Chapter 10 Conceiving general jurisprudence

Thus far the discussion has being concentrated only at Habermas and Hart while disregarding most other approaches. Therefore it is necessary to explain how the argument laid out so far features within the wider jurisprudential literature dealing with law from a transnational perspective. Since the way I approached Hart's theory by exposing an unsolved puzzle within Habermas's critical reconstructive theory and the reading I presented of Hart's theory are both unorthodox I will start with laying out the tradition of legal positivism or analytical jurisprudence.[25] First I will ask how it is possible to make sense of analytical jurisprudence as a tradition with a specific history. I will then show that the two philosophers exerting the greatest influence on the discussions on legal positivism after Hart, Joseph Raz and Ronald Dworkin, both neglect transnational and empirical aspects and shaped the tradition in specific way. Afterwards, two recent extensions of this tradition will be examined that both aim at accounting for a wider range of phenomena while including empirical dimensions, namely Brian Tamanaha's socio-realistic legal theory and William Twining general jurisprudence. I will however argue that both fail to reestablish general jurisprudence as a philosophical discipline and incidentally defend the hermeneutic approach pursued throughout this book.

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[25] As the object of inquiry is the tradition of legal positivism following Hart the terms "analytical jurisprudence" and "legal positivism" can be used synonymously.

1. The tradition of analytical jurisprudence

Textbooks, anthologies or general overviews on jurisprudence or legal philosophy usually proclaim that jurisprudence has been single handedly revitalized by Hart comparable to the renaissance of political philosophy brought about by Rawls. Along this line Leslie Green presents an overview on general jurisprudence that concentrates on the discussions in the tradition of analytical jurisprudence including Ronald Dworkin and John Finnis as dissenting views.[26] Thus Green uses "legal philosophy" and "analytical jurisprudence" synonymously with "general jurisprudence." Even though "jurisprudence" is qualified in Greens overview as "general" he takes it for granted that it comprises only a specific, namely the analytical, tradition and that certain issues, in particular international law and sociological questions, are not part of it at all. The question hence is how analytical jurisprudence became the core of general jurisprudence and what it amounts to when conceiving the discussions following Hart as a specific tradition. As an explanation for using analytical jurisprudence synonymously with general jurisprudence one could refer to the philosophical landscape Hart encountered when he started to work in Oxford. At this time, analytical philosophy or ordinary language philosophy was considered to be the only way to avoid philosophical confusions and to enable progress just like in any other science.[27] Thus the term "analytical jurisprudence" referred not only to a specific method but indicated at the

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[26] See Leslie Green, "General Jurisprudence: A 25th Anniversary Essay," *Oxford Journal of Legal Studies* 4 (2005): 565-580.

[27] Nicola Lacey gives a lively account of the post-war intellectual atmosphere in Oxford and the dominance of ordinary language philosophy at this time. Nicola Lacey, *A Life of H.L.A. Hart*, 136-151.

same time that jurisprudence is serious philosophy. However the specific appeal analytical philosophy had for Hart is only a historical explanation for the origin of the term analytical jurisprudence but not a reason why analytical jurisprudence is truly general. Moreover the conviction that systematic insights can only be gained from authors who belong to the analytical tradition has since Hart's early years in Oxford deteriorated, in any case not been reformulated in programmatic way.[28] Thus identifying general jurisprudence with analytical jurisprudence is rather a symptom of an unsatisfactory state of philosophy at a certain time in Oxford than a sound basis to start from.

At this point one might consider following the path of much analytic philosophy by pursuing a course of study without reflecting much on the origin of the tradition, the history of thought or its relation to other approaches. Yet this solution is not readily available for jurisprudence. For the subject matter of jurisprudence is unlike the basic structure of language or the mind itself unquestionably a historical product. Human beings as a kind all share the experience of using a language and being conscious. However they do not necessarily share the concept of law as an institutionalized system. Law is not like language and thought given with human beings or a development buried in pre-historical times but a social invention that has in form of the early Epos even a

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[28] The only exception is Brian Leiter who claims programmatically that jurisprudence has to be naturalized just as epistemology has been naturalized by W.V.O. Quine. However he thereby takes Quine's epistemology as being the foundation for all areas of philosophy, though fails to justify this extension of Quine's philosophy of science into a Hegelian master frame. Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," *American Journal of Jurisprudence* 48 (2003): 17-51.

written history. Moreover if societies do have this concept they typically also have some form of theorization related to it. Thus even if there was an analytical method suitable for dealing with problems related to mind and language one would still need an additional argument why the very same method could be applied to a very different subject area. In any case, the differences in the subject have to be somehow accounted for in the method. Thus when analyzing legal systems questions regarding the history and theories associated with them cannot be dismissed as easily so that the question how finally a tradition is formed appears to quite naturally.

Yet these considerations might still be countered with a factual rebuttal. One might hold that whatever the reasons are for the emergence of a tradition the debate ensuing to Hart has shown as *a matter of fact* that this tradition is general jurisprudence is at its best. It is the "only game in town." This claim is seldom made openly but rather implied when discussions on general jurisprudence are limited to the positivist tradition (including their apostates). It would be pointless to complain about ignorance since the establishment of a tradition over an extended period of time cannot be changed after the fact. It is however fruitful to bring out the significance of the positivist tradition by showing why certain possible ways have not been pursued. This way the tradition need no longer be conceived as the natural outcome of the best arguments available in all possible worlds but becomes self conscious as a tradition. In this respect intellectual traditions are like the histories of nations. At first sight a nation might appear to have been always around and naturally rose to power or organized into a state. Only by considering the whole range of circumstances and other possible outcomes the history of a nation appears as a contingent development. Likewise intellectual traditions can appear as specific constructions if alternative paths are presented. In the second part it

has been shown how Hart's theory can be reconstructed to be more responsive to historical and contemporary legal phenomena. In particular I argued that it is possible to discern legal rules at the level of primary rules, that institutionalization brings about dialectic, that legal systems can either rely on conditional or unconditional force, are typically linked via linkage rules and establish together the dominant legal discourse. The tradition of analytical jurisprudence however has taken, though starting from Hart as well, a very different cause. Analyzing some features of the works of Joseph Raz and Ronald Dworkin will show how the tradition has been established and how the approach taken here might serve to bring out its potential for general jurisprudence.

2. The influence of Joseph Raz and Ronald Dworkin

Joseph Raz is arguably the most influential legal philosopher in the positivist tradition after Hart and has influenced discussions on authority, legal reasoning and interpretation. Yet the question here is only how Raz has defined his field of inquiry and thereby shaped the tradition of general jurisprudence. Starting with his first book Raz conflates the concept of law with the concept of a legal system and explicitly restricts his analysis to municipal legal systems. However he does not justify his decision to concentrate on legal systems but merely states that "when faced with borderline cases [e.g. international law as Raz explains in a footnote] it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to the typical cases, and leave it at that."[29] In a later article he briefly explains it is an "assumption" of analytical jurisprudence that is only concerned with municipal legal systems. "I think that we feel that legal systems not only happen to be the most important institutionalized system

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[29] Joseph Raz, *Practical Reasons and Norms*, 150.

governing human society, but that that is part of their nature. We would regard an institutionalized system as a legal one only if it is necessarily in some respect the most important institutionalized system which can exist in that society."[30] The statement is not supported by any further argument or historical evidence. A "feeling" "we" allegedly share is however a shallow base to ground the nature of something on especially as Raz admits there can be various institutionalized systems in a society that can vary in importance. Thus Raz relies on practical and historical knowledge without providing any means for assessing or questioning it. This point can be supported by another observation. Raz frequently refers to "modern" legal systems,[31] however does not explain when modern legal systems came into existence (in Roman times, in the Middle Ages, during the enlightenment or even later?), or how they evolved in "modern" times. Most recently Raz restricts the philosophical inquiry to the "modern, capitalist, or postindustrial concept of law,"[32] which is however not helpful for conceiving of a specific time when the concept of law has come into existence; if it pertains only to the "postindustrial age" is might even be a concept to come in the future. When mentioning American and French law as typical examples for legal systems[33] it is telling that Raz glosses over the fact that France was in modern times not only nation state but a Colonial Power as well and is nowadays highly integrated into the European Union and thus cannot serve as a handy example for a state that is sufficiently characterized as a

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[30] Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press 1979), 116.

[31] Ibid., 107.

[32] *On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 33.

[33] Ibid., 78.

municipal legal system. Indeed the assumption that the state is the only and most important legal institution whereas international law can be neglected as unimportant corresponds in political terms the perception of American isolationists.[34] However the reason for Raz's restriction is not political but grounded in a specific philosophical attitude.

Raz holds that philosophy is concerned with the "necessary and universal" whereas research in the "contingent and particular" is the task of sociology.[35] Hence his aim is to explain the nature of law in the form of essential properties of law "throughout its history."[36] In this regard Raz sticks to Hart's program of conceptual analysis, though focuses it in a specific way. Whereas Hart refuses to give a definition of law but shows how certain distinctions and characteristics help to understand diverse situations Raz's aim is to derive a "complete understanding" of the concept. This consists in "knowing and understanding all the necessary features of its object."[37] Thus Raz consciously departs from the loose contact to the historical dimension Hart still remained and concentrates instead on the pure conceptual level. The relevant point for characterizing Raz's approach can be clarified by analyzing how he conceives the relation between the understanding the concept and its historical manifestations in different societies throughout history. Raz argues that not all societies have legal systems and even if do

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[34] For an historical overview on isolationism see Ronald E. Powaski, *Toward an Entangling Alliance: American Isolationism, Internationalism, and Europe, 1901-1950* (New York : Greenwood Press, 1991), 1-26.

[35] Joseph Raz, *The Authority of Law*, 104.

[36] Joseph Raz, *Between Authority and Interpretation*, 16.

[37] Ibid., 20.

they need not be aware of the concept of law since possession of the concept is logically independent from living in community governed by law.[38]

Thus he concedes not only that the development of legal institutions is contingent and depending upon social conditions but also the development of insight into these institutions. Philosophy might be able to gain insights into the necessary feature of law but it is in itself not necessary. From this starting point on it would be possible to explore the dialectics between social changes and changes in the history of ideas in a systematic way. Yet this would require to take sociological explanations more seriously and to develop a historical sense of differences. Raz however does not realize the implications of his arguments as the vocabulary of necessary features misleads him to conceptualize law only at the pure conceptual level. It is most telling that when explaining the notion of a concept Raz uses the example of a triangle, i.e. an example from the 'pure' realm of geometry. However understanding mathematical objects or the 'brute facts' of the natural sciences is a very different enterprise from conceiving of social or institutional facts.[39] In social relations human beings interact and mutually understand the interaction, but the interaction itself is not a mathematical object or brute fact that could be conceived independently of the interaction. Thus if A promises something to B there is no promise outside the relation between A and B. They both use the concept of promise but the concept does not exist outside human relations and can only be traced by looking at the way humans interact. Often it is possible to abstract

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[38] Ibid., 40.

[39] The notion of brute facts in distinction to institutional facts has been coined by John Searle. See *The Construction of Social Reality*, 2.

from circumstances like it is possible to abstract from the fact that all thoughts are uttered in some language. Raz concedes that concepts are only independent of any of us but not of us collectively.[40] However by concentrating exclusively on necessary and universal features without relating them to historical manifestations Raz treats social relations as if they there were brute facts and looses the contact to the original hermeneutical relation of understanding. This becomes most obvious when Raz does not just analyze concepts in hypothetical situations or circumstances fixed by shared understandings but refers to the development of law and the relation between the concept of law and social practices in various societies, i.e. when he takes the first steps towards a general jurisprudence.

Raz addresses the problem that the reflection on the concept of law grew out of a specific tradition but nevertheless pretends to be universal by considering a culture that is "radically different from ours."[41] First he reminds that for understanding it is necessary to relate their practices to ours and to have concepts, which "apply across the divide between us and them."[42] However when it comes to theoretical concepts the two cultures are according to Raz not on the same level. "The point to note is that it is our concept which calls the shots: other concepts are concepts of law if and only if they are related in appropriate ways to our concept."[43] Raz then goes on to argue that our inquiry is universal which however does not explain why this kind of inquiry is only to be found

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[40] Joseph Raz, *Between Authority and Interpretation*, 23.

[41] Ibid., 42.

[42] Ibid.

[43] Ibid. 32.

in Western societies. Thus Raz claims that the concept of law is a "culture transcending concept" which as a matter of fact has only been clarified in "our" culture. It is most striking that Raz refers to "our culture" and "our concept of law" as self evident notions that do not even need a footnote for further specification. The reason why in Raz's account other cultures appear as mere passive receivers and our concept as the absolute dominant one that "calls the shots" is that Raz conceives of our culture as being a coherent whole, which finds its adequate expression in the analytical tradition. It would be too easy to dismiss Raz's pretentious claim as a late revival of a 1950s Oxford prejudice as this would conceal the underlying philosophical bedrock. For the modern Wester culture is indeed dominated by a paradigm, though it is not the paradigm of Oxford style philosophy but the scientific paradigm.[44] Accordingly the world is transparent, can in principle be known entirely and is progressively explored by the sciences. However the studies of human history, culture and philosophical reflection so not feature in this paradigm as endeavors of equal standing they require striving for an understanding of different traditions that does not resemble the idea of a unified scientific progress. Since Raz does not even mention the possibility of contravening philosophical traditions or alternative understandings of our society his approach can be characterized as a form of scientism, i.e. the view that science is the paradigm for all kinds of research. Raz models his approach as if there was a realm of brute facts, which can be clarified within one paradigm of ongoing research and as if there was scientific

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[44] On scientism as one of the dominating cultural paradigms see Tzvetan Todorov, *Hope and Memory. Lessons from the Twentieth Century*, transl. by David Belos (Princeton: Princeton University Press, 2003), 19-25.

progress to which history and traditions have nothing genuinely to contribute. It is this form of scientism in Raz that has shaped the tradition of analytical jurisprudence and foreclosed the opportunity to take notice of approaches that are rooted in different philosophical traditions.

This diagnosis can be supported in two ways, first by pointing out different possible points of departure in Hart and second by showing how the commitment to scientism limits the potential of Raz's approach. I have argued earlier that Hart's account of the different kind of rules (legal rules, moral rules, rules of etiquette) can be reinterpreted in a way that legal rules can be ascertained without presupposing secondary rules. Indeed Hart uses such an account for a tentative description of the situation in a primitive society and likewise for a characterization of international law. In these parts it becomes most obvious that Hart is concerned with a typology and the evolution of social institutions. It is his openness towards social and historical dimension of law that enables Hart to tackle not only those two well known conundrums but to consider as well exceptional cases such as colonial regimes or governments residing in exile. Raz on the other hand stresses the universal and abstract character at the cost of all historical varieties. The uninstructed consequences of Raz's approach can most clearly be shown by analyzing one of Raz's main theoretical concepts, namely the concept of a legal system.

Raz realizes that it institutional nature or union of primary and secondary rules is not enough to distinguish legal systems from other institutional normative systems. Raz therefore holds that three features are necessary conditions for legal systems to exist. (1) Legal systems are comprehensive in that they claim to regulate any behavior, (2) legal systems claim to be supreme in regard to other normative systems, and (3) legal

systems are open systems as they might give binding force to norms, which do not belong to them. With the examples of the first part in mind it is easy to show that these features are not specific enough since they do not only single out municipal legal systems but apply e.g. to canon law as well. Furthermore the features do not suffice to characterize historical or contemporary municipal legal systems. Modern states do not claim to regulate any behavior but only behavior which does not belong to the protected sphere of private life. The states in absolutist period on the other hand had relatively little were compared to modern state administrations relatively weak and had to rely on institutions such as churches to provide services such as education and social welfare. Raz might reply that his account is qualified to the end that legal systems necessarily *claim* comprehensiveness and supremacy and that examples such as canon law merely shows they are open towards the reception of other normative systems. However, even with this qualification the characteristics are not specific enough since the claim of supremacy is also successfully maintained by the EU whereas the totality of international human rights law establishes a (often vain) claim of comprehensiveness. The historical reconstruction of the development of legal systems in the Western legal tradition puts Raz's mere conceptual analysis to the test. It is however not a rejection of all forms of conceptual analysis as the reconstruction of Hart given in the previous part shows. There I distinguished between legal systems relying on conditioned from those relying on unconditioned force and proposed to highlight their interrelation by introducing the notion of linkage rules. This provides a more flexible account for analyzing actual social practice.

The underlying reason why Raz is unable to use his account in such a way is again the scientism informing his account. Since Raz is looking for necessary features

existing at all times and all places where law exists he inevitably ends up with some features that are either not specific or insufficient for understanding actual social practices. For social practices are unlike natural facts changing over time and are embedded in different forms of human understanding. Raz's theory however is not sensible for the historical and hermeneutical dimension. That these shortcomings are indeed not caused by Raz's theoretical framework that is centered at legal systems but foremost by his methodological approach can be show by readjusting his approach slightly.

If Raz instead of looking for necessary features would employ a Weberian approach aiming at analyzing typical features of modern Western states he could avoid the criticism that his account does not match historical experience for typical features need not be found in each and every case. However this methodological readjustment would come at a price. Raz would have to show in form of historical and comparative analyses that his theoretical framework is indeed suitable to explain central features of states and, in addition, to account for systematic differences of various regimes. This proposition might appear to be far-fetched for someone working in the tradition of analytical jurisprudence. It is however merely the program of Kelsen's *General Theory of Law and State*, in which he explains among other things the fundamental difference between authoritarian and democratic regimes and various forms of federal organization and the gives an account of international law.[45] Hence it is not Raz's alignment to legal positivism or the starting point from legal systems but Raz's scientism that precludes

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[45] See Hans Kelsen, *General Theory of Law and State.*

Raz from taking an approach that is more open to social phenomena and that has shaped the tradition of general jurisprudence.

The route Raz has taken has an additional downside. In his last book Raz declares that the analysis of the concept of law is not just done for its own sake but has a specific aim. "In large measure what we study when we study the nature of law is the nature of our own self-understanding. The identification of a certain social institution as law .... is part of the self-consciousness, of the way we conceive and understand our society."[46] Furthering self-understanding is indeed a characteristic that distinguishes philosophy from other sciences. However it is questionable whether Raz's account is helpful to this end. Furthering one's own self-understanding requires exploring how one has come to be what one is seeing what distinguishes one from others. If self-understanding of our society is the same kind of activity it requires likewise historical and comparative explorations. It is however unclear how an account could improve the self-understanding of our society that does not speak of our society but only of societies as such, that cannot explain the specifics of our society in distinction to other societies, and that has no means to include or assess the historical development and the self-description found in our society. It is to be noted that this critique is not a sweeping rebuttal of analytical jurisprudence as the method of conceptual analysis along the lines of Hart is still held to be valuable. Instead the critique shows starting from Hart a tradition with a certain characteristic has been formed.

For an overall understanding of the tradition it is also necessary to assess relevant criticisms and alternatives. Ronald Dworkin's writings are often regarded as the

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[46] Joseph Raz, *Between Authority and Interpretation*, 31.

most influential criticism of the analytical tradition. Here the main focus is, like previously in the case of Raz, not on Dworkin's many contributions to legal interpretation and political philosophy but more specific on the question how he has shaped through his criticism shaped the tradition of analytical jurisprudence. Therefore I will concentrate on the question how Dworkin conceives of the task of legal philosophy.

In his more recent writings Dworkin grounds his critique of analytical jurisprudence upon a distinction between sociological and the doctrinal concept of law. According to Dworkin the former is concerned with what makes a structure of government a legal system rather then some other form of social control whereas the latter inquires into what makes a statement of what the law requires true.[47] He then posits: "The sociological question has neither much practical nor much philosophical interest. The doctrinal question, on the contrary, is a question of enormous practical and considerable philosophical significance. The sociological question has very little to do with adjudication; the doctrinal question, if not answered skeptically, has everything to do with it."[48] Dworkin sees his own approach as an interpretive answer to the doctrinal question. His main line of argument is that propositions of law include moral considerations as legal discussions cannot be understood without regard to morality. This becomes most obvious in deliberation of judges. If a judge faces rival understandings of a clause she has to decide on the grounds of political morality. On the other hand he dismisses the sociological question outright as being uninteresting or in

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[47] Ronald Dworkin, "Hart and the Concepts of Law," *Harvard Law Review Forum* 119 (2006): 97-98.

[48] Ibid., 98.

the case of analytical jurisprudence as being misguided. His argument is the same as for why morality is part of the law. "A useful analysis of an interpretive concept ... cannot be neutral. It must join issues in the controversies it hopes to illuminate."[49]

Previously I argued that Dworkin's conceptual argument can be faulted for being a King Midas fallacy.[50] If employing moral argumentation would show that the law becomes moral itself part of morality all social sciences would become indiscriminately part of the moral discourse. As a methodological recommendation I attributed the argument as a Narcissism fallacy for assuming that all legal philosophy must converge upon the philosophical reflection of a judges's point of view. Here however the question is only which role the influence of Dworkin played in shaping the tradition of analytical jurisprudence.

One of the reasons for Dworkin's influence on the discussions in analytical jurisprudence is that he had against Hart a point that revealed a real deficit or gap in the tradition. Generally speaking the gap is that the relation between general legal theory and practices has not been sufficiently reflected by Hart. The general frame of the criticism is compelling since positivism consists in analyzing a social practice to that a mischaracterization of the practice would be a failure of the analysis. The crucial setup of Dworkin's strategy however is that he does not state the challenge in general terms, namely how to relate social practices to a general framework, but presents his own solution as the only way how actual practices can be reflected in a "philosophically

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[49] Ronald Dworkin, *Justice in Robes* (Cambridge, MA: The Belknap Press of Harvard University Press 2006), 225.

[50] See Chapter 7.

interesting way." Since his solution ends up in a moral reading of national constitution Dworkin presents a moral alternative from the point of view of judges or lawyers. This way however he opens up a false alternative and implicitly reinforces assumptions underlying the tradition of legal positivism. He shares the assumption that "sociological questions" are philosophically uninteresting. He even reinforces the disrespect of all historical, comparative research or sociological discussions outside the tradition of analytical jurisprudence. For he shuns even Raz's modest claim that philosophy might improve our self-understanding as errant: "If we want to study our own self-consciousness we would do much better to turn to fiction, politics, biography, depth psychology, and social science. We reflect on the character of law to know what we must do, not who we are."[51] This contention is obviously idiosyncratic as it leaves no space for philosophical approaches other than Dworkin's.

In Dworkin we find the opposite kind of reductionism as in Raz. Raz treats the issues found in Hart as if they were a science. Dworkin on the other hand treats them as if they were all part of morality. This form of reductionism can be called moralism, as all forms of understanding are subordinated to moral assessment. Together these two strands shape the tradition of analytical jurisprudence by establishing a false alternative.

The limits of this tradition of analytical jurisprudence – and its alternative presented by Dworkin – become most obvious when considering the work of Jürgen Habermas. As shown in the first chapters Habermas takes up a variety of philosophical, sociological and historical discussions, and includes them in a framework that bridges critical and reconstructive aspects or in Dworkin's terminology, sociological and

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[51] Ibid., 229.

doctrinal questions. It is hence a mere prejudice on Dworkin's side to exclude all sociological questions *a priori* as being uninteresting or to proceed, like Raz, as if they did not even exist. Habermas's work also reveals a second weakness of the positivist tradition. One of the reasons that Habermas's work is widely received, not only by academics but also by politicians and citizens all over the world, is that it promotes self-understanding of us and our society just like Raz calls for. Since we understand ourselves and others as historical being embedded and challenged by a variety of kinds of practices furthering self understanding requires to delve into these traditions and practices. Doing so in an ingenuous way is one of the strengths of Habermas's writings. Thus the example of Habermas highlights the deficits of the tradition established by Raz and Dworkin. Yet on the other hand the careful reading of Habermas's writings has also established the relevance of conceptual analysis the main weakness of Habermas's account is an insufficient reflection of the concept of law. I have tried to show how Hart's theory can be reconstructed to complement Habermas's account and thus conceive of a general descriptive legal theory that combines historical awareness with a sharpened conceptual analysis.

My approach developed through a close reading of Habermas and Hart is however not the only one that takes up socio-legal issues and the challenged posed by globalization in particular to come up with a general jurisprudence. Notably Brian Tamanaha und William Twining proposed different ways to reform the tradition of legal positivism so that it is better equipped to meet contemporary challenges. Even though the general outlook of both approaches is similar to the one that has been leading the discussion here important differences remain.

3. Brian Tamanaha: General jurisprudence as a sociological framework

Brian Tamanaha has developed a general jurisprudence from a socio-legal point of view. His aim is to give an account of law that is applicable to all societies and reckons in particular with the existence of non state law. Tamanaha's starting point for embarking on the project to develop a general jurisprudence was his observation that the official state law of Micronesia did only to a limited degree govern the actual practices of the population who rather followed their own understandings of rules.[52] At the same time Tamanaha realized a weakness in the theoretical account of legal pluralism.[53] His main criticism is that there can be no single social scientific understanding of law upon which to build legal pluralism. Instead he claims that only a pure conventional identification of law would allow describing the phenomena studied by legal pluralism in a more fruitful way. Tamanaha then justifies his conventional account by showing that it is the upshot of the legal positivist discussion tradition.[54] He diagnosis a tension between the essentialist, conventionalist and functionalist aspects in Hart's theory and argues they can only be resolved by a radical conventionalist account. He retains Hart's abstraction of primary and secondary rules as being characteristic of legal systems. However he does not see this feature as the essence of legal systems, nor does he see law as a

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[52] Brian Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (Leiden, New York: E.J. Brill, 1993).

[53] See Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20 (1993): 192-217.

[54] Brian Tamanaha, A *General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 133-205.

necessary prerequisite to uphold public order.[55] According to Tamanaha the union of primary and secondary rules can only distinguish law from non institutionalized forms of normative order (like morals and customs) but it cannot distinguish law from other sorts of institutionalized normative systems (like corporations).[56] Tamanaha also notes that this problem cannot be solved by giving as Raz does more stringent conditions for what counts as a legal system. For Tamanaha points out that not only states but also many religious systems satisfy these conditions, so that the conditions are not specific enough. In addition not all states satisfy the conditions as an empirical matter. Some of the most developed states that are highly integrated in international legal order do no longer claim comprehensiveness and supreme authority whereas in some developing countries state law is not the primary source of social order. Tamanaha proposes that a pure conventional concept of law would not be hampered by these problems.

Thus he claims: "A legal system exists whenever there are legal actors (conventionally identified as such) engaged in producing and reproducing a legal system through shared secondary rules, regardless of their efficacy in generating widespread conformity to the primary rules."[57] Tamanaha's account is not only conventional regarding the identification of law but also regarding its function as it allows "to question whether law satisfies any functions, and, if so, which ones and to what extent."[58] Tamanaha's prime example for questioning the function usually attributed to

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[55] Ibid., 155.

[56] Ibid., 139.

[57] Ibid., 148.

[58] Ibid.

law are the circumstances in Micronesia, where legal official act very much like their counterparts in the U.S. system but were perceived by the local populations as a foreign and strange force that had little to do with their daily practices. For two reasons Tamanaha sees his account as belonging to the positivist tradition. First he subscribes to the social source thesis that law is a product of complex social practices though specifies that the theory applies not only to state law but to all manifestations and kinds of law including indigenous law, international, religious law and natural law. Second Tamanaha subscribes to the separation thesis, that there is no necessary connection between law and morality, though extends the thesis to apply to all possible manifestations and kinds of law. Thus unlike many legal pluralists Tamanaha does not implicitly favor local or indigenous law for being in some way superior to state law.[59] Characteristically, Tamanaha applies the separation thesis also to natural law. His reasoning is that natural law is not the same as an ongoing philosophical discussion or individual reflection on the best course of action but has typically a concrete manifestation in the form of some authoritative text and has been used to legitimize powers of the most diverse types. As natural law in this sense is coupled with power structures it shares with other forms of law the capacity "for accomplishing evil in the name of law."[60]

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[59] Tamanaha notes it is the implicit political agenda of many legal pluralists to lessen the stature of state law and raising the respect for non state law. Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," 205.

[60] Brian Tamanaha, A *General Jurisprudence of Law and Society*, 159.

The appeal of Tamanaha's approach is that it takes seriously Hart's pledge to develop a general descriptive jurisprudence and while building upon discussions in analytical jurisprudence comes up with a remarkably simple solution. Tamanaha shows the breaths of his theory by applying it to different social arenas and times.[61] As the identification of law is completely conventional Tamanaha conceives of a plurality of overlapping orders and types of law existing at different times and places, starting with the multiplicity of jurisdictions in the medieval ages, over the formation of multiple layers of orders though colonial rules up to contemporary regulations through supranational regimes and agencies.[62] His picture of the legal pluralist situation is however not a merely harmonious or fortunate one since Tamanaha point out different situation s clashes between legal systems, e.g. between official and indigenous law and strategies of dealing of exploiting these situations. "Sometimes these clashes can be reconciled. Sometimes they can be ignored. Sometimes they operate in a complementary fashion. But very often they will remain in conflict, with serious social and political ramifications."[63]

The similarities to the account I developed in the first chapters are striking: A legal pluralist view on historical developments has been incidentally used to criticize Habermas's historical reconstruction of the development of modern law, and based on Hart's they has been reconstructed as to come up with a more thorough understanding of

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[61] Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008): 375-411.

[62] Ibid., 377-390.

[63] Ibid., 410.

law. In comparison Tamanaha's approach presents a challenge and a critique at the same time. It seems to imply that the detailed analysis of historical understanding is at best unnecessary for conceiving the legal relations, whereas the reconstruction of Hart's theory is even if undertaking in a similar spirit just another 'essentialist' analysis of the concept of law. It is however possible to defend the hermeneutic approach against Tamanaha's challenge.

As a start it is useful to remember how Hart characterized his approach. His aim was not to give a definition of the word law applicable to various circumstances but to provide a conceptual analysis of a number of distinct though related social phenomena.[64] Even though Hart did not elaborate his methodology it can be shown that his project it not what Tamanaha takes it to be and that Tamanaha's approach is no answer to Hart's concerns. Tamanaha's declared aim is to shift the analysis to a "higher level of generality, to place Hart's analysis under a broader umbrella and resituate it as one (key) part of what is a more expansive baseline."[65] His basic claim however "law is what ever people identify and treat through their social practices as 'law' (or droit, recht etc.)"[66] is not at the same level of generality. It is, to use a Kantian distinction, at the level of empirical generality but not strict philosophical generality. Though even without invoking Kant's epistemology the difference between Hart and Tamanaha's project can be shown by closer investigation. Tamanaha's is foremost only concerned to come up with a definition of 'law' but he does not elaborate on the categorical distinction

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[64] Hart, *The Concept of Law*, 17.

[65] Brian Tamanaha, A *General Jurisprudence of Law and Society*, 134.

[66] Ibid., 166.

between law and force (Hart's gunman example) and between law and other rules of behavior such as morality or customs. It has however been argued earlier that the reflection on these topics are not just proto-theoretical aspect of Hart's theory but become essential part once the central case thesis is abandonded and a greater variety of legal phenomena is considered.

The reason is that it is then insufficient to rely on the union of primary and secondary rules as a central feature of law. Tamanaha realizes the same problem but does not solve it by giving an analysis of law as a special kind of primary rules[67] but by relying on conventional identification of law by social actors. However by refraining form conceptual analysis problems that can be addressed this way do not cease to exist but reappear. Tamanaha readily concedes that customary law and international law are instances of law.[68] However he has no conceptual argument to explain why these are instances of law apart from the fact that they are called law. In particular it is unclear why certain rules should not count as instances of mere etiquette or as moral requirements. Tamanaha's solution to this problem is credit the conventional identification as being reliable. He argues "as a matter of general social practice people do not lightly apply the label law."[69] Thus even though he stresses that what is identified as law is pure conventional as well as the function it fulfills he assumes that the labeling

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[67] See chapter 5.

[68] See e.g. Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27 (2000): 314.

[69] Brian Tamanaha, "Socio-legal Positivism and a General Jurisprudence," *Oxford Journal of Legal Studies* 21 (2001): 28. The article is a modified version of a chapter in *A General Jurisprudence of Law ans Society*. The remark on social practice of using the label law is added in the article.

practice is over all times and cultures fixed in a rigorous way. This point reveals that Tamanaha presupposes more conceptual analysis than he is ready to admit. For being able to distinguish law from related social practices is already the result of conceptual clarifications. In addition Tamanaha's decision to deflect from conceptual analysis in favor of conventional identification impoverishes his account as a sociological theory as it makes the singling out of the concept of law as only stable label arbitrary. If law is a social practice that is found in different circumstances and societies it is at least conceivable that further distinctions such as that those between customs and morality are to be found as well. However they would have to be brought out in form of a conceptual analysis in the first place. Previously I showed that it is possible to reconstruct Hart's theory in this way. I argued that law is a special kind of social rules namely multilateral rules that exhibit a reference to justice and are decisive. I also hold that secondary rules are not necessary to conceive of something as law though establish legal systems and allow the governed to a take an external point of view towards the rules. As the account contains additional distinctions it is richer than Tamanaha's. It is nevertheless strict descriptive and by including the further notions of systems relying on conditioned and unconditioned force and linkage rules as two additional typical features of law apt to describe the variety of legal systems Tamanaha has in mind as well.

The main distinction to Tamanaha concerns however not the kind of concepts employed but the methodological approach. Tamanaha could defend his conventional approach against all more elaborated conceptual analyses in a principal way arguing that every such account is inevitably essentialist and has a Western cultural bias whereas a conventional account can adapt to what ever circumstances or usage of the label law be found in a given social arena. As Tamanaha uses the account to identify law in Western

societies and in non-Western societies likewise it seems to avoid any Western bias. However this account has shortcoming if it is to replace conceptual analysis as part of the philosophical tradition. Tamanaha assumes there is a perspective from which all legal phenomena, municipal law, indigenous law, international law etc. appear at equidistance and all of them can simply be identified by the way people use the label "law". At first sight this might appear to be an approach particularly respectful to other cultures. However law in the Western legal tradition does not only exist as a practice but is also theorized in various ways. These theories have in turn shaped the way we understand law and legal terms such as person, legal duty, contract, etc. The tradition of analytical jurisprudence is no exception to this observation. Even though Hart's theory is sometimes considered as starting point for all discussions his account is by building upon former philosophical theories of Austin and Kelsen part of this tradition as well. By leveling the difference between our usage of the concept of law and usages found in other social arenas Tamanaha carries on all implicit theoretical assumptions of the Western legal tradition and the positivist strand in particular without being able to control them. The reason Tamanaha sees no problem in using the positivist tradition as an 'innocent' starting point is that he thinks of theories only as a means to describe social practices. However this is not the only aim of legal theory. Another reason to study legal theory and the Western legal tradition is to understand their broader philosophical basis, to criticize misunderstandings and engage with former view. This form of reflective criticism is integral part of the Western legal tradition. It is therefore also a source where fundamental, philosophical criticism can emerge from. By dodging to engage with it Tamanaha misses not only certain insights but looses the contact to an understanding of ourselves. Arguably theoretical and in particular philosophical

inquiries do not all aim at coming up with working concepts but consist in the quest for essentialist concepts, or in coming to grasp the idea that there are no such concepts. In any case it consists in engaging with the philosophical tradition and prolonging them. It is this level of reflection that is missing in Tamanaha's account.

One could raise the objection that stressing the importance of philosophical ideas and the Western legal tradition for the analysis of the concept of law is though part of a conscious self reflection prone to develop a paternalistic attitude towards other traditions. There are two answers to this reproach, a conceptual and a hermeneutical one. First, conceptual analysis does not necessarily proceed in a Razian way where it concentrates only on modern municipal legal systems. I showed in the previous part how a conceptual analysis that takes the empirical strands in Hart's theory more seriously can bring out the relations between various legal systems and the structures of dominance involved when having interconnected institutionalized systems. To this end the notions of linkage rules and legal discourse have been introduced signifying that the legal systems most widely interconnected monopolize the identification of something as an officially recognized legal system. Hence a conceptual analysis can be useful to conceive of legal pluralist phenomena.

Second, even though a hermeneutical approach will have to give considerable weight to the Western philosophical tradition it might still be a prerequisite for understanding and integrating other approaches. This can be shown by considering the critical reading of Habermas's social philosophy I presented in the first part. I argued that a certain understanding of law as being a state centered "system" has shaped and to some degree distorted Habermas historical reconstruction in particular by neglecting social and transnational legal phenomena. Such a hermeneutical reevaluation does not

only serve to foster a better self-understanding but can at the same time be seen as a model for coming to terms with the current structure of the transnational legal discourse where similar structures of dominance of certain types of discourses might exist. Thus the account of jurisprudence as general descriptive legal theory, which has been pursued throughout this book does unlike Tamanaha not claim to come up with a number of concepts that are neutral with regards to all traditions but is consciously rooted within the Western legal tradition. As it is at the same time a philosophical account it can serve to criticize or reconstruct the tradition. This way it invites readings form other traditions without patronizing or prefiguring them.

The basic line of argument throughout the book has been to present a reconstruction of Hart's account as a completion of conceptual problems left over in Habermas's account of legal philosophy. This somewhat unorthodox way to get into the argument has compared to other approaches a number of advantages. It is rooted in the tradition of legal positivism though avoids the trap of reducing jurisprudence to an unhistorical abstract account as represented by Raz on the one hand or transforming into a moral view as represented by Dworkin on the other hand. Even though the general outlook is close to Tamanaha's view of general jurisprudence as a conventional framework for social scientific research the method is different in that the development and criticism of philosophical ideas play a central role.

4. William Twining: General jurisprudence as a discipline

One final aspect of the approach pursued here can be brought out by comparing it to William Twining's account of general jurisprudence. Again the discussion is rather a family dispute. Twining also takes a global perspective and criticizes that jurisprudence both as a discipline and as a philosophical tradition appears to be very limited in that it

concentrates on the Anglo-American analytical tradition while presupposing the paradigm of modern state law but neglects non state law. Twining stresses in particular that in today's globalized world it is necessary to deal also with non Western legal traditions. For his own approach he refers to jurisprudence as "to the theoretical study of two or more legal traditions, cultures, or orders (including ones within the same legal tradition or family) from the micro-comparative to the universal."[70] His aim is to develop a general jurisprudence that comprises conceptual, normative and empirical studies. Twining's criteria for a successful theory is whether its concepts "travels well", i.e. whether it develops adequate ways of "talking about law across legal orders, jurisdictions, levels, traditions, and cultures – ranging form comparison of two or more contexts to genuinely global generalizations."[71] His leading idea is that "as the discipline of law becomes more cosmopolitan, jurisprudence as its theoretical part needs to broaden its reach to take more account of non-Western legal traditions, a wider range of legal phenomena, and different levels of normative and legal relations and ordering."[72] Thus the reason for extending jurisprudence are changes within the discipline of law, which jurisprudence, as theoretical part should reflect. The programmatic claim becomes only necessary as Twining identifies the discipline jurisprudence with analytical jurisprudence, which takes indeed very little interest in actual social practices. The criticism Twining voices in regard to the tradition of analytical jurisprudence are

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[70] William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press 2009), 20-21.

[71] Ibid., 39.

[72] Ibid., 56.

similar to the ones of Tamanaha. It is therefore unnecessary to elaborate them again. More interesting is however the way how Twining carries out his aim to develop a general jurisprudence. His working definition of law is as follows: "From a *global perspective* it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between subjects at one or more levels or relations and or ordering."[73] Twining calls it a thin functionalistic view as it does not attribute necessary function to the law but only records that law is oriented towards some functions. For analyzing the functions law can fulfill Twining turns to Llewellyn's law-job theory.[74] Twining renders it in the following way. All human being are members of groups, such as family, club, tradition union, nation state or even world community.[75] For surviving and achieving aims it is necessary to assume that certain law-jobs are done. Twining divides them into five categories, adjustment of trouble cases, preventive channeling of conduct, re-channeling of conduct while needs and conditions change, allocation of authority, and finally providing integration. Llewellyn developed his law-job theory as a social scientific framework for studying certain Indian tribes. Twining however thinks Llewellyn account can be conceived as an analytical theory as it is not based on empirical generalization but like Hart's theory "almost devoid of empirical content."[76] Thus he grants the theoretical concept of the "law jobs" some standing

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[73] Ibid., 117.

[74] See in particular, Karl Llewelly and E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941) and "The Normative, the Legal, and the Law-Jobs," reprinted in *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962).

[75] Ibid., 105.

[76] Ibid., 107.

independent from being part of empirical research. Twining turns to Llewellyn's theory in the first place as he is unsatisfied with Tamanaha's pure conventional approach. Though he credits Tamanaha for having opened analytical jurisprudence to the social sciences and sides with Tamanaha by seeing law as merely one source of social order he reproaches him for having gone in his conventional approach too far. His main criticism is that Tamanaha has no analytical basis for differentiating legal from non-legal social practices. "Tamanaha is trying to use folk concepts for analytical purposes in a way that may create confusion."[77] In contrast to Tamanaha Twining does not rely on pure conventional labeling practice but wants to retain some essentilaistic criteria to distinguish legal practices from other social practices. Llewellyn's law-job theory is then for Twining the way to open up towards the empirical dimension but nevertheless retain some hold in the conceptual realm.[78] However Twining also declares that he does not put much "theoretical weight"[79] on his account but uses it as a clarification in quite specific contexts and concedes that his conception is only one way among several for categorizing the phenomena in question.[80] In order to meet his claim that general jurisprudence has to comprise a normative and an empirical dimension as well Twining adds a survey on discussion on normative theories of justice,[81] empirical dimensions of law and justice[82] and on human rights[83] including southern voices of human rights

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[77] Ibid., 102.

[78] Ibid.

[79] Ibid., 371.

[80] Ibid., 371.

[81] Ibid., 122-172. Twining discusses utilitarian and contractarian approaches to global justice.

[82] Ibid., 225-261.

criticism.[84] Thus Twining includes a range of theories and discussions in his account, which is unmatched by any other theory discussed so far. Unlike Tamanaha he does not conflate conceptual analysis with a framework for empirical descriptions and discusses normative issues as well.

The challenge Twining poses is to match the comprehensive range of theories and empirical data he mentions. If general jurisprudence has to be that comprehensive it seems to be a nearly impossible endeavor. Twining addresses the problem that his approach might appear to be over demanding by claiming that it is not the launching of a great overarching theory but "an activity ... responding to the challenges of globalization."[85] However drawing the distinction between 'grand theory' and 'activity' does not save Twining's account from the reproach. For the reason for the impression that his theory is overloaded is a fundamental tension in Twining's theoretical account. Twining conflates two notions of general jurisprudence; On the one hand general jurisprudence as an academic discipline on the other hand general jurisprudence as general legal theory. When taking general jurisprudence as a discipline it is an empirical question whether it is indeed restricted in the way Twining describes, namely neglecting non-state law, non-Western legal traditions or paying insufficient attention to normative theories of justice or empirical research. Since non of the topics Twining mentions are unknown or not already explored by some discipline Twining's programmatic claim boils down to the question how to organize university departments and compose

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[83] Ibid., 173-201.

[84] Ibid., 376-442.

[85] Ibid., 7.

meaningful curricula for a discipline called general jurisprudence. In this respect Twining's project is not impossible but – given the interest of most students and university administrations – merely unlikely. However Twining uses general jurisprudence also to refer to his way to characterize the concept of law in form of a thin functionalist account. The relation between these two ways to understand general jurisprudence is however unclear. Twining's thin functionalist account does not play any role in his discussion of normative theories and is not even in all empirical descriptions used for formulating hypothesis or structuring the research field. Often Twining merely gives an overview over discussions, e.g. on the millennium goals[86] or adds new theoretical concepts such as the concept of surface law[87] without relating him to his thin functionalist account. Thus the various discussions proceed alongside without informing each other. This raises the question what it is that makes Twining's book one continual approach and not a collection of different vaguely related topics.

One could argue that the thin functionalist account building upon the law job theory is the theoretical ore of Twining's approach whereas all other aspects are merely addenda. However even in the core part Twining is undecided as to whether the claims are firmly theoretical claims or rather relate to the organization of the subject area. Analyzing this tension in greater detail will show that it is not just a correctable failure on the part of Twining but sign of a philosophical lacuna. The tension is recognizable in two respects. First it appears between Twining's commitment to analytical jurisprudence and the way he characterizes his functionalist account. Given his commitment one

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[86] Ibid., 323-361.

[87] Ibid., 293-322.

would expect that Twining engages in conceptual analysis and would defend his account on this ground. However right after praising the merits of conceptual analysis and introducing his account he draws back and refers to it as merely "one way" to organize the subject thus characterizes it as a taxonomic framework to organize topics or discussions. A framework, which might turn out to be more or less expedient, is however not the same as the result of a conceptual analysis even if the analytical terms are the same. For a conceptual analysis is based on the arguments used to justify the account. The web of interrelated claims and distinctions that help to establish the insights are in the end the only basis a conceptual analysis rests on. The appropriateness regarding non-state law might be one of the arguments. It is however not the definite benchmark as the 'data' of non state law are not given pre-theoretical but are themselves shaped by some conception. As a philosophical theory conceptual analysis cannot start from the scratch but blends in ongoing discussions and will arguably always be contested. Hence conceptual analysis cannot serve at the same time as an uncontested and expedient framework as this would revoke the philosophical pretension to establish claims, which are true. Twining however seems to recoil from the idea that general jurisprudence is itself a contestable position within the philosophical discourse.

The reason for Twining's uneasiness about more substantial account can be revealed by considering the second respect in which the tension between the two concepts appears. It is to be found between Twining's principle that general jurisprudence has to take into account several traditions and his claim that analytical jurisprudence has to play an important part. If the principle requires considering any two traditions together it is merely a learned recommendation how certain prejudices might be overcome or reflected. For then the choice of traditions would not be guided by a

philosophical insight regarding the inevitableness of traditions but only by the piece of advice to put oneself into someone's else's shoes for testing the generality of claims. This advice however does not reveal anything specific about general jurisprudence. If however Twining's principle is supposed to bring to attention that the tradition of analytical jurisprudence is central but needs to be completed and augmented by including other traditions it would be a philosophical claim in need of justification. Yet Twining does not explain why analytical jurisprudence should occupy a central place. One possibility is that Twining tries to remain neutral in regard to various traditions, Western and non-Western ones. However his theory would then not be a philosophical theory but a framework for empirical descriptions and in this respect hardly differ from Tamanaha's conventional approach. The choice between the two theories would depend on how useful they are for descriptive purposes so Twining would have no principle argument against Tamanaha's reductionist view. There is however also a second way to explain Twining's unwillingness to engage into the defense of a certain tradition: He lacks an elaborate notion of a philosophical tradition. Even though he names many traditions and possible approaches he does not explain what exactly constitutes a tradition and what makes an engagement with traditions unavoidable. In his theoretical account Twining refers only to the tradition of analytical jurisprudence (including Llewellyn's law-jobs as analytical concepts). The phenomena he wants to describe this way are Western and non-Western forms of law. Thus the analytical theory is applied to a universe of discourse in which all forms of law including their theoretical reflections are on a par. This separation between analytical jurisprudence forming the core part of his theory and the universe of discourse consisting of all possible forms of law explains why Twining cannot conceive of the idea of a philosophical tradition. Analytical

jurisprudence denies because of its scientistic tendency the relevance of traditions. As all other approaches are lumped together with non Western traditions it is difficult to conceive of *our* tradition as an unavoidable starting point to organize one's thoughts.

Twining is in general not hostile to the idea of philosophical traditions. At one point he even explains how Spanish neo scholastic scholars, Roman law doctrine, and Aristotelian moral have informed our understanding of contract law. [88] Thus in principle Twining recognizes that the Western legal tradition is influenced and shaped by philosophical concepts and needs to be reconstructed in a hermeneutical manner. Twining's main weakness is that he does not does not realize that his own approach is to be seen in this line. Hence he fails to give a philosophical reconstruction of our tradition of general jurisprudence that could serve to understand how it came about and which role analytical jurisprudence plays in it. For this reason the various discussions Twining refers to while unfolding his account appear unrelated. They are added without relation to the organizing idea of a philosophical tradition.

Conceiving of a tradition does not mean to presume that the tradition is unified like a coherent theory or free of oppositions. Therefore it cannot amount to uncritically endorsing the tradition. Yet speaking of a tradition is more than crediting some authority for having introduced an argument. It indicates that arguments cannot totally be disentangled from their context as they are often implicit answers to previous arguments or reactions to social circumstances. Furthermore they derive their persuasiveness from the theoretical web they are embedded in. Thus a single counter argument e.g. against

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[88] Twining point of reference for his argument is James Gordely, *Philosophical Foundations of Modern Contract Doctrine* (Oxford: Oxford University Press 1991).

Kant's moral philosophy, is unlike in a mathematical proof usually not sufficient to render the whole approach deficient as often the initial argument can either be improved or explained as being due to historical limitations. Thus even though arguments are part of a historical web they are not just expressions of historical circumstances but also travel over time. Conceiving them as part of a tradition recognizes the dual structure of arguments and theories. A hermeneutical reconstruction of a tradition holds the middle ground between a pure historical and a pure systematic reading. It gives theories their own right as every reconstruction of a tradition allows theories to speak back, i.e. is open towards historical and systematic criticism. This way the reconstruction places itself in a process of ongoing understanding.

With this idea of a tradition in mind it is possible to conceive of general jurisprudence as an endeavor to overcome limitations of analytical jurisprudence while still being a philosophical project. The tensions found in Twining' account of general jurisprudence hence could be employed in a productive way by reconstructing philosophical traditions in a hermeneutical way. This methodological improvement on Twining's account is however not just hypothetical but has a specific upshot: It leads directly to the approach pursued throughout this book.

At the beginning it might have appeared to be a mere matter of choice to confront Habermas' and Hart's understanding of law, or while discussing Habermas's theory a matter of convenience to use Hart's theory for completing some insufficiencies in Habermas. Now after considering Tamanaha's and Twining's systematic alternatives starting from analytical jurisprudence the hermeneutic approach is fully justified. The crucial point is to conceive of both the continental Habermasian and the analytical Hartian approach as traditions that ultimately support each other.

A final point regarding the tradition of analytical jurisprudence needs to be made. Seeing analytical jurisprudence as a tradition that needs to be hermeneutically reconstructed is still unusual as it contravenes the tendency to see analytical jurisprudence as an ongoing progress of discoveries that like the sciences need not engage with philosophical traditions. However analytical jurisprudence has itself become a tradition. Realizing this is arguably only possible after the discussion has reached a turning point where it can become aware of itself. At the surface a sign of having reached such a turning point is that discussions on jurisprudence appear to have come to a dead end. For outsiders they appear increasingly irrelevant and even to insiders self centered and obsessed with the same questions again and again.[89] The reason that has been given here is that the debate is trapped between scientism on the one hand and moralism on the other hand while both strands have lost their contact to the sociological dimension. Legal philosophers like Tamanaha and Twining who realize these limitations have to overcome two major problems: first they have to explain how analytical jurisprudence can reach out to the social world and in particular to non-traditional circumstances. Second they have to re-conceptualize analytical jurisprudence as a specific philosophical tradition. I argued that both authors though having recognized sociological shortcomings of analytical jurisprudence have failed to develop a philosophical alternative, Tamanaha by conflating philosophical analysis with the

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[89] Notably Brian Tamanaha and William Twining have made the same observation. To name but one insider Jeremy Waldron states that "analytical discussions tend to be flat and repetitive in consequence, revolving in smaller and smaller circles among a diminishing band of acolytes." Jeremy Waldron, "Legal and Political Philosophy," 381.

recordings of folk concepts and Twining for lacking the idea of a philosophical tradition and consequently failing to expound his position as a hermeneutical perspective.

The exploration of Habermas and Hart has shown an alternative path. By starting with Habermas I indulged in one tradition that already integrates normative and sociological approaches. However the hermeneutical reading has at the same time allowed to detect shortcomings of Habermas by pointing out the diversity within our tradition and the need for conceptual clarifications. The systematic reconstruction of Hart that is open towards a reception of transnational and non state legal systems I offered subsequently is therefore necessitated by our own tradition.

It is thus possible to find tensions between dominant and less dominant traditions, between social practices and official regulation and a reflection of the role of theoretical concepts in our own tradition as part of an ongoing struggle for philosophical clarification. This insight does not exhaust or diminish the need to open for non Western legal traditions or circumstances. It is however the best preparation for understanding them and being accessible by them. For the Western philosophical tradition is then neither a superior scientific world view that "calls the shots" (as in Raz) nor an uncontestable moral basis (as in Dworkin). It is however more than just an expedient framework for description (as in Tamanaha and Twining) namely an ongoing dialogue that is open towards criticism from other traditions as the principles and typical ways of such challenges are already built into it. Thus for achieving the aim Tamanaha and Twining both strive for general jurisprudence must foremost become self conscious as a philosophical tradition among others. If we study law to achieve self understanding we have to start with us, with a critical hermeneutics of our tradition. Like in any hermetical project we came around a full circle and are back were we started: While being aware of

transnational and global circumstances trying to understand and come to grips with our tradition; and while philosophizing hopefully furthering it.