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CHALLENGES THE AGENDA OF CONCEPTUAL ANALYSIS OF THE CONCEPT OF LAW AND THE NATURE OF LAW

Chauhan Sunita Ramkunwar Singh[1*]

Corresponding Author:-

Abstract:-

Although these are all valuable cautions to recognize before plunging headlong into the enterprise of searching for the necessary and sufficient conditions of the concept of law, they are no more than cautions. All of these cautions presuppose contested questions about the nature of concepts and about how we might go about recognizing and explaining them, and while it is important to recognize the con-tested nature of some of the assumptions, it is nevertheless far from unreasonable to engage in conceptual analysis of the concept of law on the assumption that there is a concept to be analyzed, and that the analysis will yield a set of necessary and sufficient conditions for application of the concept. This too may not be so, and it is possible that law is such a diverse, loose, and shifting array of phenomena that there is no interesting nature of law itself, and no interesting concept of law. Nevertheless I assume not only that there are concepts, and not only that they can be analyzed in terms of their necessary or essential properties, but also that there is a concept of law and that the concept of law is one of the concepts that can be so analyzed. This does not follow necessarily from the previous assumptions. It is possible that there are concepts susceptible to philosophical analysis but that the concept of law is not one of them. But I assume the contrary, and thus assume the possibility and even the value of conceptual analysis of the concept of law.

INTRODUCTION

It is a commonplace among scholars of general jurisprudence that a central goal perhaps *the* central goal or perhaps even the only goal of general jurisprudence is to use the tools of philosophical analysis as a way of helping us to understand the nature of law. And although the question of what it is to understand some phenomenon is invariably a subjective and psychological determination, the object of that understanding the nature of law is not necessarily either subjective or psycho-logical. Rather, the assumption in much contemporary writing on general jurisprudence is that the nature of the phenomenon of law has an observer-independent or theorist-independent existence, and that the task of the theorist is to discover and explain what that nature is. There is much that is controversial embedded in the foregoing paragraph, and I will take note of some of these controversies presently. My principal goal in this paper, however, is to address the question of what it is for some phenomenon law, in particular to have a nature, and what it is for a theorist to try to ascertain it. Or does the nature of something consist, as some contemporary legal philosophers maintain, of the subset of the set of necessary or essential properties that are also in some way important, or that might be valuable to our understanding or does it, as I shall argue here, possibly consist of those properties that are important but not necessary. Such a conclusion might be philosophically unsatisfying, especially if we simply take an inquiry into the nature of something as necessarily being an inquiry into the concept of something, and then take an inquiry into the concept of something as necessarily being a search for necessary and sufficient conditions. But if the enterprise of jurisprudence is conceived to be about understanding law in its most theoretical way rather than necessarily and exclusively providing a useful application of certain traditional philosophical tools, then the philosophical itch created by probabilistic and empirical rather than logical conclusions perhaps ought still to be a concern, but perhaps not so much as to be fatal to the jurisprudential enterprise.

Some Preliminary Assumptions

Although this paper is an inquiry into one aspect of jurisprudential methodology, I will nevertheless bracket several other important and interesting methodological questions. Thus, I will not address the questions whether there are concepts at all, what the relationship is between concepts and what they are concepts of, whether conceptual analysis is possible, and, if it is, whether it is a task best undertaken with non-empirical philosophical tools as opposed to, say, social scientific ones. There are rich debates in the literature on all of these questions, both outside of jurisprudence and within. And I do not deny that the resolution of these debates is highly pertinent to the specific question I address here. Nevertheless, I propose to focus more narrowly on the question of the relationship between conceptual necessity and jurisprudential inquiry, leaving issues about the implications of answers to that question for other occasions, and leaving it to the reader to evaluate the assumptions that may be implicit in my approach and my conclusions. I will assume as well that law has a nature that it would be valuable to identify and understand. Finally, I assume that the analysis of the concept of law can be a descriptive one. There is, of course, an active debate about the possibility of a descriptive in the sense of nonmorally-normative but not necessarily in the sense of non-normative analysis of the concept of law,

On Concepts and Necessity

With these assumptions in hand, we can turn to the central issue: in engaging in the task of understanding the nature of law, we can rephrase the question in terms of whether it is vital that we identify the properties that are both necessary and important .In order to answer this question, we need to step back and look to the purpose or function of conceptual analysis of the concept of law. Much then turns on what it is for some phenomenon to have a nature at all. The standard view is that no property can be part of the nature of some object of study unless that property is an essential feature of the object of study. To say that having feathers and a backbone is part of the nature of being a bird is to say that nothing can be a bird if it lacks feathers and lacks a backbone, and thus the proper-ties of having feathers and a backbone are necessary conditions of both birds and the concept of bird, in a way that the property of the capacity for flight is not. Although most birds can fly, and although having feathers is apparently necessary for flight among vertebrates that are not bats, there are some feathered vertebrates that cannot fly penguins and ostriches, for example and thus the standard view is that because flight is not necessary for birdness, the capacity for flight is not part of the nature of the concept of birds and not part of the nature of birds.

Birds are natural kinds, and it is more controversial whether the same analysis does or could apply to artifacts or to other social constructions. But it is at least plausible that it could. Perhaps usability for exchange is a necessary condition of the concept of money, for example, just as having pages may be essential to the concept of book. It is true that socially constructed concepts can change over time and vary across cultures, but that does not mean that there could not be a snapshot of some culture's concept of something socially constructed at some time. The concept of book might require pictures as well as pages in some cultures, just as the concept of money at some future time might not require usability for exchange, but our concept of book now requires pages and does not require pictures, and the possibility of that conclusion varying with time or place is not inconsistent with its soundness at this time in this place. That the concept of law might be different in other cultures, that it might be different in this culture at other times, and that it

The Varieties of Concepts

That there is a concept of law that we can describe, and perhaps describe without making morally normative commitments, does not necessarily mean that we can describe it by recourse to necessary and sufficient conditions. Therefore, there may be no more of a set of necessary and sufficient conditions for the proper grasp and use of the concept of law than there are necessary and sufficient conditions for the proper grasp and use of the concept of game, to use

Wittgenstein's example, or the concept of art, which is a common candidate for a family resemblance concept. That law is a family resemblance or cluster concept presupposes that there *are* family resemblance concepts, which remains contested. Moreover, it is possible that there are family resemblance concepts but that law is not among them, assuming that not *all* concepts are family resemblance concepts, which is also contested.

Necessity and Importance

That the concept of law may have necessary and sufficient conditions for its proper application does not entail the conclusion that philosophical analysis is the appropriate way of uncovering them. One or another variety of the challenge from naturalism would suggest that even if there are concepts with necessary and sufficient conditions for their proper application, the way to discover those necessary and sufficient conditions is by empirical research and not by philosophical speculation. Given that few legal theorists maintain that the necessary properties of the concept of law are necessary a priori or necessary by definition, however, it is not clear that the naturalist challenge is a fundamental rather than a methodological one. Most of the theorists who offer analyses of the concept of law acknowledge that they are describing empirical and contingent features of the world in this case the features that explain how people in some culture use the concept of law. Whether such description is better done by perceptive philosophers or instead by empirical social scientists is an interesting and important question, but there may be less disagreement than is commonly supposed between naturalists and non-naturalists except about the resources that should be used to learn about the concept of law that is used in this or that culture at this or that time.

Julie Dickson, have emphasized that of the set of necessary truths about the concept of law, the primary focus of general jurisprudence is and should be on the subset of those necessary truths consisting of the necessary truths that are in some way important, or whose identification and explanation will assist in our understanding. This conclusion some would say concession, although I would not has led some theorists to conclude that the enterprise of conceptual analysis of the concept of law is inevitably normative, but as long as we recognize, with Hart, that not all ought's are moral ought's, then we can acknowledge that selecting the important necessary truths from out of all the necessary truths requires choice and evaluation without committing to the view that moral choice or moral evaluation is necessarily part of so-called descriptive general jurisprudence.

On the Importance of the Contingent

But now we have reached the heart of the matter. If trying to understand the nature of law. Requires that we identify the necessary truths that are also important, then what about those important truths that are not necessary? And I do not refer here to those important truths that are simply contingent. There is nothing oxymoronic in the idea of a contingent necessary truth, for that which is necessary now and here could have been otherwise, and still may be otherwise. Rather, the question is whether there are things. Of course if we understand and define the nature of something as being necessarily about the concept of that thing, and understand the concept of something as necessarily being about necessary or essential properties, then there is no question to be asked But might there instead be another understanding of the nature of something that could also be useful? And to entertain this possibility, it will be useful to return to birds. More particularly, we should ask whether there is not some-thing about flying that will help us to understand the nature of birds. It is true that penguins and emus are birds and do not fly, and that bats fly but are not birds, so flying is neither a necessary nor a sufficient condition for birdness. But it is surely of great interest that almost all birds fly and almost all non-bird vertebrates do not fly, and thus if we think about why, how, and when birds fly we are likely to learn something of great interest about birds. Moreover, what we learn may increase knowledge for its own sake, but may also have practical importance for understanding birds and understanding the physics of flight.

Flying is thus a property highly concentrated in birds but neither exclusive nor necessary for birds, yet still of great importance. But to fail to note or consider the height of these peoples is to miss something of importance and interest. And so too with the whiteness of swans or the promptness of German trains, properties that are again not exclusive to these objects or institutions, but whose probabilistic concentration makes them of substantial importance to us and it is *our* understanding that is at issue, just as it is *our* concept of law that we are considering when we look for the necessary properties of that concept. If I am right about the foregoing examples, then it is plausible to suppose that much the same might apply to law. If there are properties that are highly concentrated in law, that probabilistically are far more likely to be concentrated in law than in other institutions even if their presence is neither necessary nor sufficient for law, would it not be a mistake to ignore their importance?

Coercion and the Nature of Law

With respect to law, it may well be that coercion is the most important of these non-necessary but probabilistically concentrated properties. It is true, as numerous theorists, including Hart but also before and after him, have observed, that coercion is not a necessary condition for law. If we had a group of officials who non-coercively accepted the ultimate rule of recognition, if we had a population that similarly accepted the same ultimate rule of recognition, and if pursuant to that ultimate rule of recognition we had a system of primary and secondary rules, we would have law and a legal system even with no coercion whatsoever.

As Hart and countless others have recognized, however, it is likely that no such legal system exists now, and none may have existed even in the past. All or at least almost all actual legal systems have their coercive elements, and thus it is a

salient feature of real legal systems that they coerce at least some subjects into compliance with the system's laws. Indeed, even though Hart is undoubtedly correct in identifying the figure of the puzzled man who wishes simply to know what the law is so he can comply, and then in claiming that at least some such subjects exist in most real legal systems, it is an open question as to just how many such people there are in any legal system. Yet although we are uncertain, it is plausible to suppose that puzzled men are far outnumbered by bad men, which explains why coercion is an omnipresent even if contingent and even if non-necessary feature of all or virtually all actual legal systems.

Important Characteristics of the Nature of Law

Thus, if we take nature to refer to salient and important characteristics rather than strictly essential or necessary ones, or if we substitute a word like character for nature, it is highly plausible that coercion is as much part of the actual character of law as flying is of birds. To say this is to remain agnostic on questions relating to concepts or conceptual analysis, but only to conclude that there may be highly important and probabilistically concentrated features of some phenomenon that are not strictly necessary to the phenomenon, that may not be part of the concept of the phenomenon, but which may nonetheless be important to understanding the phenomenon as it exists in the world, and whose importance may well be illuminated by the use of broad theoretical, including philosophical, tools.

It is important to emphasize that I am using coercion here only as an example. Although I do believe that coercion is, post-Hart, an unfortunately neglected feature of law, supporting that claim is not my agenda here. Attention to the importance of pervasive and concentrated but nonessential features of law may well support an increased focus on the role of sanctions and coercion, but even if it does not, there may be other such pervasive and concentrated but nonessential features whose importance should be noticed and analyzed with philosophical tools. Thus, although coercion may well be a good example of the consequences of my methodological claim, nothing in that claim depends on the ultimate soundness of coercion as an example. That said, it is possible, as a claim about the history of ideas, that Austin's insistence on the central role of sanctions and coercion has played a causal role in generating some of the contemporary methodological stances. Once Hart was taken to have demonstrated that sanctions could not be essential to legality and legal obligation, there remained the question of how something so obviously important to how law is actually lived, experienced, and structured in the legal systems we know could not be part of the theoretical explanation for the nature of law. One answer to this question, therefore, could be that the theoretical explanation of the nature of law was and this is an answer plainly suggested by the title of Hart's book and by the philosophical methodological controversies of the day an inquiry into the essential or necessary features of the concept of law and not an inquiry into what is important about law as it is actually experienced. Moreover, if part of the increasingly dominant positivist project was to distinguish law from other normative rule systems etiquette, for example then it was seen to be necessary to search for the features of law without which it would not be law at all, and which in addition were not present in seemingly similar non-law institutions and phenomena. Hence, there arose the focus on the necessary and sufficient conditions for the concept of law, as opposed to the jurisprudential examination on the important features of actual legal systems, and thus a decreased focus on coercion. Nevertheless, for whatever reason, the enterprise of jurisprudence has increasingly avoided attention to that which is important but not necessary, and it is by no means clear that this development has been entirely or even substantially for the good.

The Boundaries of Jurisprudence

I cannot emphasize strongly enough what I am not claiming here. Although a number of prominent legal theorists have questioned the value of some are all of the debates in contemporary jurisprudence, I do not join them. Thus it is not my goal here to challenge the usefulness of conceptual analysis of the concept of law as a worthy jurisprudential exercise. What I do challenge is the view that conceptual analysis of the concept of law and a conceptual analysis seeking to explain with philosophical tools the necessary or essential features of law is the *only* worthy jurisprudential enterprise. And thus I offer a challenge to any definition of jurisprudence that would exclude from the field anything other than a search for those necessary features. I question not conceptual analysis's importance, but only its hegemony.

Conclusion

Thus, the goal of this paper is not, to repeat, to challenge the agenda of conceptual analysis of the concept of law, but only to challenge its jurisprudential hegemony. That which is contingent, non-essential, and even particular may be vitally important, and in need of empirical and philosophical illumination. If the non-essential is excluded from the "province of jurisprudence," we may hinder rather than help the effort to understand the nature of law, and thus frustrate the very goal that conceptual analysis is designed to serve. "What law is" is an important area of inquiry, but so too is "What law is like." The two are not the same, and there is no reason why the two cannot co-exist within the province of jurisprudence.

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