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The Legitimacy of Judicial Decision-Making: Towards Empirical Scrutiny of Theories of Adjudication

ARTICLE

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ABSTRACT

Jurisprudential accounts of judicial decision-making encompass a conceptual account of how judges decide cases and a normative account of how judges should decide cases. This paper explores the conceptual and normative dimensions of theories of adjudication and argues that these theories must be held to empirical scrutiny. The conceptual dimension of theories of adjudication clarifies what is necessarily true about judicial decision-making. The normative dimension of theories of adjudication explains how judges legitimately exercise judicial power through adjudication. In this paper, it is argued that empirical insights may shed light on the plausibility of the legitimacy claims of theories of adjudication, given the fact that these normative claims build on the descriptive dimension of these theories. Hart and Dworkin's theories of adjudication are discussed to illustrate a narrow and wide conception of legitimacy in the context of judicial decision-making. The last part of this paper explores how empirical research based on interviews may be helpful to assess the conceptual and normative claims of Hart and Dworkin's theories of adjudication.

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1. INTRODUCTION

Theories of adjudication in jurisprudence have two, contrasting, aspects in that they combine both a descriptive and a normative dimension. On the one hand, theories of adjudication aim to explain how judges *decide* concrete cases. On the other hand, theories of adjudication seek to explain how judges *should decide* cases. Most theories of adjudication are united in their rejection of empirical insights on judicial decision-making. These theories make conceptual and normative claims about judicial decision-making, but hold that empirical insights should be considered irrelevant. Shielding conceptual claims about law from empirical scrutiny is increasingly considered problematic in the current debate on the methodology of jurisprudence. Therefore, this paper explores how theories of adjudication might be subject to empirical scrutiny and considers what a more empirically informed approach to these theories entails for their conceptual account of judicial decision-making and their normative account of the legitimacy conditions of adjudication.

This paper is structured as follows. In Section 2, I will argue that theories of adjudication are best understood to encompass a descriptive and a normative dimension. The descriptive dimension of these theories provides conceptual claims about judicial decision-making. The normative dimension of theories of adjudication aims to explain how judges should exercise their power through judicial decision-making. In Section 3, I will maintain that the concept of legitimacy provides a helpful lens through which to understand theories of adjudication, and in particular their normative dimension. The concept of legitimacy has proven to provide a helpful lens through which to distinguish between different theories of jurisprudence, and thus may also help to make sense of the differences in their normative account of judicial decision-making.[1] A distinction will be made between theories that rely on a narrow conception of legitimacy and those that rely on a wide conception of legitimacy. Hart's theory of adjudication will be explored as a good example of an influential and intriguing theory that implicitly relies on a narrow conception of legitimacy, while Dworkin's theory of adjudication provides a helpful illustration of an extensively discussed theory that assumes a wide conception of legitimacy. In Section 4, I will maintain that the descriptive dimension of theories of adjudication has lexical priority over its normative dimension. This entails that Hart's and Dworkin's theories of adjudication explain how judges should decide cases by highlighting how judicial decision-making implicitly or unconsciously works in practice. Although a description of the practice of judicial decision-making forms an important part of a theory of adjudication, empirical insights into the actual practice of judicial decision-making are generally considered irrelevant. I will argue that this view is unconvincing. Theories of adjudication rely on descriptive claims that may be proven deficient or faulty on the basis of empirical inquiries. A normative account of the legitimacy conditions of adjudication must also build on these empirically informed descriptive claims. The distinction between narrow and wide conceptions of legitimacy can be used to assess the plausibility of the normative dimension of theories of adjudication. In Section 5, I will explore how these theories may be held to empirical scrutiny. I will also propose a possible way forward in future research to critically assess theories of adjudication on the basis of interviews.

2. THEORIES OF ADJUDICATION

Jurisprudential accounts of adjudication are concerned with an explanation of the nature of judicial decision-making and encompass a descriptive and normative dimension.[2] The *descriptive* dimension of theories of adjudication is concerned with how judges decide concrete cases. Take, for example, the legalist view that judges are very restricted in their modes of legal reasoning when deciding cases. Richard Posner describes the legalist approach to judicial decision-making by judges as follows,

> they do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside of

1 See D Priel, 'The Place of Legitimacy in Legal Theory' (2011) 57 McGill Law Journal 1. Priel uses the concept of legitimacy to distinguish between different theories of law.

2 W Lucy, 'Adjudication' in J Coleman, K Himma and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 206. See also, P Brady, 'Towards a theory of adjudication: some issues of method and principle' (DPhil thesis, University of Oxford 2014) 6–8 and B Leiter, 'Heidegger and the Theory of Adjudication' (1996) 106 Yale Law Journal 253, 255–256.

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> conventional legal texts – mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) – for guidance in new cases.[3]

Posner has argued that a legalist view on judicial decision-making is implausible from a descriptive point of view, in particular in the context of the American legal system.[4] Thus, theories of adjudication aim to make sense of how judicial decision-making actually works in practice.

Most legal theorists defend more general descriptive claims on judicial decision-making and aim to arrive at conceptual claims about adjudication.[5] Conceptual claims about law seek to uncover what is necessarily true about law by illuminating and clarifying the beliefs and perceptions of citizens and officials who are affected by law.[6] Cotterrell captures the aim of theories in jurisprudence when he argues that these theories should be 'a *projection up* from law as regulatory practice and experience into any realms of theory that can support that practice or make sense of that experience'.[7] Conceptual claims about adjudication aim to clarify what is necessarily true about judicial decision-making. This implies that these conceptual claims should illuminate and clarify the beliefs and perceptions of judges on adjudication. For example, judges may not always be fully aware of how they actually decide concrete cases and judges may not always have a comprehensive understanding of the modes of legal reasoning which they employ. Thus, conceptual claims about adjudication aim to uncover what is necessarily true for adjudication by illuminating and clarifying the beliefs and perceptions of judges.

Jurisprudential accounts of judicial decision-making also have a *normative* dimension. The normative dimension of theories of adjudication explains how judges should decide cases. It should be noted that some legal theorists deny that judicial decision-making can be justified, and thus be legitimate. Lucy's distinction between heretical and orthodox theories of adjudication can be used to illustrate this point.[8] Heretical theories of adjudication deny that a judicial decision can be justified, based on the law or on any other grounds.[9] A judicial decision is always arbitrary because legal norms may be interpreted in a myriad of different ways. Moreover, when judges are forced to make choices, no convincing foundation can be used to determine which choice is best.[10] Judicial decision-making can, therefore, only be approached from an ideological viewpoint: judicial decisions mirror the personal ideological beliefs that judges have. This implies that heretical theories of adjudication deny that judicial decision-making can ever be legitimate. However, orthodox theories of adjudication offer a more plausible account of judicial decision-making.[11] An orthodox theory of adjudication entails that judges must reach their decision by relying as much as possible on the laws of a legal system. Or, as Lucy explains how judges reach their decision,

> they decide cases *relatively* constrained by standards *relatively* determinative of the dispute before them. 'Relatively' because the orthodox do not believe that adjudicators have no choices open to them when making decisions but rather that, albeit in different ways and for different reasons, adjudicative choices are justifiable in principle and often in practice.[12]

3 R Posner, *How Judges Think* (Harvard University Press 2008) 7–8.

4 ibid 19–56.

5 Brady (n 2) 4–5 and W Lucy, *Understanding and Explaining Adjudication* (Oxford University Press 1999) 48–49.

6 M Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Edward Elgar 2015) 139–144. This does not mean that legal theorists merely seek to clarify general intuitions about law. Dickson rightly points out that the beliefs and perceptions of citizens and officials are more complex and ambiguous than generally held intuitions. Intuitions may provide some insight into law, but these intuitions will only be a stepping stone towards an understanding of the beliefs and perceptions of citizens and officials. See J Dickson, *Elucidating Law* (Oxford University Press 2022) 113–114.

7 R Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2018) 55.

8 Lucy (n 5).

9 For examples of heretical theories of adjudication, see Lucy (n 5) 7–8.

10 ibid 11.

11 See Posner (n 3).

12 Lucy (n 5) 46.

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In this view, the legitimacy of judicial decision-making stems from the fact that judges apply valid legal norms in concrete cases. A judicial decision may not always follow merely from the application of laws to the facts of a particular case, but the choices that judges make can often be justified.

It is important to highlight that legal theorists disagree on the nature of normative claims in jurisprudential theories, such as, for example, theories of adjudication. Dickson's distinction between indirect evaluation and direct evaluation in jurisprudence helps to clarify this point.[13] *Indirect evaluation* entails that a legal theorist evaluates what is important to citizens and officials who are affected by law. Moreover, legal theorists should make these beliefs and perceptions of citizens and officials explicit and clarify them in a coherent and convincing theory. In this view, a legal theorist should make 'evaluative judgments regarding what is important and significant about law which to take account of, and attempt to explain, the way in which it is viewed by those living under it'.[14] Indirect evaluative claims can be formulated as 'X is important'.[15] *Direct evaluation* requires legal theorists to morally evaluate the beliefs and attitudes of citizens and officials. In this view, a legal theorist should consider which theory of adjudication is the most morally appealing. This would also imply that a legal theorist should assign a moral function to law and judicial decision-making. Direct evaluative claims take the form of 'X is good'.[16] In my view, Dickson rightly argues that jurisprudential theories entail indirect evaluative claims, but not all theories are committed to direct evaluative claims. Theories of adjudication rely on indirect evaluative claims, but not all theories are also committed to presenting the most morally appealing account of judicial decision-making.[17] In this contribution I will focus on indirect evaluative claims about judicial decision-making and disregard claims that directly concern the moral function of law and judicial decision-making.[18]

3. NARROW AND WIDE CONCEPTIONS OF LEGITIMACY

It is not common practice for legal theorists to refer to the concept of legitimacy to provide a clear account of the normative dimension of judicial decision-making.[19] In my view, the concept of legitimacy provides a helpful lens through which to distinguish between different normative accounts of adjudication. Beetham's distinction between the legal, moral and social dimensions of legitimacy is helpful in this context.[20] Most theories of adjudication rely on a narrow legal conception of legitimacy. Based on these theories, judicial decision-making is legitimate when judicial decisions are in accordance with the law. Or, as Beetham explains, 'power is legitimate where its acquisition and exercise conform to established law'.[21] Some theories are informed by a wide conception of legitimacy and incorporate a moral or social dimension. A moral conception of legitimacy requires the exercise of power to be also in accordance with moral principles. These moral principles are universal in nature. Beetham explains that any rational individual should accept these moral principles:

> power is legitimate where the rules governing it are justifiable according to rationally defensible normative principles. And as with any moral principles, these embody a universalising claim; it is not the principles that happen to pertain in a given society

13 J Dickson, *Evaluation and Legal Theory* (Hart 2001).

14 ibid 43.

15 ibid 53.

16 ibid 52.

17 I do not wish to evaluate Dickson's claim here that jurisprudential theories should not necessarily be engaged in making direct evaluative claims. For an insightful overview of the extensive scholarly debate on the methodology of jurisprudence on this point, see J Pojanowski, 'Reevaluating Legal Theory' (2021) 130 Yale Law Journal 1288.

18 Another reason why theories of adjudication should not solely be seen as directly evaluative theories can be found in Dickson's most recent work. Dickson provides compelling arguments why direct evaluative claims must be grounded in indirect evaluative claims. See Dickson (n 6) 155–160. I will return to one of these arguments in Section 4.

19 Exceptions are, for example, W Edmundson, 'Why Legal Theory is Political Philosophy' (2013) 19 Legal Theory 331 and Priel (n 1).

20 D Beetham, *The Legitimation of Power* (Palgrave 1991).

21 ibid 4.

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> that are sufficient, but those that any rational person, upon considered and unbiased reflection, would have to agree to.[22]

The concept of legitimacy may also have a social dimension. Social legitimacy demands that the exercise of power is actually deemed acceptable by the individuals that are affected by it.[23] This means that social legitimacy depends on the beliefs and perceptions of individuals.

Hart's theory of adjudication is a good illustration of an influential and much discussed theory that implicitly relies on a narrow conception of legitimacy.[24] Hart maintains that law is best seen as a system of primary and secondary rules. Primary rules are duty-imposing rules. Secondary rules are power-conferring rules that spell out how valid primary rules can be identified, how these primary rules can be amended, and how conflicts can be adjudicated. Judges are part of a legal system where secondary rules of adjudication spell out which adjudicative institutions are deemed legitimate. Or, as Hart as explains,

> [a]t any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system.[25]

This entails that the legitimacy of judges to take legally binding decisions follows from the law itself.

Hart accepts that, in some exceptional cases, judges cannot base their decisions on the laws of a particular legal system because they may be confronted with vague or indeterminate primary rules. This would mean that judicial decision-making cannot always be in accordance with the law. Take, for example, Hart's well known illustration: 'no vehicles in the park'.[26] In many cases, it will be clear when to apply this rule. Cars are vehicles and therefore, on the basis of this rule, cars should not be in the park. However, in some cases it is unclear whether a rule should be applied. Or, as Hart explains, '[t]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out'.[27] Hart maintains that judges must exercise discretion in these penumbral cases.[28] Judges must choose which non-legal norms they will apply, such as, for example moral principles. Nevertheless, when exercising discretion, judges are free to apply norms beyond existing positive law.[29] Hart maintains that it is inherent to primary rules that they are vague or indeterminate in some instances. Therefore, judges legitimately exercise discretion in penumbral cases because these cases are inevitable when primary rules are applied in practice.

Dworkin's theory of adjudication is a good illustration of an influential and much discussed account of judicial decision-making that implicitly depends on a wide conception of legitimacy. Dworkin integrates a moral dimension in his theory of adjudication.[30] In his theory, Dworkin maintains that judges should aim to reach a decision that best fits the laws of a legal system, but which also takes into account moral principles that justify these laws. This means that judicial decisions cannot be deemed legitimate merely because they are in accordance with the laws of a legal system. Or, as he emphasises, '[l]aw is not exhausted by any catalogue of rules and principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives.'[31] Dworkin argues that

22 ibid 5.

23 ibid 6.

24 HLA Hart, *The Concept of Law* (Oxford University Press 1994).

25 ibid 145.

26 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 607-608.

27 ibid 607.

28 Hart (n 24) 127–128.

29 ibid 252–254.

30 R Dworkin, *Law's Empire* (Hart 1986).

31 ibid 413.

judicial decisions must also be justified in light of the morality of a community. In this view, a judge 'constructs his overall theory of the present law so that it reflects, so far as possible, coherent principles of fairness, substantive justice, and procedural due process, and reflects these combined in the right relation'.[32] Therefore, Dworkin maintains that inherent to judicial decision-making are two dimensions: fit and justification.[33] On the one hand, judges must reach a decision that best fits the laws of a legal system. On the other hand, judges are obligated to reach a decision that conforms to the moral principles that justify the laws of a legal system.

Judges will be most mindful of the dimensions of fit and justification in cases where disagreement exists about the grounds of law that determine what legal norms should be taken into account. Dworkin calls this theoretical disagreement.[34] He emphasises that in these cases, lawyers 'disagree on what the law really is, on the question of racial segregation or industrial accidents, for example, even when they agree about what statutes have been enacted and what legal officials have said and thought in the past'.[35] Disagreement may also arise on whether a particular legal norm exists on the basis of a statute, judicial decision or any other source of positive law. Dworkin calls this empirical disagreement.[36] When judges are confronted with empirical disagreement they will determine as a matter of fact what legal rules exist. By identifying valid legal norms judges may resolve this type of disagreement. However, theoretical disagreement cannot be resolved by identifying valid legal norms because this type of disagreement concerns the grounds of law as such. When judges are confronted with theoretical disagreement, they must interpret legal practice and put it in its best light. This interpretation explains which decision best fits the existing laws of a legal system and accounts for the moral principles that justify these laws.[37] Dworkin argues that judges will always be able to reach a single right decision in a particular case, even in cases of theoretical disagreement.[38] Lawyers may disagree on what a right or wrong decision is in a particular case, but they can always objectively distinguish between right or wrong decisions based on sound arguments. Therefore, Dworkin maintains that we can objectively determine what moral arguments should prevail in a particular case, even when theoretical disagreement has arisen.

4. THEORIES OF ADJUDICATION: EMPIRICALLY INERT?

Theories of adjudication provide different accounts of the legitimacy conditions of adjudication. Some theories rely on a narrow conception of legitimacy and maintain that the legitimacy of judicial decisions is grounded in the law itself. Other theories defend a wide conception of legitimacy and incorporate a moral or social dimension to make sense of the legitimacy conditions of judicial decision-making. In this section, I will defend the claim that the normative dimension of a theory of adjudication is rooted in its conceptual account of judicial decision-making. This means that an explanation of how judges *should decide* cases necessarily builds on an account of how judges *decide* concrete cases. In this section, I will also argue that theories of adjudication should not be considered empirically inert. Empirical data give insight into the soundness of conceptual claims about law. For example, empirical insights may point out deficiencies in the descriptive dimension of a theory of adjudication. These empirical insights may also shed light on the plausibility of the normative dimension of a theory of adjudication, because this normative dimension necessarily builds on a conceptual account of judicial decision-making.

32 ibid 405.

33 ibid 255.

34 ibid 4–5.

35 ibid 5.

36 ibid 4–5.

37 ibid 90. Dworkin emphasizes that his account of judicial decision-making does not make a sharp distinction between easy cases where judges simply apply the law and hard cases where theoretical disagreements arise. Easy cases do not generate disagreements that warrant careful and explicit consideration of the dimensions of fit and justification. See Dworkin (n 30) 266; 353–354.

38 ibid 266–275. See also R Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 Philosophy and Public Affairs 87.

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4.1 DESCRIPTIVE AND NORMATIVE DIMENSIONS OF THEORIES OF ADJUDICATION

Theories of adjudication encompass a conceptual account of how judges decide concrete cases and a normative account of the legitimacy conditions of judicial decision-making. It is important to stress that, for many theories of adjudication, including Hart's and Dworkin's theories, these dimensions are interrelated in that the descriptive dimension has lexical priority over the normative dimension.[39] This entails that a normative account of how judges legitimately exercise their power through adjudication necessarily builds upon a conceptual description of judicial decision-making. Or, as Leiter highlights, 'The normative ambition of a theory of adjudication is that judges ought to do "more explicitly and more consciously" what it is the theory claims (as a descriptive matter) they largely do already'.[40] This means that the conception of legitimacy on which theories of adjudication rely, builds on its descriptive account of how judges decide concrete cases. Thus, a theory of adjudication explains how judges should decide cases in light of what judges sometimes implicitly or unconsciously do in practice.

Examples from Hart's and Dworkin's theories of adjudication may illustrate this point. Hart maintains that in penumbral cases judges are free to apply norms beyond existing positive law. They must exercise their discretion in these rare cases because judges are confronted with primary rules that are vague or indeterminate.[41] Hart's normative claim about the discretion of judges in penumbral cases builds on his conceptual distinction between the core and penumbra of rules. In his view, all legal rules necessarily have a core that is clear. Primary rules often fully determine how judges decide concrete cases because these primary rules have a 'core of settled meaning'.[42] Only in penumbral cases, where primary rules are vague or indeterminate, are judges unable to rely on the 'core of settled meaning' of these rules. A similar example can be given for Dworkin's theory of adjudication. Dworkin introduces the god-like judge Hercules to explain how a judge with super-human abilities should decide cases.[43] Judge Hercules is able to consider all possible arguments that determine which decision best fits the laws of a legal system and best reflects the moral principles that justify these laws. Judges must strive to decide concrete cases like judge Hercules. Dworkin accepts that judges do not possess the god-like qualities of judge Hercules. Nonetheless, how judge Hercules decides cases illustrates the process of judicial decision-making that judges should rely on when deciding concrete cases. Or, as Dworkin explains, 'Hercules is useful to us just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be'.[44]

It could be argued that it is a mistake to maintain that the descriptive dimension of theories of adjudication has lexical priority over its normative dimension. A normative account of how judges should decide cases should not necessarily build upon an accurate description of judicial decision-making. Critics of this lexical approach may argue that the normative dimension of a theory of adjudication is not constrained by a descriptive account of judicial decision-making. Instead, the normative dimension of a theory of adjudication has lexical priority over its descriptive dimension. In this view, the goal of a jurisprudential account of judicial decision-making is not to make the beliefs and perceptions of judges on judicial decision-making explicit and to clarify what is necessarily true in their views, but to fundamentally revise these beliefs and perceptions so that a more accurate understanding of judicial decision-making may be reached.[45] However, Dickson rightly argues that this revisionist approach should be considered problematic. Firstly, this revisionist approach in jurisprudence runs the risk of evaluating the law

39 Leiter (n 2) 255–256.

40 ibid 258.

41 Hart (n 24) 127–128.

42 ibid 144.

43 Dworkin (n 30) 239–254. Leiter also points out that the figure of judge Hercules should be understood in light of the descriptive dimension of Dworkin's theory of adjudication. See Leiter (n 2) 255.

44 Dworkin (n 30) 265. See also R Dworkin, *Justice in Robes* (Harvard University Press 2006) 53–57.

45 On this revisionist approach in jurisprudence, see Dickson (n 6) 122–125.

without reflecting on which aspects of law are in need of moral justification.[46] Secondly, this revisionist approach in jurisprudence may fundamentally depart from how citizens and officials view the law.[47] This would imply that a normative account of judicial decision-making could show that the actual practice of judicial decision-making is systematically wrong and that how officials understand the actual practice of judicial decision-making is wholly incorrect.

It could also be argued that a sharp distinction should be made between facts and values in theories of adjudication. This would entail that a descriptive account of adjudication should be sharply distinguished from a normative justification of judicial decision-making. Joseph Raz's work could be read in this way.[48] Raz distinguishes between a conceptual theory of law, an account of law's essential features, and a normative theory of adjudication, explaining the legitimacy conditions under which judges should exercise their power. Raz's distinction would imply that his theory of adjudication does not rely on any conceptual claims about law.[49] However, Raz's work illustrates that a sharp distinction between fact and value cannot be made. His conceptual theory of law centres on the sources thesis: the idea that the existence of law is solely dependent on social facts and not on moral reasoning.[50] His theory of adjudication in his later work focuses on why judges should be seen as moral reasoners. They are obligated to apply moral principles to decide concrete cases.[51] In a detailed critique of Raz's work, Martin shows that this commits Raz to an incoherent position.[52] On the one hand, Raz defends the sources thesis but, on the other hand, Raz also maintains that judges should rely on moral reasoning to decide concrete cases. This illustrates that no sharp distinction can be made between facts and values in jurisprudential accounts of adjudication.

4.2 THE RELEVANCE OF EMPIRICAL INSIGHTS FOR THEORIES OF ADJUDICATION

Most theories of adjudication are generally not empirically informed, despite the fact that jurisprudential accounts of judicial decision-making aim to rely on an accurate description of the practice of judicial decision-making. Empirical claims in the field of jurisprudence, including jurisprudential accounts of judicial decision-making, are often considered unimportant. These claims can provide insights into how law functions in practice, but empirical insights do not necessarily provide conceptual clarity on the nature of judicial decision-making. For example, empirical studies on how judges view their role in a legal system, how they reach their judgments, or what reasoning they employ to justify their decisions may provide valuable insights into the practice of judicial decision-making in a particular context, but these insights are only of importance in a jurisprudential account of judicial decision-making when they are true in every legal system and at every point in time. Nevertheless, theories in jurisprudence are not systematically studied from an empirical perspective.[53]

However, the view that empirical insights are irrelevant for theories of adjudication is unconvincing because this does not take seriously that law is socially constructed. In light of recent sustained criticisms of the methodology of jurisprudence, legal theorists increasingly accept that the nature of law is socially constructed.[54] Although some legal theorists deny that law in every aspect is socially constructed, they have explored more in depth how empirical

46 ibid 157.

47 ibid 158.

48 M Martin, *Judging Positivism* (Hart 2014).

49 Martin rightly points out that Raz does not seem to rely on a sharp distinction between facts and values in his earlier work. Raz abandons this position in his later work. See Martin (n 48) 6.

50 J Raz, *The Authority of Law* (Oxford University Press 2009) 47.

51 J Raz, *Ethics in the Public Domain* (Oxford University Press 1994) 340.

52 Martin (n 48) 58–60.

53 On the general view that empirical insights are irrelevant for jurisprudence, see, for example, K Himma, 'Conceptual jurisprudence: An introduction to conceptual analysis and methodology in legal theory' (2015) 26 REVUS: Journal for Constitutional Theory and Philosophy of Law 65 and B Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017) 62–65.

54 B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007) and Giudice (n 6).

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insights can play a role in theorizing law.[55] Following Giudice, it is important to distinguish between three distinct ways in which law can be socially constructed.[56] Firstly, law may be socially constructed in that the laws and institutions of a particular legal system change over time as the beliefs and perceptions of individuals in a society change. This means that the beliefs and perceptions of individuals influence laws and institutions. Secondly, law may be socially constructed in the sense that a particular group of individuals conceptualize law in a particular way. For example, the beliefs and perceptions that judges have on judicial decision-making may have changed over time. This means that the concept of law that judges rely on has changed. Thirdly, the nature of law may be socially constructed. In this view, what distinguishes law from other social practices is time and place dependent because the nature of law is dependent on the beliefs and perceptions of individuals in a given society.

Two objections can be raised against the relevance of empirical insights for conceptual claims about law. Both objections ultimately aim to shield conceptual claims from empirical scrutiny.[57] Firstly, legal theorists who accept that law is a social construction have argued that empirical insights are only relevant when they build on a robust philosophical account of law that precedes empirical investigation. This implies that conceptual claims about law necessarily precede empirical insights about law. However, this begs the question as to whether law is socially constructed. Or, as Priel notes,

> it is difficult to see why law is singled out for conceptual elucidation while leaving unstudied countless other social constructions. Even worse, if that is the case, it is difficult to see what such an elucidation could yield. If law is a social construction like any other, then its nature too should be studied empirically.[58]

Thus the view that law is a social construction cannot be made coherent with the claim that a jurisprudential theory necessarily precedes empirical investigation.

Secondly, legal theorists who accept that law is a social construction have argued that conceptual claims aim to clarify the nature of law as a social construction. This would entail that empirical insights about law are irrelevant because legal theorists aim to reach conceptual clarity on the nature of law as a social construction as such, and not on how it is actually constructed in practice. However, if it is a conceptual truth that law is socially constructed, it is unclear why scholars have not set out to describe the nature of other social constructions. Priel highlights this when he considers: 'if law is a social construction like other social constructions, then whatever is said to be necessarily true of law in general must be necessarily true of all social constructions'.[59] Therefore, legal theorists who defend conceptual claims about law can only make conceptual claims about social constructions in general. Other conceptual claims about law and judicial decision-making must be empirically informed.

5. EMPIRICAL SCRUTINY OF THEORIES OF ADJUDICATION: A POSSIBLE WAY FORWARD

Theories of adjudication should not be shielded from empirical scrutiny. What does this entail for these theories? In my view, theories of adjudication are best seen as potentially helpful tools to make sense of judicial decision-making in a particular context. Whether a theory of adjudication provides a sound descriptive account of judicial decision-making cannot depend solely on conceptual arguments. Empirical data must be used to critically assess the conceptual claims of a theory of adjudication. A theory of adjudication is deficient when it is only able to make sense of some aspects of the practice of judicial decision-making and faulty when the theory is not able to clarify the beliefs and perceptions of judges at all. This means there is only room for conceptual claims about judicial decision-making in a qualified sense. Legal

55 For an insightful and detailed argument on the role of social construction in jurisprudence that does not accept that law in every aspect is socially constructed, see M Giudice, *Social Construction of Law* (Edward Elgar 2020).

56 ibid 5.

57 D Priel, 'Law as a Social Construction and Conceptual Legal Theory' (2019) 38 Law and Philosophy 267.

58 ibid 276.

59 ibid 276–277.

theorists can defend conceptual claims about adjudication and systematize these claims into general theories. Nevertheless, conceptual claims about judicial decision-making should not be shielded from empirical scrutiny in light of the fact that theories of adjudication may be proven deficient or faulty in a particular context.

Empirical insights are also of importance for the normative dimension of theories of adjudication. Theories of adjudication defend a particular normative account of how judges should decide cases by building on a set of conceptual claims. Whether a narrow legal conception of legitimacy or a wide conception of legitimacy provides a sound justification of the legitimate exercise of power by judges, depends on the descriptive dimension of a theory of adjudication. Therefore, empirical data may also indicate whether a theory of adjudication provides a plausible normative account of the legitimacy conditions of adjudication. For example, empirical data may reveal that judges do not view legitimacy in a strictly legal sense, but that they predominantly consider judicial decision-making to have a moral or social dimension. This would entail a strong argument that theories of adjudication that rely on a legal conception of the concept of legitimacy provide an implausible account of judicial decision-making in this context.[60] Nevertheless, it should be stressed that empirical insights do not provide a direct critique of the normative dimension of judicial decision-making. These empirical insights help to assess the conceptual claims of theories of adjudication. However, given the fact that the normative dimension of theories of adjudication rely on conceptual claims, empirical insights may shed light on the plausibility of this dimension in a particular context.

In the literature, theories in the field of jurisprudence, such as, for example, theories of adjudication, are generally not scrutinized on the basis of empirical insights.[61] Although some empirical research has been conducted on legal theories, no systematic empirical studies have been conducted on jurisprudential accounts of adjudication.[62] Before I propose a possible way forward to empirically assess the claims of theories of adjudication, it is important to consider what empirical insights may be relevant. In his detailed survey of empirical research on judicial decision-making, Barry distinguishes between three types: archival studies, experimental studies and role analysis studies.[63] Archival studies investigate data derived from judicial decisions and seek to establish correlations between independent variables and aspects of these decisions. For example, archival studies may establish a correlation between the age and experience of judges and the outcome of a concrete case.[64] Experimental studies seek to study the behaviour of participants who are asked to perform tasks in a controlled environment that are related to judicial decision-making. These experiments may, for example, show what systematic cognitive errors affect the decision-making of judges.[65] Role analysis studies aim to understand judicial decision-making by deriving empirical data from judges themselves. Barry notes that the beliefs and perceptions of judges may be obtained from extra-legal sources, such as, for example, speeches and scholarly writings. Insights into the beliefs and perceptions of judges may also be derived from participant observation and interviews.[66]

In my view, role analysis studies provide a possible way forward to empirically assess theories of adjudication. Theories of adjudication aim to illuminate and clarify the beliefs and perceptions of judges on adjudication and show what is necessarily true about judicial decision-making in these understandings. Given the fact that theories of adjudication make descriptive claims about what is necessarily true in the beliefs and perceptions of judges on

60 Although I will not pursue this line of reasoning here, it could be argued that empirical insights are not relevant for direct evaluative claims about adjudication because these claims entail a moral justification of judicial decision-making as such. In this contribution, however, I focus solely on indirect evaluative claims of theories of adjudication and thus will not address this point here.

61 D Galligan, 'Legal Theory and Empirical Research' in P Cane and H Kritzer (eds) *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

62 Recent examples of studies that empirically assess jurisprudential theories are D Howarth and S Stark, 'H.L.A. Hart's secondary rules: What do 'officials' really think?' (2018) 14 International Journal of Law in Context 61, and R Donelson and I Hannikainen, 'Fuller and the folk: The inner morality of law revisited' in T Lombrozo, J Knobe and S Nichols (eds) *Oxford studies in experimental philosophy* (Oxford University Press 2020).

63 B Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge 2021) 5–8.

64 ibid 132–138.

65 ibid 12ff.

66 ibid 7–8.

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adjudication, role analysis studies may help provide a critical test for these conceptual claims. In order to illustrate how role analysis methods can be used to conduct such a critical test, I will explore how interviews may help to gain insights into the beliefs and perceptions of judges that are relevant to Hart's and Dworkin's theories of adjudication. It should be stressed that this is one possible way forward in future research to use role analysis methods to empirically study the beliefs and perceptions of judges. Other role analysis methods, such as, for example, participant observation and other types of empirical methods, such as archival studies and experimental studies, may also be used in future research to subject theories of adjudication to empirical scrutiny.

Several conceptual claims can be derived from Hart's theory of adjudication that may be subject to empirical scrutiny on the basis of interviews. Three claims centre on the role of secondary rules of adjudication. Firstly, Hart's theory of adjudication rests on the assumption that, in practice, authoritative standards exist that constitute the authority of the institutions that are entitled to adjudicate cases. This means that, in practice, judges must be able to identify what secondary rules of adjudication they must abide by when deciding cases. Empirical data may show that judges describe different or possibly conflicting rules of adjudication, or that judges believe that, in practice, no general rules of adjudication exist that legitimize the authority of courts. Judges may claim that the authority to adjudicate cases does not solely follow from secondary rules. Secondly, Hart's theory of adjudication claims that judges must accept the standards of conduct that secondary rules of adjudication impose. This means that judges cannot merely obey these secondary rules, but they must accept these rules as authoritative standards of conduct. However, judges may accept these secondary rules for a myriad of reasons. Some judges may indeed accept secondary rules of adjudication, but empirical data may reveal that general acceptance does not exist in practice. Thirdly, Hart's theory of adjudication claims that most judges accept secondary rules of adjudication as authoritative standards. This means that the majority of judges in a legal system must accept these secondary rules. Empirical findings may indicate that this majority does not exist. In practice, some judges may deny that secondary rules of adjudication exist or may not always accept the standards of conduct that these secondary rules impose. This would further complicate the assumption that the legitimacy of judicial decision-making is grounded in the general adherence to secondary rules of adjudication.

Hart's theory of adjudication also entails a claim on rules that judges apply when deciding cases. Hart assumes that primary rules are vague or indeterminate in penumbral cases and that judges must exercise discretion when confronted with vague or indeterminate primary rules. Empirical data may show that judges are more often confronted with penumbral cases and that judges maintain that they do not have discretion. For example, judges may assert that they have an obligation to rely on a particular type of non-legal norms, such as moral principles, to reach a decision in penumbral cases. This would suggest that a more plausible normative account of judicial decision-making should rely on a wide conception of legitimacy.

A number of descriptive claims can be distilled from Dworkin's theory of adjudication that centres on the role of moral reasoning in judicial decision-making. Firstly, Dworkin's theory assumes that judges rely on moral reasoning to justify their decisions. That is to say that not only do judges rely on the laws of a legal system to reach a decision, but they also consider whether a decision is morally justified. Empirical data may demonstrate that not all judges agree that moral reasoning plays an important role in judicial decision-making. This would dispute Dworkin's claim that all judges take into account moral arguments when deciding concrete cases. Secondly, Dworkin presupposes that moral reasoning is pervasive in legal practice, i.e. judges rely, either implicitly or explicitly, on moral arguments in every concrete case. However, in practice judges might consider moral reasoning only to be relevant in a particular area of the law or they might maintain that moral arguments are restricted to particular kinds of disputes. This would entail that a moral dimension of judicial decision-making is not always relevant in practice. Thirdly, Dworkin's theory of adjudication relies on cases of theoretical disagreement to substantiate its claim that moral reasoning plays an essential role in judicial decision-making. Empirical findings, however, may demonstrate that theoretical disagreements are not widespread in legal practice. This would suggest that a more plausible normative account of judicial decision-making should either rely on a narrow conception of legitimacy or a wide conception that is focused on how the beliefs and perceptions of individuals justify the exercise

of power by judges. Dworkin's theory of adjudication also claims that judges are able to reach one single right decision in each particular case, even in cases of theoretical disagreement. Nonetheless, when judges are being interviewed they may claim that they are not always able to reach only one right answer when deciding concrete cases. Judges may argue that, in some cases, not one single right answer exists. This would cast doubt on Dworkin's claim that judges can always objectively determine what the right decision is, even in cases where theoretical disagreement has arisen.

6. CONCLUSION

In this paper, I have argued that empirical insights are essential for a sound jurisprudential account of judicial decision-making. I have explored how existing theories of adjudication may be subject to empirical scrutiny and what this empirical scrutiny entails for the descriptive and normative dimensions of these theories. I have defended two further claims. Firstly, I have argued that a distinction between narrow and wide conceptions of legitimacy helps us to further understand the normative dimension of theories of adjudication. Secondly, I have supported the view that the descriptive dimensions of these theories should not be shielded from empirical scrutiny. Theories of adjudication should be subjected to empirical scrutiny to assess the explanatory scope and force of these theories. Empirical data can also provide insight into the plausibility of the normative dimension of these theories, given the fact that a normative account of adjudication must build on a sound descriptive account of the practice of judicial decision-making. This means that empirical data provide insight into how plausible a particular conception of legitimacy, whether narrow or wide, is.

In the last section of this paper, I have examined how future research may scrutinize Hart's and Dworkin's theories of adjudication on the basis of empirical insights. I have argued that interviews may help to generate relevant empirical data on the beliefs and perceptions of judges, because theories of adjudication aim to make sense of judicial decision-making from the point of view of the judge. Future research may show whether other empirical research on judicial decision-making, such as archival studies and experimental studies, may also yield relevant empirical data. In this contribution, I have identified aspects of Hart's and Dworkin's theories of adjudication that may be critically assessed on the basis of empirical data derived from interviews. Future empirical research that goes into the beliefs and perceptions of judges will lead to theories of adjudication that can withstand empirical scrutiny.

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The author has no competing interests to declare.

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