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Does the Rise of Naturalism Mean the End of Conceptual Analysis in the Methodology of Jurisprudence?

Hukuk Felsefesi Metodolojisinde Doğalcılığın Yükselişi Kavramsal Analizin Sonu Anlamına Gelir mi?

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ABSTRACT

Recently, the method of conceptual analysis as the presumed method of analytic jurisprudence has come under attack by Brian Leiter. Relying on W.V.O. Quine's naturalized epistemology displacing analytic-synthetic distinction on truth, Leiter offered the rejection of conceptual analysis and the adoption of naturalist method committed to doing empirical research in pursuit of providing cause-effect type of explanations in law. He argues that since conceptual analysis relies on the a priori intuitions of the conceptual theorist, this method fails to deliver the universal and necessary truths it set out to deliver. In this essay, I will

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analyse whether the charges Leiter levels at conceptual analysis stick to it. Drawing on the works of contemporary conceptual jurisprudents, I will conclude that conceptual analysis is secure from the defects that Leiter accuses it to have. I will argue that the questions the naturalist method and the method of conceptual analysis can succeed to answer are different sorts of questions about the law; conceptual analysis does proceed on a posteriori reasoning and its arguments are best construed as necessary truths upon contingent grounds. As a result, the naturalist method fails to replace the method of conceptual analysis.

Keywords: Methodology of Jurisprudence, Conceptual Analysis, Naturalism, Necessity, Contingency, A Priori, A Posteriori, Brian Leiter.

ÖZ

Analitik hukuk felsefesinin varsayılan metodu olarak kavramsal analiz metodu son zamanlarda Brian Leiter'ın saldırılarına maruz kaldı. W.V.O. Quine'ın analitik-sentetik doğruluk ayrımını reddeden doğalcı epistemolojisine dayanan Leiter kavramsal analiz metodunun reddedilmesini ve onun yerine hukuk olgusu hakkında neden-sonuç tipi açıklamalar getirmeyi amaçlayacak ampirik araştırma yapmayı öneren doğalcı metodun benimsenmesini önerdi. Leiter kavramsal analiz metodunun kavramsal analistin a priori sezgilerine dayandığını iddia ederek, bu metodun ortaya koymayı amaçladığı evrensel ve zorunlu olarak doğru argümanlar geliştirmekte başarısız olduğunu savunur. Bu makalede, Leiter'ın kavramsal analiz metoduna atfettiği kusurların bu metodta bulunup bulunmadığını inceleyeceğim. Çağdaş kavramsal hukukçuların çalışmalarına dayanarak kavramsal analiz metodunun Leiter'ın sahip olduğunu iddia ettiği kusurlardan berî olduğunu savunacağım. Doğalcı metodun ve kavramsal analiz metodunun hukuk olgusu hakkında cevaplamada yetkin olabileceği soruların farklı türden sorular olduğunu, kavramsal analiz metodunun sonuçlarının a posteriori nitelikli olduğunu ve argümanlarının rastlantısal olgular hakkındaki zorunlu doğrular olarak anlaşılması gerektiğini ileri süreceğim. Sonuç olarak, doğalcı metodun kavramsal analiz metodunun yerini almada başarısız olduğunu ortaya koyacağım.

Anahtar Kelimeler: Hukuk Felsefesi Metodolojisi, Kavramsal Analiz, Doğalcılık, Zorunluluk, Rastlantısallık, A Priori, A Posteriori, Brian Leiter.

INTRODUCTION

In theory construction in legal theory, the approach of analytic jurisprudence is distinguished by its commitment to solely providing descriptive analyses on the form of the law in a neutral fashion and not to go beyond this point for better or worse by offering how the content of the law ought to be crafted, the question which falls in the realm of normative jurisprudence that busies itself with dispensing normative advice for the legislation of allegedly better laws. Over the past couple of decades

though, this descriptive self-confinement of analytic jurisprudence has been contested widely. While some jurisprudents have taken issue with the very possibility of purely descriptive methodology stripped off any normative engagement,[1] others have come up with the charge that the analytic approach has not been descriptive enough in sound terms because of its poor choice of an epistemic tool to employ in investigating the nature of law[2] which renders its findings remain unproven, if not conspicuously wrong. This tool is the intuition-reliance tenet of the method of conceptual analysis in mounting conceptual arguments on the nature of law resorted mainly by John Austin, H.L.A. Hart and Joseph Raz among others in their accounts. It is the latter sort of attack directed at the method of conceptual analysis by Brian Leiter that makes up the subject matter of this essay. Leiter has raised a number of objections to this method for its failure in accounting for how adjudication really works, its reliance on the a priori intuitions of the theorist, and the inability of a priori intuitions to deliver necessary truths about law it seeks to establish. Instead of conceptual analysis, he offered to adopt the naturalist method in the analysis of law. Drawing on the works of contemporary conceptual jurisprudents, I will challenge Leiter's charges. I will argue that conceptual analysis is secure from the defects that he accuses it to have and the naturalist method fails to replace the method of conceptual analysis.

I. THE PROMISE OF NATURALISM IN JURISPRUDENCE

A. Conceptual Analysis as "Obsolete"

By general framing, the method of conceptual analysis in its form employed by legal theorists is taken to be aiming at unveiling the necessarily

1 Ronald **Dworkin**, Law's Empire, The Belknap Press of Harvard University Press, New York 1986; Liam **Murphy**, "The Political Question of The Concept of Law", Hart's Postscript: Essays on the Postscript to The Concept of Law, ed. by Jules Coleman, Oxford University Press, Oxford 2001, p. 371–409; Stephen **Perry**, "Hart's Methodological Positivism", Hart's Postscript: Essays on the Postscript to The Concept of Law, ed. by Jules Coleman, Oxford University Press, Oxford 2001, p. 311–354. Against these objections, Dickson defends the thesis that arguments of analytic jurisprudence are indirectly evaluative. Julie **Dickson**, Evaluation and Legal Theory, Hart Publishing, Oxford 2001.

2 Brian **Leiter**, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York 2007; Brian **Tamanaha**, "What is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law", Transnational Legal Theory, Vol. 2, No. 3, 2011; Roger **Cotterrell**, "Why Jurisprudence Is Not Legal Philosophy", Jurisprudence: An International Journal of Legal and Political Thought, Vol. 5, No. 1, 2014.

true, non-contingent features of law that can be identified and applicable across different legal systems. In unearthing these features of law, the main epistemic tool of legal theorists is the observable 'propositional attitudes'[3] of individuals viz. judicial officials and other citizens engaging with legal practice concerning the functioning of legal systems, the place of rules in practical reasoning and related concepts involved in the legal practice such as legal obligation, legal validity, authority, normativity etc. The propositional attitudes of individuals consist of their prevailing and legal practice-guiding beliefs, commitments, discourse and linguistic[4] usages of concepts that play a role in maintaining social life under the governance of law. Drawing on these sources, analytic jurisprudents construct conceptual arguments on the foundational, but elusive features of law that have yet to be conceptualized, make inferences in consideration of other concepts at play, set logical connections between them and so forth. The soundness and plausibility of their final conceptual contentions are corroborated by the way the legal practice is shaped and maintained by the very pool of attitudes of participants that provided the starting point for their intricate analyses. Proceeding on these grounds, Hart found the factual premises of his account in "the widespread common knowledge" of "any educated man" on the "features of a modern municipal legal system."[5] Though not so explicit, Raz too referred to some reference point outside and broader than just himself, "our society" –which can warrantably be taken as our legal practice– for the evidential source of his conceptual analyses:

"In large measure what we study when we study the nature of law is the nature of our own self-understanding. … It is part of the self-con-

3 Brian **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, New York, Oxford University Press, p. 124.

4 Albeit misguidedly, sometimes conceptual analysis is reduced only to the analysis of the meaning of concepts. For instance, see Andrei **Marmor**, "Farewell to Conceptual Analysis (in Jurisprudence)", Philosophical Foundations of the Nature of Law, ed. by Wil Waluchow/Stefan Sciaraffa, Oxford University Press, Oxford 2013, p. 213. Yet this tendency is clearly rejected by Hart in his saying that it is the "phenomena", not the "words" that he aims to throw light on. H. L. A. **Hart**, The Concept of Law, 2nd ed., Oxford University Press, New York 1994, p. v.

5 **Hart**, The Concept of Law, p. 240.

sciousness of *our society* to see certain institutions as legal. And that consciousness is part of what we study when we inquire into the nature of law."[6]

Against the appeal the method of conceptual analysis enjoyed among analytic jurisprudents, since the mid-1990s Brian Leiter has steadily and fervently campaigned to 'naturalize' the methodology of analytic jurisprudence in a number of essays that culminated in a book with a title[7] reflecting the spirit of his attempt. "Naturalism," in his words, "is always first a methodological view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences."[8] This is a philosophical movement that, since the 1960s, has swept through many areas of philosophy –knowledge, mind, metaethics, language- and either replaced or supplemented the previous linguistic-bound approaches where philosophical questions were traditionally answered by means of "*a priori*, armchair methods of the philosopher."[9] Yet, he says, this has not been the case up until he threw himself into this task. He holds it unfortunate on the part of analytic jurisprudence that it fell behind the recent philosophical developments and "remained untouched"[10] by the naturalistic turn that other fields of philosophy went through. He complains that analytic jurisprudents still continue to employ the method of conceptual analysis that trades on their intuitions, a method "at risk of becoming an item of antiquarian interest."[11]

Yet, Leiter is skeptical with the intuition-reliance in achieving knowledge by this method both in its reliability and in its scope. He regards the conceptual analyst's reliance on his intuitions as an "epistemologically bankrupt,"[12] unreliable epistemic tool yielding a pseudo analysis

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6 Joseph **Raz**, "Can There be a Theory of Law?" in Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason, Oxford University Press, New York 2009, p. 31, (emphasis added).

7 **Leiter**, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy.

8 Brian **Leiter**, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York, p. 34.

9 **Leiter**, "Rethinking Legal Realism", p. 31.

10 **Leiter**, "Rethinking Legal Realism", p. 33.

11 Brian **Leiter**, "From Legal Realism to Naturalized Jurisprudence", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York, p. 2.

12 Brian **Leiter**, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, Oxford, New York, p. 175.

with nothing more than the results of "armchair sociology"[13] which are unmoored in the social facts. This strikes Leiter as the most significant downside of conceptual analysis that undermines its contentions by a priori justification whereas they always ought to be considered "vulnerable to the demands of a posteriori theory construction."[14] The conceptual analyst may take the advice of Frank Jackson, the champion defender of conceptual analysis in contemporary philosophy, and take "opinion polls"[15] to corroborate his contentions. Even if some truths may be grasped about the essential properties of law with or without taking this extra mile, Leiter breaks it to conceptual jurisprudents that these results will not be what they endeavored for in terms of strength and comprehensiveness. What they can achieve by their intuitions or opinion polls will be "strictly ethnographic and local,"[16] "culturally specific"[17] facts at best, falling short of their aspiration of "timeless or necessary truths about how things are"[18] that make up the aim of analytic jurisprudence.

Drawing on these supposedly self-defeating practices of conceptual analysts, Leiter argues that we better "move beyond mere conceptual analysis"[19] and seek to "locate law … within a naturalistic picture of the world."[20] As we will see briefly in the next subsection, he believes that the naturalist approach to law yields its practical payoffs especially in adjudication. Yet, he does not content himself with this application of naturalism to law only. He goes even further to suggest that "questions about the nature of law itself might be settled by the results of the empirical sciences"[21] and seems to expect positive results from such investigation on "what the "ordinary man" really thinks."[22]

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13 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 133.

14 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 134.

15 Frank **Jackson**, From Metaphysics to Ethics: A Defence of Conceptual Analysis, Oxford University Press, New York 2000.

16 **Leiter**, "Beyond the Hart/Dworkin Debate", p. 177.

17 Brian **Leiter**, "Science and Methodology in Legal Theory", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York, p. 192.

18 **Leiter**, "Beyond the Hart/Dworkin Debate", p. 177.

19 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 125.

20 **Leiter**, "From Legal Realism to Naturalized Jurisprudence", p. 3.

21 **Leiter**, "From Legal Realism to Naturalized Jurisprudence", p. 6.

22 Brian **Leiter**, "Naturalizing Jurisprudence: Three Approaches", The Future of Naturalism, Ed. by John R. Shook/Paul Kurtz, Humanity Books, New York 2009, p. 202.

B. Naturalization of Analytic Jurisprudence

The naturalist epistemology Leiter invites us to embrace in order to overcome the methodological debacle in analytic jurisprudence builds on W.V.O. Quine's insights. In his seminal paper, *Two Dogmas of Empiricism*, Quine attacks the analytic-synthetic distinction introduced by Immanuel Kant and subscribed by logical positivism.[23] In Kant's definition, an analytic proposition is a statement in which the predicate's contribution to the sentence meaning is already contained in the meaning of a subject. By analysis, the predicate decomposes the subject into its necessary and sufficient components. In the example of "A bachelor is an unmarried male person" the predicate "unmarried male person" gives the meaning of the term in the subject "bachelor." However, this type of proposition is not eligible to have a truth value. As the predicate does not refer to a fact that the subject already does not do, an analytic statement can be either self-contradictory or free of contradiction. For instance, uttering the proposition "a bachelor is an unmarried male child" is not registered as a false proposition. Rather, it is considered self-contradictory given the very meaning of the term 'bachelor,' which applies only to male adults. One who utters such a proposition simply fails to know the meaning of this term. This is considered an a priori demonstration of an analytic proposition independent of facts. Such an analytic proposition picks out self-evidential, unfalsifiable and necessary truths; yet, the predicate of an analytic proposition does not add up to the knowledge we already possess. With synthetic propositions, however, the analysis of the predicate produces contingently true, new and genuine knowledge of the subject as in the example of "Water is H_2O." Such a synthetic proposition can be proven or disproven only a posteriori, i.e. by employing scientific methods to check if the content of its predicate holds true about its subject.[24] Quine rebels against this long-standing dualism on the truth of propositions on empirical grounds. He holds that no statement is independent of experience and can be held true merely by virtue of its meaning.[25] He recognizes only the guidance of science as the highest authority in identifying and describing the

23 Willard Van Orman **Quine**, "Two Dogmas of Empiricism", in From a Logical Point of View: Logico-Philosophical Essays, 2nd revised ed., Evanston, Harper Torch Books, New York 1963, p. 20.

24 Immanuel **Kant**, Critique of Pure Reason, Trans. and Ed. by Paul Guyer/Allen W. Wood, Cambridge University Press, Cambridge 1998.

25 Brian **Leiter**, "Why Quine is not a Postmodernist", in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York 2007, p. 144.

reality and rejects any a priori type of demonstration.[26] He emphasizes this point in the following:

"The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. … no statement is immune to revision. Revision even of the logical law of the excluded middle has been proposed as a means of simplifying quantum mechanics; and what difference is there in principle between such a shift and the shift whereby Kepler superseded Ptolemy, or Einstein Newton, or Darwin Aristotle?"[27]

Being "immune to revision" is the fundamental problem Quine identifies with analytic propositions. He argues that those propositions we are prone to stuck with and obstinate to not abandon have been called 'analytic' independent of contrarian empirical facts and those for which we are more open-minded and ready to revise under new empirical evidence 'synthetic'.[28] For him, the differentiation of analytic propositions from synthetic ones makes sense only from a "socio-historical" perspective, but it does not state an "epistemic difference."[29] A posteriori knowledge is the only type of knowledge we can have.

The wide research spectrum Quine charts for the naturalistic program can be taken to include even law alongside a social field like history and Leiter undertakes to employ this project in jurisprudence by vindicating its superiority over conceptual analysis. Joining Quine on the rejection of

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26 **Leiter**, "Science and Methodology in Legal Theory", p. 183. Quine's elimination of analytic truths and claim that all propositions are liable to a posteriori demonstration may leave one with the misimpression that this thesis of his is somewhat linked to Karl Popper's thesis on the falsifiability of scientific theories. Quine's thesis challenged the logical positivism's notion of confining the making of analytic propositions to the domain of philosophy and synthetic propositions to the domain of science. Yet, Popper's discussion remained within the methodology of science. His objection is not directed at the status of analytic truths; rather it is directed at the verificationist method of scientific investigation through induction. In defiance of this, he advances the thesis that the falsifiability of the theories is the criterion that distinguishes scientific theories from non-scientific ones. See "Karl Popper", available online at https://plato.stanford.edu/entries/popper/ C.O. 03.12.2024

27 **Quine,** "Two Dogmas of Empiricism", p. 42-43.

28 **Leiter,** "Beyond the Hart/Dworkin Debate", p. 176.

29 **Leiter,** "Beyond the Hart/Dworkin Debate", p. 175-176.

a priori theorizing, he argues that all propositions are responsive to a posteriori demonstration to the extent that experience requires us to adjust other parts of our theory of the world to accommodate recalcitrant evidence.[30] On these grounds, Leiter construes naturalism consisting of two theses:

"Substantive Thesis. With respect to questions about what there is and what we can know, we have nothing better to go on than successful scientific theory.

Methodological Thesis. Insofar as philosophy is concerned with what there is and what we can know, it must operate as the abstract branch of successful scientific theory."[31]

By the recipe of these theses, theory construction in some field of philosophy "should be continuous with empirical inquiry in the sciences."[32] This means that a theorist, say a philosopher of mind, must "get up from the armchair"[33] and refer to the findings of neuroscientists before constructing arguments about how body and mind relate or what intention or consciousness means. Leiter expands this naturalistic replacement of scientific methodology to "social sciences"[34] as well. He holds that "we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature."[35] As to providing a naturalistic explanation of law, he urges us to build our explanations upon the findings of "anthropologists, sociologists, psychologists, and others … about the social practices in and around law."[36] Only by the findings of such empirical social sciences can we construct theories of law that can "give us the best going account of how the world [law and legal institutions] works."[37]

However, Leiter himself has yet to conduct any analysis by employing this naturalist methodology on the questions of the nature of law the conceptual jurisprudents have raised. Instead, he registers the members of

30 **Leiter**, "Why Quine is not a Postmodernist", p. 144; **Leiter,** "Beyond the Hart/Dworkin Debate", p. 176.
31 **Leiter**, "Beyond the Hart/Dworkin Debate", p. 180, (emphasis omitted).
32 **Leiter**, "Rethinking Legal Realism", p. 31.
33 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 134.
34 **Leiter**, "Rethinking Legal Realism", p. 31.
35 **Leiter**, "Rethinking Legal Realism", p. 35.
36 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 134.
37 **Leiter**, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", p. 134.

American Legal Realism -the prevalent adjudicative movement between 1920s and 1940s in the US Supreme Court- as the precursors of naturalism in the adjudication chapter of jurisprudence.[38] He finds legal realists' approach to the theory of adjudication quite empirical and reminiscent of Quine's naturalized epistemology.[39] This analogy of legal realism to naturalism in this respect is rooted in the realists' call on us to turn our gaze to "how the construction of decisions really proceeds"[40] vis-à-vis the assumed application of formalist reasoning in judicial decision-making. In his framing, the realist judges acted more heavily "fact-responsive" than acting "rule-responsive".[41] That is to say, what was operative in their reasoning for reaching a judicial verdict was not the formalist reasoning dictating the deduction of their decisions from the pre-formulated legal rules viz. statutes and precedents.[42] Rather, they built their verdicts "primarily [on] the underlying facts of the case"[43] which in effect took them beyond the only "facts that are … made relevant by any legal rule."[44] From such non-restricted scope of facts, they rendered their verdict based on "what they think would be fair,"[45] "what is right or wrong for that cause,"[46] "what

38 Additionally, Leiter refers to the work of Jeffrey A. Segal and Harold J. Spaeth on the predictability of U.S. Supreme Court's decisions as an application of the naturalist method in explaining adjudication. In brief, in the "attitudinal model" they developed, Segal and Spaeth took "the ideological attitudes and values of the justices" towards "the facts of the case" as the main determinant factor that guided their votes in the making of the Court's decision. Taking their cue from the characterization of justices as liberal or conservative in the newspapers out of the statements they made at their confirmation hearings, Segal and Spaeth argue that they could correctly predict the votes of justices with 71% accuracy in the context of search-and-seizure decisions. **Leiter**, "Science and Methodology in Legal Theory", p. 187.

39 **Leiter**, "From Legal Realism to Naturalized Jurisprudence", p. 5; **Leiter** "Legal Realism and Legal Positivism Reconsidered", p. 64.

40 **Leiter,** "Legal Realism and Legal Positivism Reconsidered", p. 65.

41 **Leiter**, "Rethinking Legal Realism", p. 24. Leiter confines this contention to the cases that are reviewed at the appellate courts and concedes the more rule-boundedness of judges in lower courts in reaching decision. See **Leiter**, "Rethinking Legal Realism", p. 41.

42 **Leiter**, "Rethinking Legal Realism", p. 24.

43 **Leiter,** "Rethinking Legal Realism", p. 24.

44 **Leiter,** "Rethinking Legal Realism", p. 22, n. 33.

45 **Leiter,** "Rethinking Legal Realism", p. 22.

46 **Leiter**, "Rethinking Legal Realism", p. 22.

seems to be the due thing on the facts,"[47] "prevailing commercial culture,"[48] or what the "socio-economically best under the circumstances"[49] is and so on. In consideration of such an approach of the realist judges, the matter of adjudication veers away from the formalist theory of how they are assumed to decide cases and instead turns into an empirical one of how they actually decide. This empirical question can be answered only by "approaching law like a behaviorist psychologist, an anthropologist, or an empirical sociologist"[50] and ensuring the construal of adjudication's "methodological continuity with the natural and social sciences."[51] Only in this way can we discover "what input (that is, what combination of facts …) produces what output (i. e. what judicial decision)"[52] and bring out "regular, law-like (ideally: lawful) patterns of decision."[53]

The bottom line, at the heart of the legal realists' 'what is at work in the courtroom' approach lies a shift from traditional epistemic sources in understanding adjudication much as Quine pioneered in general epistemology. If the way judicial decisions are actually made proves to be different from the assumed explanation of formalist theory, the root cause of this formalist failure must be found in the evidential ground it stands on: the lack of empirical observation in explaining the adjudicative process by theorists. This failure to understanding adjudication too is chalked up to the intuition-driven method of conceptual analysis. Allegedly, conceptual analysts are not equipped with the proper tools in understanding how the adjudication really works. By their emphasis on the importance of a posteriori inquiry, the realists's approach comes down to the abandonment of conceptual analysis-type of theory construction in understanding adjudication.

In the case of adjudication, there seems to be much to gain from Leiter's agenda of naturalization. If the judges decide the cases before them by paying heed to facts that go beyond the ones stipulated by rules and also by involving their value judgments, this might -though not necessarily, but potentially- give rise to a stray from the normative framework

47 **Leiter**, "Rethinking Legal Realism", p. 23.
48 **Leiter**, "Rethinking Legal Realism", p. 27.
49 **Leiter**, "Rethinking Legal Realism", p. 27.
50 Brian **Leiter**, "Is There an "American" Jurisprudence?" in Naturalizing Jurisprudence: Essays on American, Legal Realism and Naturalism in Legal Philosophy, Oxford University Press, New York 2007, p. 90.
51 **Leiter**, "Rethinking Legal Realism", p. 56.
52 **Leiter**, "Rethinking Legal Realism", p. 40.
53 **Leiter**, "Rethinking Legal Realism", p. 56.

set out by legal rules. Though such practice may lead to a disconnection between the intended practical guidance of legal rules and the way individuals are to be treated by the courts, obtaining the knowledge of how courts actually decide cases has an immediate practical value for lawyers and their clients. If some legal researchers seek to harness the available methods of social sciences to obtain this type of practical knowledge, their findings will help to drive up the predictability of court decisions in virtue of the content of the law. What is more, it is highly unlikely that their findings will be turned a blind eye by scholars who raise questions about the adjudicative matters of law; rather, they will most welcome such empirical results in their research questions. Yet, what about the analytic jurisprudents who do not pursue questions whose answers will not bring such immediate practical payoffs? Is their appeal to their intuitions on the non-contentwise and formal aspects of law incapable of obtaining any knowledge of value? Are their legal-theoretical analyses doomed to be only non-necessary, time-bounded, ethnographic and empirically divorced truths at best, as Leiter claimed?

Whether Leiter's attacks on the method of conceptual analysis reach his target and, even if they do, whether the conceptual analysis is vulnerable to his attacks are to be addressed in the next section. From the foregoing discussion of Leiter's naturalist program, I will concentrate on his charges against this method that (1) the conceptual analyst's reliance on his intuitions instead of applying scientific method turns this enterprise into an a priori generation of knowledge about the nature of law, (2) the truth of knowledge thus generated can be limited to locally contingent truths about the law whose practices the analyst is familiar with, which defeats the analyst's aim of delivering universal and necessary truths about the nature of law. I will challenge these charges of Leiter and aim to clarify the points he targeted by scrutinizing the works of H.L.A. Hart, Joseph Raz, Jules L. Coleman and Scott J. Shapiro as the leading jurisprudents who employ this method to the law. I will argue that even though these jurisprudents do not base their conceptual theses on the results of social scientific investigations, their non-recourse to hard evidence cannot lead to the identification of their theses as a priori truths. Their theses are neither of their normative speculations nor the figment of laymen's imagination; rather, their intuitions are the imports of professional wisdom of involved theorists with an acquired knowledge of the functioning of legal practices and institutions. In this respect, their conceptual theses about the nature of law ought to be taken as more of a posteriori kind. Against Lei-

ter's second charge that Leiter that conceptual truths can have only contingent character as they are based on the theorist's local intuitions, I will demonstrate that this is a claim already, however partially, embraced by conceptual theorists. It will be seen that making claims of contingent truths about the nature of law has a place in the method of conceptual analysis and the theorist's intuitions on the local legal practices provide the necessary initial steps for conducting conceptual analysis on the nature of law which makes the way for local-transcending necessity claims. Finally, I will argue that even the claims to necessity by conceptual analysis develop from contingent bases in the sense that they are liable to contingent social practices of law. Yet, preceding the fulfilment of these challenges, the very purpose of engaging with the conceptual analysis of law ought to be identified at the outset. In the following, against Leiter's charge that conceptual analysts fail to explain the adjudicative process, I will first bring out that the main interests of conceptual jurisprudents do not lie in explaining this process at all. Rather, they are more interested in more general, non-adjudicative aspects of the nature of law that are remotely related to the judicial decision-making which stands as a more convenient stage for the application of Leiter's naturalistic program.

II. THE FUNDAMENTALS OF CONCEPTUAL ANALYSIS

A. The Purpose-Specificity: Theoretical Explanation of The Practical Phenomenon of Law

In the history of philosophy, path-breaking developments in search for the truth come mostly following methodological shifts. At the turning points, the preceding substantial answers given to the perennial questions of philosophy till then are considered to be wrong or insufficient for the most part because of the wrong methodological commitments of the predecessors. However, the history of philosophy testifies that the newly introduced methods are not always powerful enough to eradicate the already available ones thoroughly. It is often the case that the contending methods either coexist side by side either by compromising and revising their characteristic tenets, or rather clarifying themselves under the new challenges. 20th century has been more prolific than ever before on methodological diversity and has witnessed several turning points since its beginning such as logical, linguistic, conceptual, naturalist and hermeneutic among others. In this section I will undertake a clarificatory task for the purpose of the method of conceptual analysis that Leiter demonized.

In building a defense against Leiter's attacks, one particular challenge is that conceptual jurisprudents often prove to be tight-lipped about their

methodological commitments. Furthermore, even the self-declared commitments are not secure from harsh criticisms. Hart's *Concept of Law* provoked many discussions around the topics it covered since its publication. He characterizes his work as an essay in 'analytical jurisprudence' in that he is concerned with the clarification of the general framework of legal thought rather than bringing up some criticism of the content of laws, and raising questions about the meaning of words so as to show how the legal discourse differ from ordinary discourse. Additionally, he deems his work as an instance of 'descriptive sociology' since the task he set his hands to was to throw light on the social phenomenon of law.[54] On the other hand, Hart develops his method against John Austin's legal theory[55] who is considered to be the forerunner of the use of the analytic method in jurisprudence.[56] In his work, Austin makes another methodological statement that his endeavor is "to resolve a law (taken with the largest signification which can be given to the term properly) into the necessary or essential elements of which it is composed."[57] So, this should raise the question that in what aspects the two theorists in one tradition contradict each other and what does Hart mean by the application of descriptive sociology applied to law?

We can begin to investigate by appealing to the methodological explanation of another renowned book with a similar title the author of which was in the same philosophical chamber –known as Oxford ordinary language philosophy– with Hart. Gilbert Ryle in his *Concept of Mind* makes the following statement:

"The philosophical arguments which constitute this book are intended not to increase what we know about minds, but to *rectify the logical geography of the knowledge which we already possess*. …*It is, however, one thing to know how to apply such concepts [of mental powers and operations], quite another to know how to correlate them with one another and with concepts of other sorts*. Many people can talk sense with concepts but cannot talk sense about them; they know by practice how to operate with concepts, anyhow inside familiar fields, but they cannot state *the logical regulations governing their use*. They are like people who know their way about their own parish, but cannot construct or read a map of it, much less a map of the region or continent in which their parish lies. For certain

54 **Hart**, p. v.
55 **Hart**, p. 16-17.
56 John **Austin**, The Province of Jurisprudence Determined, Cambridge University Press, New York 2001, p. 157.
57 **Austin**, p. 117.

purposes it is necessary to determine *the logical crossbearings of the concepts which we know quite well how to apply*.[58]

Naturally, the object under investigation constrains one's freedom of choice in methodology: whereas the mind might be a natural kind whose existence is very controversial and law is believed to be by many, at least partially, as a socially constructed phenomenon. But the two theorist's methodological commitments bear striking resemblances even at first glance. The first one concerns the titles of their works featuring the phrase *the concept of* used to qualify the type of their works in their respective fields. Both the definite article *the* and the term *concept* used to qualify their works on law and mind exclude the alternatives of a/an idea/phenomenon in question which signifies that the upcoming revelations are not from somewhere we are not acquainted. Their choice of titling their works compares to the titling of John Rawls' work *A Theory of Justice* in which the indefinite article *a* gives us the signal that he will offer an account with which we might not be familiar with our social practices of the concept of justice. Secondly, both theorists share a moderate aim. Ryle has a non-informative motivation about minds that his is not a pursuit after the real essence of mind. He sets himself the task of a geographer which is to deliver a roadmap for logical correlations among concepts related to mind.[59] Quite similarly, Hart states that his effort is to further our understanding of the modern municipal legal system as a social phenomenon different from, but related to coercion and morality.[60] This effort is not oriented to capture the hidden nature of law we have never heard of, but rather to describe the established case of law we are accustomed to in our legal

58 Gilbert **Ryle**, The Concept of Mind, 60th Anniversary Edition, Routledge, New York 2009, p. Iix-ix, (emphases added).

59 Of Ryle's reliance on the shared linguistic usage in a society, Tanney makes the following intriguing comments: "as the analogy of philosophy with cartography suggests, Ryle investigates the workings not just of one concept by itself, but "all of the threads of a spider's web of inter-working concepts."" "Gilbert Ryle", available online at https://plato.stanford.edu/entries/ryle/ C.O. 10.10.2024. In her introduction to *The Concept of Mind*, Tanney also remarks that "the philosopher's chart of the logical geography of concepts deals with the various ways in which these concepts figure in the sayings (not only the describings) of people competent in their use. Like the recipe-writer, the philosopher-cartographer will presuppose many abilities of the follower of his philosophical map." Julia **Tanney**, "Rethinking Ryle: A Critical Discussion of The Concept of Mind", in Gilbert Ryle, The Concept of Mind, 60th Anniversary Edition, Routledge, London 2009, p. iv.

60 **Hart**, p. v, 17.

practices by employing classificatory means.[61] He reiterates this point in the *Postscript* as well:

"*My aim in this book was to provide a theory of what law is* … [it] seeks to give an *explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect*. ... As a means of carrying out this descriptive enterprise my book makes repeated use of a number of concepts such as duty-imposing rules, power-conferring rules, rules of recognition, rules of change, acceptance of rules, internal and external points of view, internal and external statements, and legal validity. These concepts focus attention on elements in terms of which *a variety of legal institutions and legal practices may be illuminatingly analyzed and answers may be given to questions, concerning the general nature of law*, which reflection on these institutions and practices has prompted."[62]

In both excerpts above, both Ryle and Hart declare that they will busy themselves with the clarification and interrelations of certain concepts in their respective fields. Hart especially makes explicit that his inquiry is going to focus on the explanation of the nature of law in general. He dismisses the perennial pursuit of previous jurisprudents going after a definition for law by genus and differentia to uncover its essence by which the proper use of law can be tested. For him, such a pursuit would prove to be neither possible nor useful on account of the peculiar aspects of modern law.[63]

Being the scholar who employed the method of conceptual analysis by far the most extensively in his works, Raz holds the aim of the application of this method to the concept of law to be "improv[ing] our understanding of the nature of law"[64] and to "reveal the nature of the law."[65] According to him, a concept picks out certain aspects of the world and the concept of law picks out "a type of social institution," -the phenomenon of law- in society which is "entrenched in our society's self-understanding."[66] Yet, a concept is distinct from a word and phrase we use in daily discourse and,

61 Ian P. **Farrell**, "H.L.A. Hart and the Methodology of Jurisprudence", Texas Law Review, Vol. 84, 2006, p. 1008.
62 **Hart**, p. 239-240, (emphases added).
63 **Hart,** p. 14, 246.
64 **Raz**, "Can There be a Theory of Law?", p. 31.
65 **Raz**, "Can There be a Theory of Law?", p. 24.
66 **Raz**, "Can There be a Theory of Law?", p. 31.

therefore, the explanation of a concept is an attempt different than the explanation of the meaning of a word or phrase.[67] "Explaining a concept," he proceeds, "is close to explaining the nature of what it is a concept of."[68] Thus, the explanation of the concept of law amounts to an explanation of the nature of the phenomenon of law. On this point, Raz stipulates two conditions to fulfil for a successful explanation of the concept of law. It has to, first, "*explain* what the law is" and, second, advance propositions "which are *necessarily* true" about the features of law.[69] To the exposition along these lines of his construal of what the method of conceptual analysis in law amounts to, Raz drops two crucial remarks that expand his take on this method by exclusion of two mistaken attributions from its scope. In his bid to demarcate the boundaries of conceptual analysis of law, he reprimands the adoption of "lawyers' perspective … the inclination to identify the theory of law with a theory of adjudication" for being "short-sighted" and "an arbitrary starting-point".[70] A lawyer's main interest lies in promoting his client's interest for which it is eminently instrumental to master the working logic of adjudication in actual practice. No matter how important this is for stakeholders to the litigations in courts, it cannot mean the reduction of the analysis of the nature of law into that of adjudication. In Raz's words:

"It is entirely appropriate to make [the legal profession and … the judicial system] … the object of a separate study ... It is, however, unreasonable to study such institutions exclusively from the lawyer's perspective. … [L]egal philosophy, especially when it inquires into the nature of law, must stand back from the lawyer's perspective, not in order to disregard it, but in order to examine lawyers and courts in their location in the wider perspective of social organization and political institutions generally."[71]

Having thus detached the study of the nature of law via conceptual analysis from the study of the adjudication, Raz brings into sharp relief the non-involvement of the analysis of adjudication in actual practice to the aim of the conceptual analysis of law. At another point, he repudiates the tendency of assessing the merits of a conceptual analysis of law with

67 **Raz**, "Can There be a Theory of Law?", p. 18-19; Joseph **Raz**, "The Problem about the Nature of Law", in Ethics in The Public Domain: Essays in The Morality of Law and Politics, Oxford University Press, New York 1996, p. 196-197.

68 **Raz**, "Can There be a Theory of Law?", p. 24.

69 **Raz**, "Can There be a Theory of Law?", p. 17, (emphases by Raz).

70 **Raz**, "The Problem about the Nature of Law", p. 208-209.

71 **Raz**, "The Problem about the Nature of Law", p. 203-204.

the eligibility of its findings to be put into practical service in adjudication. His view is that the success of conceptual analysis of law can be measured only by its contribution to attaining an "improved understanding of society," not by "its theoretical sociological fruitfulness."[72] It aspires to no immediate practical use for litigations. Rather, it seeks to draw the general socio-legal framework that any court decision sits in. Apropos of this point, Raz is well-known for his analysis of the concept of law and the practical authority that each instance of legal rule and court decision enjoys within the wider context of action theory and practical reasoning. For court decisions to have the force of authority, courts do not need to discuss in every instance of their decisions and justify this force in addition to discussing the substance of the case at their hands. The authority of court decisions picks up a social fact recognized by the socio-political context they lean against which found its nuanced articulation in Raz's ouvre.

Jules L. Coleman and Scott J. Shapiro are other prominent analytic jurisprudents who employ the method of conceptual analysis in their works and whom we can invoke in identifying the purpose of employing this method in law. None of them counts among the purposes of conceptual analysis the business of bringing light to how the courts act in deciding cases in the practice. Of the purposes Coleman specifies are to "uncover[…] necessary truths about our concept of law,"[73] "to rationalize the concept by articulating criteria for its use that enable us to be more precise,"[74] and in more precise terms to locate "how central moral and political argument is to retrieving the content of our concept of law."[75] He drives a wedge between the questions of interest to conceptual jurisprudence and the questions of interest to social and natural scientists.[76] By his lights, whereas legal practice may greatly benefit from the method of social and natural sciences in virtue of bringing out how judicial decision-making really works as in the case with Leiter's project,[77] the most profit-

72 Joseph **Raz**, "Authority, Law, and Morality", in Ethics in The Public Domain: Essays in The Morality of Law and Politics, Oxford University Press, New York 1996, p. 237.

73 Jules L. **Coleman**, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory, Oxford University Press, New York 2001, p. 173.

74 **Coleman**, The Practice of Principle, p. 178.

75 **Coleman**, The Practice of Principle, p. 198.

76 Jules L. **Coleman**, "Methodology", in The Oxford Handbook of Jurisprudence and Philosophy of Law, Ed by Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro, Oxford University Press, New York 2002, p. 347, 350.

77 **Coleman**, The Practice of Principle, p. 211.

able contribution of conceptual analysis to the legal practice can be helping us with understanding it "by providing an analysis of the concepts that are central to it"[78] such as the concepts of legal authority and normativity peculiar to it,[79] or distinction of validity from legality.[80] 39.Closely parallel to others above, Shapiro holds the "specific purpose"[81] of engaging in the conceptual analysis of law to be "elucidat[ing] the identity of the entity [law]."[82] He characterizes this undertaking as "an exercise in rational reconstruction"[83] of the "totality of our reactions"[84] about the law in the hope of laying bare some "obvious truths"[85] or "necessary truths about the law."[86] This is an elimination process in which "some of our views"[87] are left out of account and the ones "which we assign a higher priority"[88] are chalked up to the nature of law. From among the objects of analysis, Shapiro counts the function of basic legal institutions, the moving logic of legal norms and legal authority, the motivation behind law-complying behavior and the objectivity of legal knowledge.[89] At one point, he even concedes the essential bearing the conceptual analysis of law has on the adjudication of particular cases at the courts.[90] Yet he does not go so far as to include the business of the elucidation of how adjudication actually works into the province of this method. His acknowledgement of this relevance is confined to the dependence of finding out what the law is in a case on the "know[ledge of] certain philosophical truths about the nature of law in general"[91] that conceptual analysis sets out to bring out such as the rule-governed and authoritative functioning of law.

The conceptual jurisprudents I discussed here join each other in not identifying the aim of conceptual analysis of law to provide ready-to-use legal information to meet a practicing lawyer's day-to-day need of finding

78 **Coleman**, The Practice of Principle, p. 175.
79 **Coleman**, The Practice of Principle, p. 118-119.
80 **Coleman**, "Methodology", p. 350.
81 Scott **Shapiro**, Legality, The Belknap Press of Harvard University Press, Cambridge 2011, p. 13.
82 **Shapiro**, p. 13.
83 **Shapiro**, p. 17.
84 **Shapiro**, p. 17.
85 **Shapiro,** p. 16.
86 **Shapiro**, p. 31.
87 **Shapiro**, p. 17.
88 **Shapiro**, p. 17.
89 **Shapiro**, p. 15.
90 **Shapiro**, p. 31.
91 **Shapiro**, p. 25.

out the causal relationship holding between the facts of cases and the judges's possible response to them with a view to increase the predictability of the courts decisions. Rather, their common sight in employing this method is set on explaining the underlying working logic of the practical phenomenon of law we construct as part of our social world from a theoretical perspective. Whilst this aim comprises explaining the legal-practical framework any particular judicial decision builds on, it also reaches beyond the courtroom by making sense of the unique and privileged placement of law in our practical reasoning of daily lives vis-à-vis other normative sources of action such as morality.

B. Modality of Arguments: Necessity vs. Contingency

We have seen above that the main objective of analytic jurisprudence in employing the method of conceptual analysis is to arrive at some necessary truths about the nature of law. This was picked up by Leiter as a point of attack against which he argued that the method in its form employed by them is incapable of achieving this objective and can bring out only local, contingent truths in all likelihood because of its reliance on the theorist's intuitions. In metaphysical sense, the notion of necessity is a property attached to a proposition if the content of the proposition singles out a truth about the object of that proposition (1) that is always true irrespective of changing circumstances (2) that makes the object what it is and without which it would not be the same object the proposition singles out. A necessary property is intrinsic to the nature of the object concerned. By contrast, the notion of contingency refers to a property of the object non-essential to its nature and the object preserves its existence in its absence.

We are unable to see a discussion of the place of necessity claims in conceptual analysis of law in Hart's account of "the nature of law".[92] What we can do is to identify whether his well-known theses bear this property. Here we can see that only a few of those theses are marked by necessity against the majority of them carrying a contingent character. First to state, Hart makes a distinction between "the pre-legal" and "the legal"[93] organization of social order and he confines his account of law to the latter, "modern municipal legal system."[94] This confinement suggests that his conceptual theses apply only to the legal systems that emerged after a certain historical period and their truth is time-relative. This results in all of

92 **Hart**, p. 2.
93 **Hart**, p. 42, 117, 170.
94 **Hart**, p. 100.

his theses about the nature of law having a contingent character in advance. In the context of the positivist stance on the relationship between law and morality, Hart avoids the necessity of the separation thesis and recognizes a possible cooperation between law and morality in identifying the content of the rule of recognition contingent on social practices. [95] In another thesis of his, concerning the existence of a legal system, Hart frees individuals from adopting the internal point of view towards the primary rules of legal system and accommodates their compliance with this type of rules out of a plurality of motives or no motive at all.[96] Above all, notwithstanding Hart views his foremost thesis of the law as the union of primary secondary rules as the "most illuminating[…],"[97] "the most fruitful"[98] way to explain the nature of law, he refrains from committing himself to identify this union as a necessary property of the phenomenon of law. Rather, he embraces this view on account of its "great explanatory power"[99] concerning the central instances of modern legal system. He states this non-necessary status of this union in the following:

"We shall not indeed claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations - often of analogy of either form or content- to a central case."[100]

When it comes to Hart's claims of necessity on the nature of law, first we see him advancing negative necessity claims in refutation of Austin's account. Categorically, Hart rejects Austin's contentions seeking to account the various aspects of law around the simple ideas of order backed by threats, and habitual obedience toward unlimited sovereign because of their failure in explaining the modus operandi of today's municipal legal system.[101] From among his positive necessity claims, the necessity which was not sought in the adoption of the internal point of view by individuals towards the primary rules of obligation is sought in the adoption of the internal point of view by officials towards secondary rules of the conferral of power. Concerning these secondary rules with a special emphasis on

95 **Hart**, p. 204, 247, 269.
96 **Hart**, p. 116, 203.
97 **Hart**, p. 94.
98 **Hart**, p. 117.
99 **Hart**, p. 155.
100 **Hart**, p. 81.
101 **Hart**, p. 81.

the rule of recognition, Hart takes it to be a "logically a necessary condition" for the existence of a legal system that they "must be regarded from the internal point of view as a public, common standard of correct judicial decision."[102] Another thesis of his standing as a claim of necessity is his thesis of the minimum content of natural law comprising of "elementary truths concerning human beings, their natural environment, and aims" that any legal system "must contain if it is to be viable."[103]

Only in Hart's disciples can we come to see the discussion of the place of necessity claims in conceptual analysis. Raz regards such claims intrinsic and indispensable to this method, and argues that a successful theory in explaining what the law is must contain propositions "which are *necessarily* true."[104] Exemplifying this ambition, his authority thesis contends that a claim to the legitimacy of the authority exercised by a legal system in force is necessarily included to the law's nature.[105] Raz takes the construction of the necessity claims as the primal task of analytic legal philosophy:

"the assumption of universality according to which it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems. Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfil in some societies because of the special social, economic, or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. …. Legal philosophy has to be content with those few features which all legal systems necessarily possess.[106]

Bold as it is in its sharp universalist aspiration, this passage gives rise to a dissonance with Raz's take on the method of conceptual analysis. We saw above that in explaining this method Raz referred to "our own self-understanding. … part of the self-consciousness of our society"[107] that we

102 **Hart**, p. 116.
103 **Hart**, p. 193.
104 **Raz**, "Can There be a Theory of Law?", p. 17, (emphasis by Raz).
105 **Raz**, "Authority, Law, and Morality", p. 215.
106 Joseph **Raz**, "The Institutional Nature of Law", in The Authority of Law: Essays on Law and Morality, Oxford University Press, Oxford 2009, p. 104-105.
107 **Raz**, "Can There be a Theory of Law?", p. 31.

study when we study the nature of law. This seemed to run the risk that the study on the nature of law picked out our concept of law would result more in locally contingent truths rather than universally necessary ones.[108] How does Raz reconcile the place of the social basis of law with the universalist aspiration of conceptual analysis in the discussion of necessity?

At the bridge leading from the local to the universal Raz treads lightly. He avoids the temptation of early assumption that one's conceptual analysis on the nature of law attains universal truth on a platter and warns against making necessity claims on the nature of law can lead one to prefer the universal side over the local and vice versa.[109] He is of the view that a successful theory of law has both "parochial" and "universal" aspects.[110] He uses the term "the concept of law" in the context of the parochial aspect of law and the term "the nature of law" in the context of its universal aspect. The throughline of his chain of thought is that the cultural perceptions of a society inform its concept of law, and to the extent that cultures differ so can their concepts of law.[111] Even more, he thinks it is possible for some culture to have a legal system and yet lack the concept of law.[112] What this cultural dependency of the conceptual analysis of law turns on is one's inquiry into the nature of law being necessarily informed by his cultural concept of law and legal institutions. Raz concedes that on one level the fact that the difference in cultures ensues different concepts of law renders one's claims of conceptual necessity on the nature of law "only nominally universal"[113] and dashes one's universalist aspirations by having him face the plurality of parochial contingencies in approaching the nature of law.[114] Yet, this must not come to mean the recognition of the uniqueness of each and every instance of cultural concepts of law and the impossibility of theorizing on the nature of law beyond one's culture. From this level, he maintains that the nature of legal institutions and practices located in some society's concept of law are generally found in some other societies as well;[115] in this sense, the concept of law turns on being a "culture-transcending concept[…]"[116] that can pool up different cultural

108 **Raz**, "Can There be a Theory of Law?", p. 31-32.
109 **Raz**, "Can There be a Theory of Law?", p. 32.
110 **Raz**, "On the Nature of Law", p. 92.
111 **Raz**, "Can There be a Theory of Law?", p. 25, 32.
112 **Raz**, "Can There be a Theory of Law?", p. 38, 40-41.
113 **Raz**, "Can There be a Theory of Law?", p. 36.
114 **Raz**, "Can There be a Theory of Law?", p. 32.
115 **Raz**, "Can There be a Theory of Law?", p. 32.
116 **Raz**, "Can There be a Theory of Law?", p. 46.

concepts of law on the basis of "relations of similarity […] or of a common origin."[117] Availing himself of this route, he admits that his conceptual analyses proceed from the commonality of concepts of law "developed in the West in modern times."[118] While conceptual analysis takes its material from some cultural –or, cross-cultural– sources, its findings seek to be universal in truth. Raz phrases this point in the following:

"I have argued that while the concept of law is parochial, legal theory is not. Legal theory can only grow in cultures which have the concept of law. But its conclusions, if valid at all, apply to all legal systems, including those, and there are such, which obtain in societies which do not have the concept of law."[119]

Why not confine the validity of our conceptual findings on the nature of law to only our concept of law, i.e. our legal institutions and practices and recognize that beyond our cultural borders the nature of law can appear in a form different from ours? Why the need to settle for one and only nature of law true for every culture possible and not allow the natures of law? Raz's emphasis on the universal applicability of conceptual truths about law does not suggest that findings of conceptual analysis growing of one's culture are granted mind-independent and timeless validity. He suggests that a theorist's understanding of the concepts of law of other cultures can be accomplished only through relating their legal practices to his concept of law.[120] Besides, Raz makes explicit that conceptual analysis's aim to find out necessary truths about law does not imply "a craving for permanence"[121] of those truths. He concedes that conceptual truths of a society are subject to change as the legal practices undergo changes.[122] As different cultures can have different conceptual truths about law in the present time, conceptual truths of some culture are liable to change over time. As a case on his point, Raz marked the findings of his analyses of law to be pertaining to modern and Western legal practices. These suggest that the talk of necessary truths about the nature of law in conceptual analysis builds on time- and place-relative, contingent legal institutions and practices of societies. Coleman brings this contingent background Raz's chain of argumentation stands on more clearly into view:

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117 **Raz**, "Can There be a Theory of Law?", p. 32.
118 **Raz**, "Can There be a Theory of Law?", p. 33.
119 **Raz**, "Can There be a Theory of Law?", p. 41.
120 **Raz**, "On the Nature of Law", p. 96.
121 **Raz**, "On the Nature of Law", p. 99.
122 **Raz**, "Can There be a Theory of Law?", p. 25; **Raz**, "On the Nature of Law", p. 98-99.

"The descriptive project of jurisprudence is to identify the essential or necessary features of our concept of law. No serious analytic legal philosopher –positivist or interpretivist– believes that the prevailing concept of law is in any sense necessary: that no other concept is logically or otherwise possible. Nor do we believe that our concept of law can never be subject to revision. Quite the contrary. Technology may someday require us to revise our concept in any number of ways. Still, there is a difference between the claim that a particular concept is necessary and the claim that there are necessary features of an admittedly contingent concept."[123]

As can be seen from the foregoing discussion, conceptual analysts' ambition of establishing necessary truths about the nature of law is far from pretending to deliver ever-valid truths independent of sociological realities. In Hart's account, necessity claims about law were quite few and outnumbered by his claims of contingent truths. Raz and Coleman gave more voice to the contingent ground of their necessity claims. These theorists' self-aware theoretical activities show that Leiter's attribution to their undertakings in the discussion of necessity is misguided.

C. The Role of Intuitions: A Priori vs. A Posteriori

It is the place the conceptual jurisprudents give to their intuitions in finding out the necessary truths about law that picks up the most important part of Leiter's objections against employing conceptual analysis. He argued that since conceptual jurisprudents do not follow a posteriori method of naturalism in their inquiries, what they are left with in advancing arguments is nothing but to resort to their a priori intuitions which are presumed to be true without being warranted by empirical evidence. Surely, conceptual jurisprudents do not claim to be making empirical investigation in their inquiries. Yet, does their reliance on intuitions necessarily mean that they are far away from grasping the social reality of the concept they analyze?

Hart's epistemological commitment is surely to his intuitions about law as a social phenomenon. He makes clear that he bases his findings about the nature of law heavily on the folk conception of law:

123 Jules L. **Coleman**, "Incorporationism, Conventionality and The Practical Difference Thesis", Legal Theory, Vol. 4, 1998, p. 393, n. 24. On the revisability of conceptual theses, also see Engin **Arıkan**, Sert Pozitivizm, On İki Levha Yayıncılık, İstanbul 2019, p. 311.

"The starting-point for this clarificatory task is the widespread common knowledge of the salient features of a modern municipal legal system which … I attribute to any educated man."[124]

Hart regards the knowledge of some basic aspects of law[125] that legal practice operates on as an inseparable part of a successful education. The empirical knowledge of artefactually enacted legal rules in modern states implies the anti-essentialist character of Hart's theory that keeps him distant from solely a priori reasoning which divides the knowable world into worlds of form and ideas in Platonic sense or noumenal and phenomenal realms of existence in Kantian sense. What he is getting at by referring to the knowledge of a model educated man in theorizing about the concept of law is to suggest that the commonly shared understandings and commitments about legal practice and institutions in society constitute the empirical ground of his findings. Intuitions on the common understandings of people in making conceptual arguments have a role to play also in Hart's semantic investigations which plays a small part in his methodology. In his discussion of the internal point of view towards legal rules, he states that the common approach of people towards the existence of legal rules is marked by expressing the requirements of legal rules with the addition of modal verbs of 'should,' 'ought to' and 'must' which they do not use in the case of randomly convergent behavior.[126] The deference to the common understandings is at work also in his explication of the attitude of people in the use of the notion of legal obligation which is generally assumed to be leaning against the existence of a legal rule and of being obliged by brute force devoid of the support of a legal rule.

Beside drawing on the common usage of terms relevant to law, Hart can also be said to be engaging in empirical observation on the operation of legal systems and the functions of legal rules.[127] The facts of this empirical observation are the laws of a legal system. As the foremost example of this, his thesis on the legal system consisting of primary and secondary

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124 **Hart**, p. 240.

125 These are roughly the following truisms about law: "(i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones." **Hart**, p. 3.

126 **Hart**, p. 10.

127 Michael **Giudice**, Understanding the Nature of Law: A Case for Constructive Conceptual Explanation, Edward Elgar Publishing, Massachusetts 2015, p. 99.

rules in refutation of the Austinian unidimensional view of rules -as orders backed by threats- derives its inspiration from the constitutive features of legal rules with diverse functions to perform in the modern instances of legal system. Hart's intuition in introducing this thesis is that the functional pluralism observed in different legal rules reflects more accurately what is the case in the social reality of modern legal systems. This functional pluralism can be easily demonstrated via written legal sources such as constitution which features constitutional and statutory amendment provisions and statutes which include various types of procedural laws, and substantive laws that regulate non-official human behavior in diverse matters. The most controversial type of these rules in Hart's taxonomy, the rule of recognition that provides the ultimate criteria of validity of legal rules is not presented as a logical necessity that must be presumed in the chain of validity à la Kelsen; rather, his claim is that it refers to a social fact formed by the common attitudes of individuals. In Hart's words:

"In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."[128]

Raz turns out to be quite reticent in making clear remarks on the epistemology he follows. As seen earlier, he repeatedly states the main point of conceptual analysis lies in capturing the self-understanding of a society concerning the existence and operation of law. Though this leaves us with the expectation that he should have been explicit about evidentiary support to his conceptual claims about society's self-understanding, Raz remains almost always silent. On the only occasion where he seems to reject the solely a priori inventions of the theorist concerning the legal phenomena:

"The notion of law as designating a type of social institution is not, however, part of the scholarly apparatus of any learned discipline. It is not a concept introduced by academics to help with explaining some social phenomena. Rather it is a concept entrenched in our society's self-understanding. It is a common concept in our society and one which is not the preserve of any specialized discipline. It is used by each and all of us to mark a social institution with which we are all, in various ways, and to

128 **Hart**, p. 110.

various degrees, familiar. … *The identification of a certain social institution as law is not introduced by sociologists, political scientists, or some other academics as part of their study of society.* It is part of the self-consciousness of our society to see certain institutions as legal."[129]

Though this passage is far off from providing a clear view of Raz's standpoint on the evidentiary source of his conceptual arguments, he seems to suggest that his investigation into the nature of law is external to himself and the way the concept of law is understood by the society provides him with the empirical ground for his theses. At any rate, it would be wrong to conclude that Raz relies on a priori reasoning; rather, charitable reading of his works dictates that his conceptual arguments are "best understood as claims of a posteriori necessary truth."[130] As for Coleman, he lays emphasis on the a posteriori character of the conceptual theorist's intuitions by making room for possible cooperations with social sciences. Arguing against the view that conceptual analysis of law proceeds through a priori reasoning oriented to identify a priori truths, he holds that this method is anchored in the empirical realm. The phenomenon the concept designates is the point of departure in this investigation and theorist outsources himself through other more empirical research fields.[131] He states that:

"Economists, historians, sociologists, political scientists, and anthropologists all study law—both from the internal and from external points of view. … By attending to these inquiries outside of or beyond philosophy, we can obtain a rich and valuable picture of the forms of governance and organization that have been characterized as constituting law in different times and places, and under very different circumstances. … In the end the purposes of philosophical inquiry need not, and probably will not, fully coincide with all of the purposes of the social sciences; but a satisfactory philosophical account should be continuous with these more naturalistic inquiries."[132]

Leiter's discrediting of conceptual analysis with the charge of its reliance on a priori intuitions is unfounded. In the examples of Hart, Raz and Coleman, the empirical ground of their conceptual arguments about the nature of law is found in the legal practices of the society they inexist. They are not outsiders to the way law operates in their society. All being

129 **Raz**, "Can There be a Theory of Law?", p. 31, (emphasis added).
130 **Giudice**, p. 102.
131 **Coleman**, The Practice of Principle, p. 179.
132 **Coleman**, The Practice of Principle, pp. 200-201.

trained lawyers-turned-philosophers, they have professionally acquired knowledge of the basics of law and are sufficiently aware of how legal practices are sustained in their society. In pursuing answers to the questions about the nature of law, the intuitions they rely on are sociological intuitions they develop being lawyers and members of the society of which they analyze the concept of law. Working through this kind of intuitions in advancing conceptual arguments is suited enough to the legal-theoretical questions they set out to answer. Their questions are of little concern for someone who is out for up-to-date knowledge over some substantial-practical legal dispute. Leiter's suggestion of the naturalization of law finds its main use in adjudication that deals with such questions brought to a court's attention. However, the questions conceptual jurisprudents raise about the nature of law such as constitutive conditions of a legal system, normativity, authority, validity, legal obligation, connection between law and morality etc. have more to do with the socio-historical reality of law, notwithstanding this meaning no denial of these questions having some remote connection to legal practice at all. Leiter's suggestion of the a posteriori method of naturalism calls for reliance on hard evidence to establish social scientific truths on these questions. Recourse to this method in answering them has the possibility of enriching our legal-theoretical knowledge it must prove. Its findings can bring support or disprove the findings of the conceptual analyses of law and conceptual jurisprudents can make good use of hard-empirical findings in revising their arguments. Besides, their acknowledgement of possible changes in social practices leading to a change in their conceptual arguments counts in favor of their leaning more towards a posteriori theory construction. Absent the use of naturalist methodology with the traditional questions of the conceptual analysis of law, the sociological intuitions of conceptual jurisprudents remain to provide a softer a posteriori basis for their undertakings for the time being.

CONCLUSION

Located properly, Leiter's project is particularly well suited to serve the consequentialist needs of legal practice and in this respect is worthy of appreciation. It addresses the empirically more observable aspect of law and can produce practical knowledge in the service of lawyers to respond to their clients more efficiently by increasing the chance of predictability of court decisions. His effort to bring social science-oriented methodology to law is not unprecedented, though. It stands next to the "Law and Society Movement" and "The Law and Social Science Research Project" that

emerged in the middle of the 20th century. The scholars involved in the Law and Society Movement sought to find out what law does rather than what law ought to do and claimed that law, legal institutions and legal practices could be explained only by observation as objects of social sciences.[133] The latter project conducted empirical research on the tax system, commercial arbitration and jury system. Especially, the studies regarding the jury system were credited for inspiring a new tradition of interdisciplinary research in law and social science. Also, the division of labor employed on that project formed a paradigm for future projects involving the cooperation of lawyers with social scientists.[134] By his naturalist project, Leiter has laid a robust philosophical foundation for such research programs and paves the way for establishing causal and effect type norms at work in the legal practice.

But Leiter's defamation of conceptual analysis in general suggests that he aims more than the naturalization of understanding the adjudication. As noted above, he is optimistic that even the questions about the nature of law may be settled via empirical sciences. As of theoretical matter, it does not seem to be a tenable project in which the questions conceptual jurisprudents have sought to answer are asked to laymen or even to some extent to judges and draw conclusions about the nature of law. Those questions require one to have encompassing professional-theoretical knowledge across the jurisprudential board and are not likely to be settled through opinion polls. As Giudice righteously warns, Leiter should not expect anyone to abandon the conceptual method of general jurisprudence on such a priori ground without demonstrating the productivity of his proposal.[135] Even if he succeeds in such a project to a certain degree, the result would be a particular jurisprudence and he would face the same charges he directs at conceptual analysis of being a banal descriptive sociology of the Gallup-poll variety[136] devoid of timeless truths.[137] As Coleman puts it, it

133 Susan S. **Silbey**, "Law and Society Movement", Legal Systems of The World: A Political Social and Cultural Encyclopedia, Ed. By Herbert M. Kritzer, Vol. II, 2002, Santa Barbara, California: ABC-CLIO, p. 860.

134 Rita J. **Simon**/James P. **Lynch**, "The Sociology of Law: Where We Have Been and Where We Might Be Going", Law & Society Review, Vol. 23, No. 5, 1989, p. 828.

135 **Giudice**, p. 59.

136 **Leiter,** "Beyond the Hart/Dworkin Debate", p. 177.

137 Brian **Leiter**/Ronald J. **Allen**, "Naturalized Epistemology and the Law of Evidence", Virginia Law Review, Vol. 87, No. 8, 2001, p. 1496.

is doubtful that social scientific methods can deliver the goods in the way natural science has.[138]

By presenting the views of contemporary conceptual jurisprudents, I intended to give a more accurate description of conceptual analysis employed in legal theory than Leiter's tainted construal of it. What those views reveal is that conceptual analysis is neither a dead end nor out of fashion unlike what Leiter argues for. An important point to emphasize about the method is that it should be evaluated under the light of the theses asserted by its adherents, not by exaggerations they do not pursue. Misreading the views of theoretical opponents is not an unknown practice in legal theory in a bid to push one's own agenda.[139] But this should not conceal the obvious facts about the views of their opponent's methodology.

First, analytic jurisprudents seek to explain the nature of law from a theoretical point of view using philosophical tools available. They neither claim to conduct social science research nor despise empirical methods. Rather, they are open to making use of their hard evidenced findings to bolster their conceptual arguments. Their inquiries about law are prompted by theoretical curiosity to help us better understand the normative phenomenon of law with no expectation of immediate practical payoff. It raises questions which can hardly find room to be discussed in courtrooms in their routine activities of judging cases.

As to the modality of their arguments, the susceptibility of the method to the changes social practices undergo proves false that analytic jurisprudents seek a priori truths about law and related concepts. An accurate description of the enterprise requires us to recognize that they pursue to uncover the necessary truths supervenient upon contingent social facts. As we have seen above, a great majority of their theses are best understood as a posteriori necessary truths upon contingent grounds.

It must be noted that the findings of conceptual analysis with these characteristics can neither be proven strongly nor be refuted easily as in the case of the findings of natural sciences. Some conceptual arguments may explain some part of our social experience with a greater explanatory capacity, while others can succeed in this only to a lesser extent. They address the faculty of common sense of civic people with a fair knowledge on the working logic of law in modern societies. The conceptual arguments stand as proposals open to both confirmation and refutation by other

138 **Coleman,** "Methodology", p. 350.

139 It is known that Hart dedicated the *Postscript* mostly to restress and clarify his original methodological commitments against Dworkin's misinformed criticisms.

theorists. Their truth hinges on their capacity to survive in the face of counter conceptual arguments in scholarly discussions that many theses of Austin failed to come to this day.

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