditional jurisprudence of the kind described above that furnishes the propositions to be tested. For instance, conventional jurisprudence postulates a link between sanctions and rule-following. It is this link that then becomes the hypothesis for any study which seeks to research this relationship empirically. Such connections between widely differing methods assure us that there is no reason to assume that one kind of enquiry into the nature of law necessarily forecloses an investigation of another kind.

VIII. CONCLUSION

All this points to a different conclusion. Given the diversity in aims and methods within legal theory, an explicit and clear position on methodology is undoubtedly the first task in theorising. Should one aim to describe or evaluate? Should one target to explain all laws or a subset? And what kind of empirical inputs does one have regarding the chosen subset? What are the assumptions that underlie the connections or inferences drawn? The importance of clarity on these issues cannot be overstated.

Explicit statements on these issues can help in building clear and meaningful conversations in which the results of theories can be debated and questioned. It is immensely important that such conversations account for the diversity of legal systems and rule systems that we have. Most relevant to our immediate context is that we should not shy away from such conversations. Legal theory is of no relevance to us, if it cannot explain facts about the law as it exists around us. After all, if facts do not fit the theory, we must let the theory go.