THE POSSIBILITY OF THEORISING THE LAW AS A NORMATIVE SOCIAL PHENOMENON: *THE PRIOR PHASE* AND THEORETICAL PRESUPPOSITIONS

A Master's Thesis

by
ÇAĞRI GÜRKANLI

Department of Philosophy
İhsan Doğramacı Bilkent University
Ankara
May 2019

To the dear memory of my beloved aunt Sevgi

"Ölüm asude bahar ülkesidir bir Rinde,
Gönlü her yerde buhurdan gibi yıllarca tüter
Ve serin serviler altında kalan kabrinde
Her seher bir gül açar, her gece bir bülbül öter."

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ÇAĞRI GÜRKANLI

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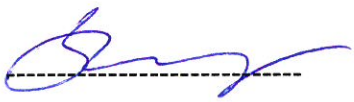
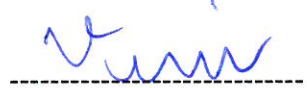


Assist. Prof. Dr. Sandy Berkovski
Supervisor

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Philosophy.

Assoc. Prof. Dr. Simon Wigley
Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Philosophy.



Assist. Prof. Dr. Lars Vinx
Examining Committee Member

Approval of the Graduate School of Economics and Social Sciences

Prof. Dr. Halime Demirkan
Director

ABSTRACT

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Gürkanlı, Çağrı

MA, Department of Philosophy

Supervisor: Assist. Prof. Dr. Sandy Berkovski

May 2019

For the last two decades, there has been an impasse between the two main camps of positivism and normativism in the ongoing methodology debate in jurisprudence. Furthermore, there have been recent attacks on the foundations of legal theory by naturalists and legal sociologists. I propose a novel way to analyze the foundations of jurisprudence in terms of theoretical presuppositions in an attempt to situate the methodology debate within the wider context of the philosophy of social science and understanding. The analysis inquires into the initial stage of theorizing where the subject matter of a study is constituted. I call this the prior phase. This foundational inquiry is built on the implications of the Gadamerian positive account of prejudices.

By facilitating this novel way, I show that the foundational worries about jurisprudence stem from its central focus on defending the distinct normativity of the law. I argue that a Gadamer-inspired approach to legal normativity is the key to overcome the impasse and bring a livelihood to general jurisprudence.

Keywords: Gadamer, Jurisprudence, Legal Normativity, Methodology, Presuppositions

ÖZET

HUKUKU NORMATİF BİR SOSYAL FENOMEN OLARAK KURAMSALLAŞTIRMANIN OLASILIĞI: *İLKİN AŞAMA* VE KURAMSAL VARSAYIMLAR

Gürkanlı, Çağrı

Yüksek Lisans, Felsefe Bölümü

Tez Danışmanı: Dr. Öğretim Üyesi Sandy Berkovski

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Hukuk felsefesinin metodolojisine dair son yirmi yıldır sürmekte olan tartışmada iki temel görüş olan pozitivizm ve normativism arasında bir açmaz söz konusu. Bunun ötesinde, naturalistler ve hukuk sosyologları tarafından hukuk teorisinin temellerine yönelik bir takım güncel itirazlar mevcut. Bu çalışmada, metodoloji tartışmalarını daha geniş bir sosyal bilim felsefesi konteksti içerisinde ele almayı amaçlayan, hukuk felsefesinin temellerini kuramsal varsayımlar üzerinden analiz eden yeni bir yaklaşım öneriyorum. Mevzubahis analiz, kuramsallaştırmanın bir çalışmanın konusunun vücuda geldiği ilk aşamasını sorgulamaktadır. Bu aşamayı, *ilkin aşama* olarak adlandırıyorum. Hukuk felsefesinin temellerine yönelik bu sorgulama, Gadamer'in olumlu önyargılar kuramının sonuçları üzerine inşa edilmiştir.

Bu yeni sorgulamayı kullanarak hukuk felsefesinin temel sorunlarının, hukukun ayrık normatifliğini savunma çabasından ileri geldiğini ortaya koyuyorum. Normatifliğe Gadamer'den ilham alan bu yaklaşımın, açmazın aşılması ve hukuk teorisine yeniden hareketlilik kazandırmak için anahtar işlevi göreceğini iddia ediyorum.

Anahtar Kelimeler: Gadamer, Hukuk Felsefesi, Hukukun Normatifliği, Metodoloji, Varsayımlar

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INTRODUCTION

Currently, there is a stand-off between legal positivism and normativism in the ongoing methodology debate in legal philosophy. In the one camp, there are positivists who claim that the existence of the law as a social phenomenon turns solely on certain social facts (Gardner, 2012: 19–21). In the other camp, there are those who claim that the existence of the law is not solely a matter of finding out certain social facts. Although it is hard to include these writers under one common term, *normativism* or *non-positivism* (Murphy, 2014) is illuminating. Legal positivism and normativism either extend to or derive from respectively different methodologies. The impasse between these two views is one of the main reasons why the foundations of jurisprudence require further discussion.

Moreover, there have been recent attacks on the foundations and justification of (general) jurisprudence by naturalists and legal sociologists (Leiter, 2007; Tamanaha, 2011). There is a variety of these arguments but what is shared in them is the denial of the autonomy of the legal as a social scientific or philosophical category. In particular, they seem to reject the idea that there is a distinct *legal* normativity in the normative domain. A strong commitment to empirical methods is also common. Although these writers are not always completely dismissive of traditional jurisprudence, they tend to reduce legal phenomena to mere social phenomena.

Ultimately, every philosophical theory requires a foundational discussion. The point of any philosophical inquiry in our day is to show its own significance. In the case of legal theory, there is room for imports from broader philosophy in terms of both issues.

I believe that the foundational worries concerning jurisprudence can be attributed to the same fundamental issue and that this issue can be resolved with a novel philosophical approach to understanding normative social phenomena. The foundational discussion will show why and how jurisprudence is possible as a philosophical theory of a social phenomenon. To do this, before coming up with a debate on the currency of particular methods or theories, it is imperative to inquire into the idea of a method or theory itself to see how reliable it can be. The reason for bringing the notion of a method into the centre of the discussion is the pervasive assumption that a scholarly work is legitimate as long as it maintains a sound and objective methodology. In short, the idea is: Stick to the method, and truth will emerge.

Hans-Georg Gadamer is a prominent figure who argues against the formation of truth and method in this way. His account of prejudices is meant to show how our reasoning is actually pre-conditioned and this prior involvement is inevitable yet enabling understanding instead of impeding it (Gadamer, 2013: 282–317). In this thesis, I aim to provide a reconstruction of Gadamerian philosophy by showing how it can be understood as a matter of presuppositions in the initial stage of theory construction that I call *the prior phase.* Then, I will point out to the implications of this discussion in legal theory by suggesting some arguments as to why and how jurisprudence is possible as a legitimate philosophical theory of a normative social phenomenon.

The analysis of *the prior phase* will show that there are presuppositions which have the character of historical prejudices in the sense that they cannot be justified in advance of the realisation that they enable the actual process of understanding. And that realisation can only be made within the processes of understanding, interpretation or theory construction. This may suggest that there is no final answer to the question of what the presuppositions of jurisprudence are. Nevertheless, there are certain prejudices which are indispensable for continuing the conversation we are having at

present. The central argument of the thesis is that the conversation in question here is jurisprudence and what I call *the hermeneutical reality of law* is one indispensable element to it.

In the first chapter, I provide an extended recap of the methodology debate in jurisprudence. Then, I propose a novel framework to analyse the foundations of philosophical theories of normative social phenomena such as the law. In this chapter, the Gadamer-inspired *prior phase* is juxtaposed with Weberian methodology to provide a more profound and clearer argument. This juxtaposition paves the way for connecting jurisprudence with the wider philosophy of social science and understanding to better inform and illuminate the methodology debate in legal theory. The second chapter provides the necessary historical and philosophical background for Gadamerian arguments while situating the article within the greater debate about objectivity, truth and normativity in social sciences and philosophy. It describes theoretical presuppositions and their roles in theorising normative social phenomena. The third chapter re-interprets the foundational worries that revolve around jurisprudence from this perspective. It renders the core problem with the legitimacy of jurisprudence anew and shows how this problem has actually been central to traditional legal theory. Along the way, the deficiencies of the typical methodologies and objectivist ideas are made manifest by showing how theoretical presuppositions work in theory construction. The final chapter aims to expose a central theoretical presupposition about the law that the legal theorist needs to attend to in order to understand legal phenomena genuinely.

CHAPTER 1

JURISPRUDENCE, FOUNDATIONS AND THE PRIOR PHASE

1.1 The Methodology Debate in Jurisprudence

The methodology debate in jurisprudence has a long history and owes to the question about the existence of the law itself. In its widest sense, positivism is the view that law's existence is solely a matter of social facts. For earlier posivitisms found in writers like John Austin, the social facts in question are supposed to be empirically observable facts in terms of *threats* of *a sovereign* and their likelihood to be realised (Austin and Hart, 1998). Laws are commands backed by threats issued by *a sovereign who is habitually obeyed* by the general public (Austin and Hart, 1998: 10–18). This theory was developed in answer to the earlier *natural law theorists* who understood the law as a moral or religious practice that was required to have some merits in terms of these in order to exist.

Austin's empirically oriented theory was later subject to harsh criticisms. For H.L.A. Hart (1997: 18–72), the central modern positivist figure in the Anglo-American legal theory, Austin's theory was insufficient because of its empirical methodology that depended on observational facts and simplistic predictions. Among its other deficiencies, Hart thought that Austin's dependence on the commands of a sovereign without realising that there was more to law than observable power relations was inadequate. Accordingly, he claimed that understanding the law would require *an internal point of view* as opposed to an external one from which only causal predictions about the law can be made (Hart, 1997: 88–92).

The internal point of view belongs to the participants of the legal practice. From this perspective, legal statements, rules, decisions and principles are meaningful and normative (binding). From the internal point of view, they constitute genuine reasons for action. For Hart (1997: 90–91), then, the existence of the law is dependent on the existence of such an internal point of view. Hence, the law was understood to be a hermeneutical concept in the sense that it satisfies two conditions: "(i) It plays a hermeneutic role, that is, it figures in how humans make themselves and their practices intelligible to themselves, and (ii) its extension is fixed by this hermeneutic role" (Farrell, 2006: 1002). The legal theorist was then expected to assume this point of view so that she can theorise about the law.

After Hart, the internal point of view became a central element in general jurisprudence. Not only positivists but also many non-positivists subscribed to the idea as we shall see. This was so, because traditional jurisprudents, from Hart to Ronald Dworkin, have centrally attempted to maintain the distinct normativity of the law via an interpretive approach. The underlying motivation behind this approach was the concern about the intelligibility of the legal practice with is rules, decisions and reasoning. If laws cannot be said to be distinctly normative, then anything legal may turn out to be part of a superfluous façade that can be explained away. The *legal* no longer serves as an objective criterion to evaluate legal outcomes or ascertaining what the legal phenomena are.

Although they shared the concern and appreciated the interpretive, internal approach; major non-positivist writers like John Finnis and Ronald Dworkin found different insufficiencies with the Hartian internal point of view. Finnis (2011: 10–15) thought that the internal point of view was inadequate for simply assuming the internal point of view failed to appreciate the practical concerns about the law that the jurisprudent must attend to (such as whether the law could be understood as practically good or distributing certain natural goods). Dworkin (1998: 45–9) thought that the internal point of view, although required to *make sense of the essentially argumentative*

character of the law, cannot sufficiently guide the theorist without an evaluative enhancement of it, to the effect that the interpretation of the law to be made by the scholar ought to show the law *in its best light*.

Against these claims, positivists who followed Hart tried to offer elaborations and modifications on the idea of the internal point of view so that it retains the distinct normativity of the law while remaining *value-neutral* or *objective.* The best formulation of this version is articulated by Julie Dickson (2001) who claims that *the internal point of view* aims to pick the data that the theorist must attend in order to theorise about the law beyond standard pragmatic theory construction virtues. By facilitating the internal point of view *as a methodological tool* or *technique*, the legal theorist first describes what the law is objectively, and makes her own evaluations about the law only afterwards (Dickson, 2015).

There are writers who claim that the long-existing impasse cannot be overcome at all and general jurisprudence as a discipline is no longer attractive (Bix, 2015; Murphy, 2014; Leiter, 2007). There are also those who think that jurisprudence should move on and try to be something else (Hershovitz, 2015). These writers are recently enjoined in pointing out the foundational problems of jurisprudence by naturalists and legal sociologists (Leiter, 2007; Tamanaha, 2015). Nevertheless, I believe that there is a way to overcome this stagnancy. This way requires, in the first instance, a broader approach to the methodology debate in jurisprudence from the wider philosophy of social science and understanding.

1.2 The Wider Debate on Methodology in Social Sciences and Philosophy

In order to analyse the foundations of jurisprudence from the wider perspective of general philosophy, I first would like to explain a stage of theorising. I call this stage "*the prior phase*." The consideration of the prior phase can facilitate the debate on the philosophical methodology of understanding normative social phenomena.

One of the enduring debates in the philosophy of science concerns the legitimacy and currency of the methodologies of social sciences and philosophy. In the overall search for truth, a very pervasive idea was to depend on a certain method to ensure that objective knowledge can be gained. This entrenched idea goes back to the Cartesian method of doubt.

Typically, a method is understood to be a set of principles and paradigms that a scholar must observe as a kind of self-discipline while conducting her studies. In another sense, a method is something similar to what can be called a *technique*, a certain way of doing something in order to achieve a given aim. The point of having a method is to make sure that the study in question is legitimate as far as epistemology and ontology are concerned. Accordingly, methods and how they are conducted within the research constitute a significant part of the foundational discussions of any field.

The idea of a method has been regarded as applicable to natural sciences, but social sciences and philosophy have always been considered as problematic. The underlying assumptions of an empirical epistemology and the aim of objectivity meant that inquiries concerning social and human phenomena might not produce valid results (Gimbel, 2016: 73–4). Anything that seems to require conscious interpretation on the part of the scholar is rendered potentially ambiguous. This view presupposes that, whatever the outcomes of the research could be, methodology as a matter of having solid foundations must be determined before the actual study is conducted.

The prior phase targets this view and aims to address the very first stage of theorising where the scholar neither has a method in place, nor has performed the actual work. *The prior phase* is the stage of theorising when one first considers the relevance of one's data for one's theory and the ways of selecting the significant portion among that data. Alternatively, in this initial stage, there are two questions that the theorist needs to answer: 1) Where does she look to gather data on the subject of her theory?

2) What is the way to evaluate significance and importance among the relevant data chosen?

The answers to these two questions will, in turn, constitute the subject-matter of a scholarly inquiry. Methods or techniques that are to be deployed by the scholar are intended to provide answers to these questions as previously articulated and justified in advance. The scholar is supposed to stick to the method so that truth emerges in due course.

The answers that a theory provides for these two questions reveal its methodological preferences or assumptions, and makes us able to spot the convergences and divergences between different theories clearly. Even though a theory is not explicit about its stance in the prior phase, we can read its commitments from its implications or assumptions. In this form, *the prior phase* not only investigates the problem of methodological legitimacy but also questions the possibility of a method and its viability in the first place. Accordingly, *the prior phase* is where the theory addresses the *foundational question:* Can there be a philosophical theory of a normative social phenomenon such as the law?

The idea behind the prior phase is not something that uniquely belongs to me. There have been other jurisprudents who reflected upon the initial steps and legitimacy of a theory of law in similar ways (Waluchow & Sciaraffa, 2013). Nonetheless, my account differs from all of them in that 1) It considers the essential pre-theoretical stage in terms of *theoretical presuppositions*, 2) It considers the possibility (legitimacy) of legal theory as a whole, 3) It aims to refute the misunderstandings and misconceptions about the idea of an initial stage before the study and 4) It connects jurisprudential theorising to metaphysics and epistemology.

These considerations should already make explicit that what I deal with here is general philosophical legal theory. This is not to say that there are no implications for

theories of a more particular or scientific nature. The purpose is instead to provide the central case for the discussion. Here, legal theory is supposed to be a philosophical theory that attempts to answer the basic question: What is law? It is a theory that explains legal phenomena systematically and comprehensively. I use the terms general jurisprudence, legal philosophy, and philosophy of law interchangeably. As long as a theory is intended as an answer to the basic question "what -and perhaps, how- is law" and it explains legal phenomena systemically and comprehensively, it is a theory of law.

The foundational discussion that I am facilitating here is not something that is unique to jurisprudence. It concerns the legitimacy and currency of understanding or explaining social phenomena in general. The debate on jurisprudence is but one sub-section of that greater debate as will become clear. Making connections between jurisprudence and general philosophy is needed and will be illuminating.

In this regard, in order to better understand *the prior phase*, I suggest that we consider it in juxtaposition with the views of a central theorist of social science who is one of the influential and jurisprudentially relevant scholars: Max Weber.

Weber realised that there was a problem of objectivity in social sciences and philosophy that arose due to the nature of their subject matter: "There is no absolutely "objective" scientific analysis of… social phenomena… independent of special and "one-sided" points of view, according to which those phenomena are – explicitly or implicitly, deliberately or unconsciously – selected as an object of inquiry."(Bruun & Whimster, 2012: 113). Therefore, the scholar cannot be said to begin her studies from scratch; she needs guidance in order to find what is relevant for her studies in the first place (Bruun & Whimster, 2012: 115–6). Weber was keen enough to observe that these will in part be determined by the presuppositions of the scholar (Bruun & Whimster, 2012: 116). Against the vast *chaos* of the data out there, the reason

> "why order can reign… is the fact that, in each case, it is only a part of individual realities that is of interest and has significance for us, because only that part has a relation to cultural value ideas with which we approach reality." (Bruun & Whimster, 2012: 118)

So far, Weber's arguments reflect *the prior phase* to a large extent. He too understands that there is something prior at play before the actual study, and connects them to the questions of *relevance* and *significance*. It is in what follows that I disagree with him.

For Weber, the absolute validity and justification of any meaning or any norm cannot be found out by the *factual/empirical component* of any science since there is a strict distinction between values and facts (Bruun & Whimster, 2012: 315–16). All that human sciences can be expected to do is to analyse the means of attaining a certain given end, point out whether the means are suitable for the desired effect and whether they will have unwanted side-effects (Bruun & Whimster, 2012: 130–1). The rest, whether that end should be chosen or not, even the unique meaning of an end cannot be validly argued by the scholar (Bruun & Whimster, 2012: 317–18).

Nevertheless, this did not pose any severe threat to the objectivity and legitimacy of the social sciences and philosophy as long as the scholar was keen to distinguish carefully where she describes facts and where she makes evaluations of her own (Bruun & Whimster 2012: 102–3). The crucial insight is to be aware of this at all times as something that the self-disciplined scholar must do. The answer to the problem of relevance then becomes *value relevance* (Bruun & Whimster, 2012: 135–6). The scholar must attend to the value expressed by the subject matter of her study. Nevertheless, whatever value there may be out there, they can be described in an empirical way. Anything that is value relevant can be the subject matter of a social study in a value-neutral way. This subscription to value neutrality is similarly reflected in Weber's more substantial work (2013: 3–33) where he discusses what *social facts* are and how *acceptance* plays a key role in ascertaining social facts.

Weber's famous stipulation of *ideal types* with a view to *value relations* is derived from these discussions. He thinks that the ideal type

> seeks to render the scholar's judgment concerning causal imputation more acute: It is not a "hypothesis" but it seeks to guide the formulation of hypotheses. It is not a depiction of reality, but it seeks to provide the scientific account with unambiguous means of expression." (Bruun & Whimster, 2012: 126)

In other words, he thinks that the proper facilitation of ideal types will safeguard objectivity. Accordingly, he understands these to be *tools* or *techniques in the form of initial frameworks* that may start the study off, but be left behind if recalcitrant empirical evidence emerges (Bruun & Whimster 2012: 330–3). In this form, Weberian methodology begins with the questions of relevance and significance and cashes them out in terms of the relationship between methods, objectivity and truth as my prior phase analysis does. Nevertheless, it subscribes to a Neo-Kantian distinction between facts and values and ends up with a sort of articulated decisionism (Bruun & Whimster, 2012: 317).

One can see at this point that there are many similarities between the Hartian/Dicksonian approach to theorising about normative social phenomena and Weberian methodology. Both of them realise that pragmatic virtues will not suffice for their proper inquiry. They emphasise the distinction between facts and values heavily. They both put a great premium on objectivity or value-neutrality. In what follows, therefore, the criticisms that I will make about the Weberian approach will also illuminate the problems with traditional jurisprudence.

It is on the latter two of these ideas that I diverge with Weberian methodology (and the positivist methodology) concerning the idea behind *the prior phase*. I believe that the questions of the prior phase cannot be answered by articulated objective methods or techniques that are justified in advance. This claim is derived from the Gadamerian account of prejudices (*prejudgments)*. The next section will, therefore, re-construct this account with an eye to the debate concerning the foundations of legal theory.

CHAPTER 2

GADAMERIAN PRE-STRUCTURE OF UNDERSTANDING AND THE FOUNDATIONAL PROBLEM OF JURISPRUDENCE

2.1 The Wider Debate on Methodology and Gadamerian Hermeneutics

Hermeneutics, in the traditional sense, is an art of interpreting and understanding. The origins of the term go back to Plato and especially to the method of interpreting holy texts. As an intellectual tradition, hermeneutics has undergone significant alterations since then. What we can call "modern hermeneutics" began with thinkers like Friedrich Schleiermacher and Wilhelm Dilthey in the 18th and 19th centuries. These transformations in the history of the discipline are crucial to understanding Hans-Georg Gadamer and his version of hermeneutics.

As I explained in the previous chapter, since Descartes or the Enlightenment in general, scholarship has been taken to be a matter of method in the West. The Enlightenment, with its emphasis on positive sciences, held reason and objectivity above all. With the respectable advancements in natural sciences and technology, the methodological self-reflection of social scientists and philosophers found a plausible systematic framework in the *positivism* of the 18th and 19th centuries.

That positivism depended on a thoroughly empirical epistemology and a very strong emphasis on objectivity (Gimbel, 2016: 73). Both of these tenets were either thought to be satisfied with or derived from the pervasive understanding of the methodology of the era which favoured objectively discovered deductive-nomological casual laws (Gadamer, 2013: 3–5). Their demand for social science and philosophy was to follow

this example as far as it can be followed. The demand was too radical to the degree that much of the previous social philosophy was dismissed as a valid source of knowledge.

In the late 18th and 19th Centuries, inspired partly by Hegel and Vico, a new school of thought, or programme came about against positivism. This *historicist* school sought to re-establish the prestige of history, and other social sciences for which they saw history as a paradigm, by finding out the deficiencies of the objectivist and rationalist edifice of the Enlightenment (Leiter & Rosen, 2008). Their positive agenda included arguments to the effect that the historicity of social phenomena was the key for their cognition: "…historicism questioned the enduring search in Western philosophy to find transcendent justifications for social, political and moral values. i.e., the endeavour to give these values support or sanction outside or beyond their own specific social and cultural context." (Leiter & Rosen, 2008: 165). In other words, they thought that all our ways of coming to know and what we can cognise as a subject matter of a study necessarily depend on the conditions of a certain period of time. Therefore, the scholar, in order to understand, must leave the assumption that there can be an objective Archimedean point out of the flux of history. She must try to carry out social science and philosophy by attending to the specific contexts that gave rise to those phenomena in the first place.

Wilhelm Dilthey (1989), although not strictly a historicist, took this idea one step forward. He claimed that although social phenomena do not admit the methods of natural sciences, there still was a need to find an objective method that will safeguard the legitimacy of human sciences (Dilthey, 1989: 53–77). His question was: "What is the complex of principles which underlies, at one and the same time, the judgment of the historian, the conclusions of the national economist and the concepts of the jurist, and gives them their certitude?" (Dilthey, 1989: 31)

Dilthey found this set of complex principles to be a common objective method; a hermeneutics as an objective method. There was a relationship of the subject and the object between the text and the interpreter; ultimately, the inquirer and the inquired. This meant that understanding anything requires understanding the intended meaning of it by the social actors that bring it about. This lead the way to the problematic of the subjectivity of the scholar for the scholar's own attribution of meaning and her own evaluations might meddle with the actual meaning of what is inquired into.

Dilthey's claim implies that if there is no method in place to safeguard the authentic meaning of what is inquired into, then the authenticity is lost. This, in turn, means that the study is no longer objective on which different parties can agree. Accordingly, Dilthey argued that genuinely engaging the historical conditions of a social phenomenon can only be done via a hermeneutics which required the scholar to transpose herself into the situation of what is to be understood (Gadamer, 2013: 181–186). The scholar as the subject needed to retain a degree of distancing in order to understand properly what the conveyed meaning is (Gadamer, 2013: 302–3). In this way, Dilthey's hermeneutics attempts to eliminate the subjectivity of the scholar which is the root of many foundational problems of social sciences and philosophy.

Dilthey and others before him like Friedrich Schleiermacher (1977) were writing during the onslaught of natural sciences and under the shadow of Kantian philosophy. Their hermeneutics can be summarised as an attempt to find *the method propré (the proper method)* for human sciences (Ramberg and Gjesdal, 2014). They hoped that such a method would provide humanities with the certainty and legitimacy of natural sciences. Hermeneutics was thus an objective method of interpretation to be used for understanding the proper context and meaning in human sciences. As it can be seen from my earlier remarks, a similar approach to hermeneutics and understanding is also found in Weber who calls for the self-discipline of the scholar through ideal types as tools to retain objectivity.

Although Gadamer finds much that is valuable in Schleiermacher, Dilthey and Weber, his purpose is radically different. Gadamer's main aim is to make the idea of a method itself problematic just like *the prior phase.* He claims that his book is "concerned to seek the experience of truth that transcends the domain of scientific method wherever that experience is to be found, and to inquire into its legitimacy." (Gadamer, 2013: xxi). The reason for bringing the notion of a method into the centre of the discussion, as I have pointed out before, is the assumption that a scholarly work is legitimate as long as it maintains a sound and objective methodology. Here is that assumption made manifest in the words of Brian Leiter (2007: 168):

> Epistemic values specify (what we hope are) the truth-conducive desiderata we aspire to in theory construction and theory choice: evidentiary adequacy ("saving the phenomena"), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth. **Honor those values—even the explicitly pragmatic ones like simplicity—and, we hope, we will acquire knowledge.** [Bolds are mine]

This is, in short, what Gadamer is against: Stick to the method, and truth will emerge. Gadamer's insistence is that there is something greater and prior at play here.

2.2 The Positive Account of Prejudices

This overarching aim of *Truth and Method* has important consequences. First of all, it necessitates a much more profound and a properly philosophical investigation compared to 19th-century hermeneutics. That more profound philosophical hermeneutics started with the so-called *ontological turn* (Gadamer, 2013: 493). Gadamerian hermeneutics owes a significant amount of its significance to this turn which began with Martin Heidegger's *Being and Time* (2001).

Heidegger understood hermeneutics to be the way of explicating the fore-structure of understanding as such (Gadamer, 2013: 260–82). The reason for this was the prior ontological situatedness. For Heidegger, when we try to understand a given object, we necessarily have a prior understanding which situates ourselves and the object together in a certain way. To make sense of the object in the first place, this

situatedness of the object and ourselves in the world together has to be presupposed (Heidegger, 2001: 61–3). Then hermeneutics is no longer a method or a technique to be used in understanding social phenomena but is a first philosophy for the ontological and practical situatedness precedes all our attempts to understand the world and ourselves. Although his subsequent philosophy is very different from Heidegger's, Gadamer builds his hermeneutics on these premises.

According to Gadamer (2013: 288–90), the main problem with the Enlightenment and its *proper methodology advocate* critics is their shared *prejudice against having prejudices* or, as he calls them*, pre-judgements*. Prior to any understanding, just in parallel with the hermeneutical situatedness, we already have pre-judgements about things, practices or thoughts we try to understand and explain. This fore-structure makes the principle of Cartesian doubt and the insistence on the objective methods problematic. Here, Gadamer's use of the term prejudice (prejudgment) is a profound one. These are not mere biases of the scholar but the historical conditions and requirements of social practices and their constraints on the inquiries concerning them.

We human beings are inevitably tied to our history. We have a mode of being that is historical and finite: "The self-awareness of the individual is only a flickering in the closed circuits of historical life." (Gadamer, 2013: 289). In such a predicament, what constitutes our historical reality is actually that history itself, i.e., our prejudgements. As Gadamer (2013: 288) captures elegantly ,"history does not belong to us; we belong to history." When one attempts to understand or explain something, that something is already hermeneutically situated. This initial situatedness is like a concealment as well as a disclosure. It implies a prior involvement and partiality (Gadamer, 2013). It is by virtue of this partiality and prior involvement that understanding becomes possible, not in spite of it (Gadamer, 2013). If we had no prior conception or understanding, it would be impossible to understand anything at all. These are the necessary conditions and outlook of our mode of understanding.

Therefore, it is as though the scholar is in a resonance chamber where every sort of voices, experiences, tradition and authority resonate in her ears without and before an explicit judgement (Gadamer, 2008: 9–10). “Our finite historical being is marked by the fact that the authority of what was handed down to us… always has power over our attitudes and behaviour” (Gadamer, 2013: 292). It is not only fruitless but also a naiveté to call for a purely objective methodology. Accordingly, the Cartesian distinction of the subject and the object withers away. The subject, whose prejudgments make understanding possible has to turn to herself. In order to understand “how” and “why” she understands what she claims to have understood, she needs to be self-aware and reflexive. The examiner thus becomes the examined. As Gander (Malpas and Gander, 2014) puts it aptly, “human understanding never occurs without presuppositions.”

The upshot of the preceding discussion is that there is no ground zero for a philosophical theory of a normative social phenomenon. Our attempts to discover objective truths via our trust in articulated methods culminate in a “fantastic over-estimation of reason.” (Gadamer, 2013: 592). This *overestimation* neglects the common and public scheme of interpretation that the shared inherited elements of our history bring to us to make understanding possible. As a matter of fact, most of what we do is, in a sense, already decided, and our primary task must be the operation of a *historically effected consciousness* in terms of the subject matter that we are attempting to understand. This historically effected consciousness is nothing but the consciousness that is aware of this historicity and the effects of the history upon itself (Gadamer, 2013: 311–12).

2.3 Theoretical Presuppositions, Jurisprudence and The Fusion of Horizons

Rendered in terms of the *prior phase,* the positive account of prejudices implies that the questions of relevance and significance can only be given by presuppositions that pertain to the substantial subject-matter and not by principled methodology. A

normative practice such as the law is intelligible as distinct in the domain of the social only because of certain shared contexts in the form of presuppositions. When one attempts to understand or explain a social practice such as the law, that something is already hermeneutically determined by the historical reality of the practice. This means that the normativity of the law can only arise thanks to a belonging to a tradition that will render the underlying practice intelligible. The form of belonging for the scholar is that of a *theoretical presupposition.*

Theoretical presuppositions are historical presuppositions which have the character of prejudices that are required for any attempt to understand a particular social practice. They are presuppositions which form the basis for theorising about a normative social phenomenon. These presuppositions are presuppositions of theorising. The term's aim is to capture their metaphysical and epistemological properties in theory-construction, not to situate it against *the practical*.

In *Human, All Too Human*, Nietzsche talks about how it is that language must have acted as a *putative science* for our ancestors (Hollingdale, 1996: 14–16). He thinks that humans could never have had language without supposing that they had "in the concepts and names of things" an "in aeternae veritates" [1] (Hollingdale, 1996: 16). Nietzsche's point here is not so much to argue against strict correspondence theories but to explain why this supposition that language and names revealed the truth about the objects was required. That supposition is an unreflective yet substantive claim to truth which turns out to be problematic when reflection follows afterwards. The same goes for logic and mathematics:

> Logic too depends on presuppositions with which nothing in the real world corresponds, for example on the presupposition that there are identical things, but this science came into existence through the opposite belief (that such conditions do obtain in the real world). It is the same with mathematics**, which would certainly not have come into existence if one had known from the beginning**

[1] "the eternal truth"

> **that there was in nature no exactly straight line, no real circle, no absolute magnitude."** (Hollingdale 1996)[2] [Bolds are mine].

It is in this sense that what I term as theoretical presuppositions meet the conditions of a genuinely historically affected consciousness.

The historical character of theoretical presuppositions is not a mere restatement of the basic idea that we are all products of history and our time. The effect of these presuppositions is much more profound and substantial for our thinking. They seem like constructs which are nevertheless indispensable for certain practices as they are inbuilt into those practices with a strong truth claim. They are thus requirements of our understanding for any practice. In this character, they are not arbitrary constructs. Neither are they, however, axioms since they cannot be articulated before the actual process of understanding due to their historicity found in practice. Without these presuppositions, it would not have been and is not, possible to even begin discussing or inquiring into the very thing that concerns us as the task of a scholarly understanding.

Jurisprudence is one of the best cases for an analysis through the lenses of *the prior phase* and theoretical presuppositions not only because of the attacks on its legitimacy. What makes jurisprudence a good showcase is firstly its immanent relation to practical reason that plays well with the practical underpinnings of *the prior phase*. Secondly, understood as a system of institutions and rules, the practice of the law depends on the integral validity and consistency of its own presuppositions. Finally, law is a social practice with a profoundly historical nature.

Theoretical presuppositions are not impediments that need to be overcome; neither are they bags of bricks that will be left behind. They are both the data to be inquired and the spectacle through which we inquire. Legitimate reasoning is only possible to

[2] Compare these to the section where Wittgenstein says: "The more closely we examine actual language, the greater becomes the conflict between it and our requirement. (For the crystalline purity of logic was, of course, not something I had discovered: it was a requirement.)" (Wittgenstein, 2009: 51e)

occur over them. In *the prior phase* of theorising, the initial metaphysical and epistemological underpinnings must be understood in this scheme. The theorist's world is already suffused with "what was handed down to us" (Gadamer, 2013: 311). That whole web of pre-judgements and pre-conceptions provides the data to be concerned with. It is also the way to select what is important among that set of data for "we are simply following an internal necessity of the thing itself if we go beyond the idea of the object and the objectivity of understanding" by doing this (Gadamer, 2013: 477). Committing to the background conditions of a practice is necessary for understanding that practice.

It is crucial to see here, again, that the prejudgments or presuppositions in question are not the mere biases of the scholar. They belong to the very thing that we try to understand. They are the implications and inbuilt shared aspects of our common history as manifested in the language. They are embedded in our institutions and traditions. It is only in virtue of these public, historically and linguistically mediated forms of presuppositions that anything is rendered intelligible as the subject matter of a study. The possibility conditions for any legitimate philosophical theory, therefore, must depend on theoretical presuppositions understood in this way. This is the true implication of *the Gadamerian positive account of prejudices* in the context of theory-construction: "Thus we can formulate the fundamental epistemological question for a truly historical hermeneutics as follows: what is the ground of the legitimacy of prejudices?" (Gadamer, 2013: 289). Asking this question means that the possibility of understanding becomes a scholarly task whose circumstances and conditions we have to work out for a legitimate inquiry (Gadamer, 2013: 317).

The interplay between the practice, its rendering intelligible and traditions leads us to Gadamer's explication of *the fusion of horizons.* A tradition, in this line, is not a narrow collection of habits but a broadly conceived background with all sorts of preconceptions, shared views, methods, languages and rules; a tradition within which a social practice is couched. In the case of the law as my prime example, these are

given by the realities of the practice: Decisions, rhetoric, processes, heuristics, legal argumentation and the principles.

According to Gadamer, the process of understanding begins in a way that is similar to the development of the structure of self-consciousness according to Hegel (2003). We first need to discover all that is subjective and substantially determining in our present (Gadamer, 2013: 313). Recalling from the pre-structure of understanding, we are already in a certain situation with the object that addresses us. This situation of which we must be conscious is called *a horizon* by Gadamer (2013: 310–320). A horizon is like an angle the inside of which is visible to the person who is at the point of the convergence of two lines. As an expression of historicity, the angle is already defined and limited. Nevertheless, without the light that such an angle sheds on our sight, it is impossible to see anything within it. This is the expression of the idea that our shared preconceptions deriving from history are the building blocks of our horizons. It is our horizons that enable us to understand.

According to the objectivists, understanding anything would require transposing one's horizon into the horizon of it whereas Gadamer (2013: 414) tells us that this would mean to conceive the otherness of the other in a such a way that all possibility of agreement will cease. To understand, we need to grasp our horizon to the full without distancing ourselves, to engage with it and with different horizons in a dialogue. Thus, we are not stuck within our own horizons. Indeed, as all horizons of particular presents stand side by side in the continuum of time and tradition, a self-contained horizon cannot be maintained at all.

We as scholars need to be open for every possibility, open to accept the claim of truth the subject matter of our study carries with itself (Gadamer, 2013: 370–75). We cannot detach ourselves from the process and the practice, on the contrary, any understanding is about the significance of that truth-claim for ourselves in the present (Gadamer, 2013: 314). That truth-claim is the theoretical presupposition in the form

of a commitment to the tradition in which the practice resides. In this way, must we bridge the past and the present, overarching it. Only then, an agreement, an understanding; *a fusion of horizon*s may occur (Gadamer, 2013: 317–8).

The best way is to conceive this operation is to do this over a straightforward example. I think that the way the concept *"classical"* is understood is a perfect one to see how it is *tradition* and *authority* which are the sources for our prejudgments that form our horizons (Gadamer, 2013: 269). Gadamer's illustration of the use of the concept of "the classical" shows how a cognitive concept may play a normative role by way of tradition and authority (Gadamer, 2013: 296–299). The cognitive function of the concept classical picks out a specific period in time varying for different fields. Nevertheless, simply because we stand in a certain relation to that period in a certain way, the concept inherently has a normative function as well. This normative function derives from our participation in a tradition, "in a process of transmission where the past and present are constantly mediated" (Gadamer, 2013: 302). It is not so much that there is any intrinsic *classicality* in any work of art or piece of writing but that our belonging to a certain tradition paves the way for us to render the concept *classical* as simultaneously cognitive and normative. Here, the temporal distance accordingly becomes a safeguard of truth as opposed to impeding understanding (Healy, 2014). What has worked out as a true prejudice for a genuine understanding is revealed, as it were, by the test of time and efforts of understanding.

Understanding in the case of norms is always interpreting and theorising in this sense that there is always a historical, conceptual and institutional background that informs and constrains our attempts to conceive normativity. To that extent, not simple methodological articulation that isolates the subject matter of a study from broader contexts but only habituation to and a realisation of the true extent and substantial effects of those background conditions can ground normativity.

Hence, the two questions of *the prior phase* cannot be answered by articulated methods for philosophical theories of normative social phenomena. They can only be answered by theoretical presuppositions. These presuppositions, in turn, constitute the very subject-matter of a legitimate theory.

CHAPTER 3

THE POSSIBILITY OF PHILOSOPHICAL INQUIRY AND INTERPRETATION

3.1 The Foundational Problem of Jurisprudence Recast

Until this point, I have made the wider context within which the methodology debate in jurisprudence is situated clear. I have shown why the two questions of *the prior phase* can only be answered by theoretical presuppositions. Now, depending on these insights, I can state in full and recast the general foundational problem about philosophical theories of normative social phenomena as it pertains to jurisprudence. As I have been trying to show, the problem concerns the realization of the theoretical presuppositions of our understanding of the law. Due to the normative nature of the law and the interpretive approach to it, this problem manifests itself not in terms of the factual elements of the law (such as those about the power structure that allows for it) but in its normative aspects. Accordingly, a closer examination of the problems revolving around legal normativity is needed.

The challenge about the interpretive approach to law's normativity and the common motivation of the jurisprudents against the challenge can be clarified by a striking example: MacCormick's example of Gulliver's watch in the eyes of Lilliputians (MacCormick, 1978). According to the famous story, Gulliver lands on the magical island of Lilliput whose tiny inhabitants capture Gulliver (Swift 2010). Gulliver, who happens to have a fob watch on him, is closely observed by the Islanders. They come to the conclusion that the watch is probably *his god*; for they observe him consult to it

before making decisions, they see him regularly praying to (looking at) it, and they notice that he protects it dearly (Swift 2010).

The Lilliputians might be said to have an understanding of their own about Gulliver's watch. This understanding may in effect be consistent with their empirical observations most of the time. However, we can see that their understanding of the watch is inadequate.

A straightforward naturalist claim here could be that there is no true understanding of Gulliver's watch and its use by Gulliver. One could also say that social phenomena are not natural kinds. It is not that social sciences and philosophy are limited in their capacity to find the truth about these phenomena but that there cannot be such truths to be discovered. The core jurisprudential claim is to resist this negative conclusion. Instead, it suggests that there is something missing in the picture. What is missing is the *idea of an internal point of view.*

Although there are differences between jurisprudents on the exact nature of the internal point of view as I have explained in the first chapter, all of their accounts are products of the interpretive approach to legal normativity. These accounts share a significant aim to make sense of the normativity of law against external (read: empirical) approaches like Leiter's or legal sociologists' or a crude predictive approach that depends on power relations like Austin's.

The aim in question is an implication of the idea that basic physical facts as we find them in the world do not suffice for understanding what the law amounts to. They are devoid of meaning in the sense that they remain as mere behaviours which can be characterised in physical terms and are not guided by norms. The guidance provided by the norms is constitutive of *the content* of legal phenomena such as rules or decisions which the jurist can apply and on which the jurisprudent can depend.

It follows that if we can legitimately explain the normativity of the law in an interpretive way, then all the challenges concerning the relevance and objectivity will be met. Therefore, the problem here is actually the very foundational question on which most of legal philosophy depends: Developing a non-reductive understanding of legal normativity that nevertheless respects its distinctive character.

The most straightforward and perhaps the seemingly easiest way to do this is to clothe the law with the garment of something that is rather unproblematically considered to be normative. That garment is morality. This is roughly the path chosen by Finnis (2011: 14–15) when he tries to incorporate *the practical point of view* as a reasonable methodological principle:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation… a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description.

A similar move is even more direct in the case of Dworkin (1998), not only because he has strong arguments against empirical methods in general but because of the obvious purposive constraints he puts on legal theory such as that of regulating the conditions of justified coercive power. What is crucial to consider here, however, is that for these theorists, the law is considered to be a sovereign socio-ontological category. Their focus on the legalistic data, and treating them as relevant and significant is an implication of this.

The Hartian solution to the problem is to claim that norms entail conventions (Hart, 1997). The rule of recognition, as a social norm, exists because there is a certain group of people (officials) on the part of whom there is a behavioural regularity coupled with certain normative attitudes. Habituation, and thereby efficacy becomes the key reply to the question about the emergence of legal norms (Eleftheriadis,

2011). The advantage of the Hartian view is that social facts about the existence of a certain kind of behaviour are much less ontologically problematic compared to facts about supposed meanings of those behaviours which seem to be required for an adequate theory of law. This advantage is methodologically emphasized by Hart's claim that his theory can also be regarded as "an essay in descriptive sociology" (Hart, 1997: v). In this regard, the reason for his insistence on the internal point of view is the aim to fix the content of the rule of recognition so that he can safely make claims about the existence of the law.

Another alternative is to bite the bullet and claim that there is no essential difference between other social norms and the law unless we admit a presupposition which will ground legal norms. This is, of course, the Kelsenian Basic Norm which reads "The first historical constitution is valid (binding)" (Kelsen, 2009: 217). Kelsen's relevant key claim about the Basic Norm is as follows: "the relevant inter human relationship may be, but need not be, interpreted as normative'… It means further: they can be interpreted without such presupposition (i.e. without the basic norm) as power relations… they can be interpreted sociologically, not juristically." (Kelsen, 2009: 218). Though he admits that there are other possible explanations, he argues that if we are looking for the juristic answers, the only way to obtain them is to think of law as normative.

As I have pointed out in the first chapter, Dickson takes the Hartian internal point of view and presents it as a solution by strengthening it. Rendered in that way, Dickson's formulation of the *internal point of view* becomes an answer to the foundational challenge that *the prior phase* raises as more or less the common answer of the positivist theories in the Hartian/Razian line (Dickson, 2013). Dickson (2001), perhaps without noticing that she is trying to address a much more fundamental question, presents the idea of an internal point of view as a necessary methodological move for addressing the two questions of *the prior phase*.

This view holds that law can best (or only) be understood by considering the views and practices of those who participate in it, i.e., with a *hermeneutical* approach. The approach concerns the practices and attitudes of a certain group of people and considers only those practices and views relevant. It states that the relevant data which the theorist must be concerned with is the participant's attitudes and practices (e.g., rules, cases, juridical behaviour and argument, rhetoric) for they are the constituents of law as a matter of social ontology.

In other words, traditional jurisprudence focuses on the argument that the actions and practices can be understood only by recognising their points or objectives; their values and significance for the people who are engaged in them. If we do not take this into account, there is nothing to distinguish law from ordinary habitual behaviours as Dickson (2004: 125-6) summarises this general argument:

> …legal theorists… .must engage in evaluative judgments concerning not merely the metatheoretical virtues of theories in general but which are judgments about the subject matter or data of legal theory itself….Legal theory tries to help us understand ourselves and our social world in terms of law, and so a successful legal theorist must make evaluative judgments of importance and significance about his or her subject matter and must do so in a way that is sufficiently sensitive to those already existing self-understandings in terms of law held by those who create, administer, and are subject to law.

When we take this *internal point of view* into account, we are supposed to carry out our accustomed conceptual analysis about the nature of obligations over judicial history and practical reasoning. The naturalist or sociologistic position, in contrast, would have us conduct empirical researches to find about whether judges are more lenient towards parole verdicts after lunch (Danziger & Levav & Avnaim-Pesso, 2011), whether people in Shasta County have a seemingly autonomous order within the Federal US Jurisdiction (Ellickson, 1991) or how constitutional court decisions are full of *cheap talk* to hide the actual underlying political determinants of them (Ginsburg, 2003). The internal point of view implies that our theory construction about the law begins in rules, decisions and the like. The entity, category or kind that is law, if any theory shall construe it, can only be found in the courtrooms. These, in

turn, supposedly make the explanation of legal normativity and phenomena sufficient in terms of the relevance question.

The jurisprudent is then invited to *assume* this internal point of view so that he can make sense of the legal practice. This assumption aims to safeguard the objectivity of the jurisprudence. The internal point of view is only assumed to make an explanation. It does not have to be genuinely shared by the theorist. What is described can be thoroughly evaluative or normative, but it is still an objective description. The scholar must not commit to anything. Even if a moral commitment could help to legitimise the normativity (bindingness) of the law as the non-positivists claim, since it will bring the potential subjectivity or relativity of those commitments, it will undermine the descriptive project.

The idea of the internal point of view amounts to something very similar to the Weberian *value-reference, acceptance* and *ideal types.* In the Weberian sense, the internal point of view becomes the determinant of the value-reference, thereby answering the question of relevance and significance in *the prior phase*. For the positivists, the objectivity of jurisprudence (and thereby its legitimacy) is still intact because they think that a straightforward description can be given even if what is explained is thoroughly normative and evaluative by simply factoring in the internal point of view of those who participate in what constitutes the normative.

Just as Weber claims that value-reference and scholarly discipline will resolve the problem of relevance and objectivity in *the prior phase*, the internal approach safeguards the objectivity of the jurisprudent for they only attend to the participant's attitudes and parts of the practice in an indirect way. This is not to say that jurisprudence has no evaluative part; but to claim that there is a prior descriptive, objective and factual work to be done (Dickson, 2001: 120–130). The internal point of view then turns out to be a methodological tool that will pick the relevant data for the theorist akin to Weberian ideal types.

In our age, the ultimate methodological question in philosophy is to show the significance of any philosophy. The continuing triumphant march of the sciences forces any global theory-construction to make explicit its own legitimacy. When a theorist tries to give an overall account of law, which is a vast and diverse phenomenon, suspicion is likely to follow. Indeed, traditional jurisprudence has been criticised for being parochial, vulnerable to biased selection effects and unwarranted (Leiter, 2007: 184–5; Tamanaha, 2011). Using the internal point of view approach to law may lead philosophers of law to an unwarranted armchair philosophising. This invites the friends of the empirical sciences to claim that arguments based on the hermeneutic approach are mere intuition mongering.

It is in this way that the problem of the normativity of a social practice such as the law and the hermeneutical approach to it is the root of problems for jurisprudence. The foundational problem is hence recast as the problem of normativity to capture the shared ground of the challenges against the legitimacy of jurisprudence.

3.2 The Shortcomings of the Internal Point of View and the Way Forward

Returning to Gulliver's watch, we immediately see the inaccuracy in the Islanders' explanation of the watch not because we simply can attribute a hypothetical, meaningful internal point of view to Gulliver. There are severe philosophical problems about that attribution. The first concerns the *middle-way* characteristic of the internal point of view.

The idea of the internal point of view is trapped between two poles: On the one hand, it cannot admit the thoroughly empirical methodology offered by naturalists and sociologists for it aims to retain the sovereignty of the legal category. On the other, it attempts to resist a Finnisian or Dworkinian enhancement on the internal point of view, for distancing moral evaluation is required due to objectivity concerns.

Nevertheless, there is no such tenable philosophical position in between the two. Accordingly, the internal point of view amounts to an arbitrary decisionism. Trying to appreciate the peculiarities of social phenomena without any compromise from the typical objectivist methods ends up being a half-hearted, inadequate solution. Without a group of people for whom the internal point of view is valid, i.e., officials in the Hartian theory, the legal system cannot exist. Ascertaining whether such a group exists, however, requires an empirical investigation which will not seem like what jurisprudents do. On the other hand, without showing that this exists, jurisprudential claims will make no sense.

Not incidentally, this is the same criticism that can be levelled at Weber: Although he is aware of the existence of a prior phase, his solution of value-reference and methodological asceticism remains *half-hearted*: *"*[Weber] *acknowledges the peculiarities of human social behaviour as a subject for science, but believes it possible to allow for them without compromising scientific method."*(Runciman, 1972: 16)

The second problem concerns the coherence of the idea. Returning to Gulliver's case, it is true that the Islanders may use all the *tools* available to them in order to understand him. They can observe him methodologically, then conduct well-formulated tests to reject different hypotheses or they can try to transpose their minds into that of Gulliver. They may even try to incorporate Gulliver's own comments about the watch when he is asked. Still, however, making sense of any of those results or the comments require us to have a prior context furnished by prejudices and shared with Gulliver in the first place. It is not because of the scholarly methods or tools we deploy, but because of these prejudices that any genuine understanding is achieved at all.

If there are no such shared horizons, then it is precisely there that the claims Gulliver makes become even more important. They are now the greatest entry point to a

genuine understanding of his use of the watch. We have to take his claims seriously, as true claims, even if only in the beginning. We need to interpret those claims not by trying to hypothesize what his world may be like, but precisely from our current predicament as something that practically appeals to our own situation as having validity.

The way the horizons (context) and prejudices work in the example reflects in this way the role theoretical presuppositions play in *the prior phase*. Legal phenomena are not like flowers or magnetic fields. They have a content fixed by the participants of the practice, and this content is manifest, at least putatively, in all of them. Rules, decisions, or principles *claim* to be applied. They are supposed to be binding, guiding behaviour. If we do not take this claim of normativity seriously, then the practice of the law loses its intelligibility.

To say that a rule of law is valid (in other words, it exists) cannot arise out of the possibility of an *internal point of view*. It must be shown that such a point of view exists, but the Hartian approach falls short in showing this for it understands the point of view in question as akin to a methodological tool. Something synthetic that the scholar is required to assume. Once we understand it in that way, the subject-matter becomes constituted by the *scholar herself.* Hence, the internal point of view undermines its own claim to objectivity.

Not surprisingly, this critique is also applicable to Weberian methodology for it also implies that values are projected onto the material by the researcher in the process of constituting a field of inquiry. Nevertheless, once we understand, together with Gadamer that the theoretical presuppositions of the inquiry are given by the tradition and not the scholar, the problem ceases. Since normativity of any social practice arises out of those traditions as background conditions, there really is no worry as long as we understand objectivity in terms of an interpersonal agreement in a new

way. The scholar is not free interpret as she wills but has to depend on the hermeutically determined content of the practice with its particularities and claims.

The method of internal point of view, however, disregards the relevance and significance of peculiarities that the particular situation presents. The nature of the thing that is the subject matter of the study asserts itself and demands that its own claims are taken seriously. As Gimbel (2016: 69) says, the scholar

> …is restrained in their interpretations -in this case, their truth claims- by both the history of interpretation, including the interpretations of social phenomena offered by social actors themselves… [She] is not free to reinterpret social phenomena in any way she pleases, but is constrained by the object of study itself.

It is not because we have techniques that can omit the peculiarities of the subject matters of our study, but thanks to those peculiarities given by their historical reality that we come to understand them.

The shortcomings of the internal point of view can be shown more clearly by a further Gadamerian critique that depends on *the problem of application.* This notion lies both in the heart of Gadamerian universal hermeneutics and the possibility of theorising the law as a distinctly normative social phenomenon. As Gadamer (2013: 317–318) points out, "To bring about [the] fusion [of horizons] in a regulated way is the task of what we called historically effected consciousness. [This task is] the central problem of hermeneutics. It is the problem of application, which is to be found in all understanding."

Building on Aristotle, Gadamer (2013: 324–8) makes a distinction between two kinds of practical knowledge: *tekhne and phronesis. Tekhne* implies knowing a set of skills that are general and applying this to particular cases when the need arises. The perfection of the possessor of the technical knowledge lies in the application of her skill to the object of her attention to its full extent. The point of possessing a *tekhne* is to display it in its maximum capacity. Due to its skill-based or rule-like nature, *tekhne* implies the subsumption of the individual case within the universal principle in a

more or less a straightforward way. There may be obstacles in doing this, but it is not a serious problem for perfection is still the goal and approaching it as much as possible by way of careful application is sufficient.

We can see the implications of this account of practical knowledge over the example of morality. Anybody in relation to morality may initially be thought of as possessing a *tekhne*, that is, *a tekhne of making oneself*. (Gadamer, 2013: 328). After all, morality is supposed to be comprised of a set of rules of conduct (whatever other features they might have) that must be applied to relevant particular situations (Foot, 1972).

Nonetheless, this is not the correct way to understand morality given the nature of understanding and the problem of application. The moral agent is not in the business of displaying her skill, knowledge and expertise in the fullest sense. The relevant set of knowledge for her is not a mere matter of learning "how to act" methodically by subsumption but of relating that general knowledge to the particular action in each and every case according to the specific needs of situations. Particularities of those situations are not obstacles, in this regard, to be overcome but they constitute a part of the application. The nature of the thing asserts itself in such a way that we cannot help but attend to it.

Remembering the fact that in their historicity, all understandings and truths are events in the Gadamerian picture, the inappropriateness of *tekhne* for understanding morality becomes obvious:

> The question is whether there can be any such thing as philosophical knowledge of the moral being of man and what role knowledge (i.e., logos) plays in the moral being of man. If man always encounters the good in the form of the particular practical situation in which he finds himself, the task of moral knowledge is to determine what the concrete situation asks of him—or, to put it another way, the person acting must view the concrete situation in light of what is asked of him in general. But—negatively put—this means that knowledge that cannot be applied to the concrete situation remains meaningless and even risks obscuring what the situation calls for. This state of affairs, which represents the nature of moral reflection, not only makes philosophical ethics a methodologically difficult

problem, but also gives the problem of method a moral relevance." (Gadamer, 2013: 323)

This mode of operation, then, cannot be a matter of *tekhne*.

The moral constraint on the method that Gadamer explains is not *universally* moral *simpliciter*. The constraint (and the enabler) is moral here for the subject matter of the study is morality. The problem of application forces us to recognise that the underlying practice creates constraints of its own kind. The point of claiming that there is a moral aspect to the problem of method is not to moralise everything. It is to stress the importance and seriousness within the scope of understanding. In a way, it is to transfer the severity of the subject matter of morality to the nature of understanding.

The subject matter of each study, as I have been trying to show, comes inbuilt with a shared pre-structure that enables its own understanding. In order to understand, one must *belong to a tradition* within which a practice is couched. This amounts to claiming that the only way to bring about scholarly understanding is to share similar conceptual schemes, normative attitudes or the existence of the possibility of a reinterpretation of one in terms of the other. The attributions of normativity to actions and institutions necessitate that shared background. In the example case of morality, the nature of the subject matter as manifested within the shared forms and structures of traditions requires things to be ordered according to the inescapable nature of moral responsibility.

Similarly, in the case of the law, the normative aspect of the underlying practice requires that normativity be part of its understanding. The subject matter itself is thoroughly normative, and we always find ourselves in the situation to apply what we know to our own case as a practical necessity. Just like moral knowledge, legal knowledge also "… is clearly not objective knowledge - i.e., the knowledge is not standing over against a situation that [the one who tries to understand the agent] merely observes; he is directly confronted with what he sees. It is something that he

has to do." (Gadamer, 2013: 325). The natural candidate for this type of reasoning is, therefore, *phronesis.*

3.3 Overcoming the Foundational Problem: True Hermeneutics

What is crucial here is to notice that the point of the problem of application is not to make everything a matter of evaluation and relativity. As I have been pointing out, there is nothing relative or personal in the strict sense of these terms. The theoretical presuppositions that make a philosophical theory possible are not mere subjective biases of the scholar but the preconceptions and considerations that owe to the nature of the practice at hand. They are the shared and the objective elements of our institutions, actions and considerations. They are the practice-bound metaphysical and epistemological constraints of understanding of a social practice such as the law.

The point of claiming that all understanding is in this way a matter of history and interpretation is not to say that there *is no truth of the matter*. Gadamer (2013: 534) makes this point when he addresses an important critique of his:

> But what does Betti say to this? That I am, then, limiting the hermeneutical problem to a quaestio facti ("phenomenologically," "descriptively") and do not at all pose the quaestio iuris. As if when Kant raised the quaestio iuris he intended to prescribe what the pure natural sciences ought to be, rather than to justify their transcendental possibility as they already were. In the sense of this Kantian distinction, to think beyond the concept of method in the human sciences, as my book attempts, is to ask the question of the "possibility" of the human sciences (which certainly does not mean what they really ought to be).

This squares perfectly with the Kantian overtone of the whole prior phase rhetoric and understanding the foundational problem of theory-construction for social phenomena in terms of a *possibility* question. Taking normativity seriously is required, but not prescriptions to the scholar. It is just that interpretation goes into the nature of the thing which is being interpreted: "…interpretation is contained potentially within the understanding process. It simply makes the understanding explicit. Thus interpretation is not a means through which understanding is achieved; rather, it enters into the

content of what is understood." (Gadamer, 2013: 416). This is not so much side-lining the 'descriptive' but to claim that there can be no 'descriptive' or 'factual' as such.[3]

The interplay between the cognitive and the normative, however, is not a problem. Just as it was this very fact why understanding the classical required habituation to a tradition, law's normativity is constituted in the same way. To understand a normative social practice, one must pay attention to it in this way. This is the only way of achieving interpersonal agreement in philosophical inquiries of normative social phenomena.

Understanding the law as *phronesis* means that the normative aspect of the underlying practice requires that normativity be part of its understanding. It requires a realisation of the practice from the perspective of the tradition in which the practice is couched. A practical orientation that will make sense of legal phenomena not as something to be understood in the abstract but as something that pertains to our own practical predicament.

Therefore, it is not possible to neatly distinguish, *as the internal point of view requires*, what is cognitive from what is normative in the field of social phenomena such as the law. Nevertheless, it is this fact, the constitutive role that the traditions as contexts play, that allows for the legitimacy of jurisprudence. This genuine hermeneutical approach makes sure that the law as a socio-ontologically relevant category cannot be dismissed or reduced. We see the inaccuracy of Lilliputians' claim *immediately* because *we happen to share similar horizons with Gulliver.*

This same point is captured by Gadamer over an account of experiences and how they are dealt within social sciences and philosophy. He takes experiences to be akin to raw data and the process of understanding experiences as akin to forming theories by

[3] A new group of writers, especially in the USA, take this Gadamerian point to be the ground of a full-wrought theory of judicial decision making. (Mootz, 2007)

depending on those data. This is given by the crucial relationship he claims that exists between the particular experiences and the universality (Gadamer, 2013: 358). What is at issue is the possibility of access to something universal by way of grasping some particular observations. Understanding is somewhere between particular observations and the absolute universal (Gadamer, 2013: 358–360).

From this perspective, experience has a dialectical (read: historical) form (Gadamer, 2013: 363–4). In the constant and rather inarticulate flux of experiences, it is not that we can recreate experiences and observe them, but that experiences happen to us (Gadamer, 2013: 364). Each bringing forth another, being the basis (rather, the horizon) for the next to be understood. The only way experience gives us knowledge is not when the same experience is judged to be repeated but when something different than what is expected happens. The particularity of the case dictates itself not as an obstacle to be ironed out by techniques, but the path to truth and understanding.

This negative dialectic of experience is illustrated with another example from Aristotle: The fleeing army (Gadamer, 2013: 358). As an army flees, gradually, it becomes aware that the enemy is no longer following, and soldiers eventually come to a halt. This does not happen in an instant by an order from the commander. Rather, the truth about the experience is not that it is solid and repeatable, but it is an event that is created by an incomprehensible coordination without a particular weight. We do not obtain knowledge but come to grasp it.

Theoretical presuppositions work in the same way in the construction of a theory of law. As an existent social practice, the law is similar to the army in retreat. The commander can give order after order, but soldiers will stop fleeing only after a while, once a series of conditions that cannot be straightforwardly calculated is realised. They will halt, as it were, by way of gradual habituation; not because of a prior and articulated order. The attribution of normativity to actions and institutions necessitates

the shared background. Nevertheless, the general knowledge that is available in the context (tradition) is not meant to provide exact answers to particular questions.

The commander who gives those orders represents the scholars who believe in the objective methodology and previously articulated principles such as the internal point of view. Therefore, their attempt to understand what is happening around them is bound to fail. The gradual halt of the soldiers themselves represents *phronesis*. The true scholar is the one who grasps this habituation with being an active and self-aware part of the surroundings (with belonging to the tradition/context) by way of committing to the overall, gradual process of the retreat (theoretical presuppositions).

Thankfully for jurisprudence, people do share a certain context and history in the form of a tradition that furnishes the ground for any interpretation to be possible. This background is not of our own making but constitutes the theoretical presuppositions that pertain to the nature of the practice that is inquired into. If we formulate this question as a foundational one and ask "How can there be a legal theory?" We must say that the shared background which is required here is the one that takes the law seriously, that respects the nature of the legal practice. This brings us to the image of law in the eyes of its practitioners and its reason d'être; its own ways. There we find that a central theoretical presupposition about the law is to think of it as normative. The law addresses us as normative, its reason d'être is guiding action.

A true prejudgment or a theoretical presupposition that makes a study possible is the one that *works out*. Only such a presupposition can guide a philosophical theory to be legitimate and significant. Those presuppositions are by that fiat the ones that belong to the subject-matter. Therefore, when they are truly worked out, something essential about the subject-matter is captured. They enable and constrain the theory-construction not in the way of a *tekhne* that impedes understanding, but in the way of a *phronesis*.

CHAPTER 4

JURISPRUDENCE AND THE HERMENEUTICAL REALITY OF LAW

Although there is much that is true in the arguments that revolve around the idea of an internal point of view, it is neither sufficient nor properly grounded as we have seen. However, the difficulties revolving around the foundations of traditional jurisprudence reveal a novel alternative. The solution lies in understanding the problem of normativity and the hermeneutical approach to in their true Gadamerian senses instead of the narrow and deficient outlook of the internal point of view. The Gadamerian approach to objectivity and interpersonal agreement that I offer in this thesis is the key here.

In this last chapter, I will point out the product that emerges out of the deficiencies of the idea of the internal point of view. This product is what I call the *hermeneutical reality of law*. Since the hermeutical reality of law shares some similarity to the Finnisian or Dworkinian critiques of positivism, I will present it in comparison with them so that its differences may be shown more clearly.

The hermeneutical reality of law which is closely connected to the problem of application lies at the centre of the key insight that Gadamerian philosophy holds for legal theory. We can see this over the apparent difference between the tasks of judges and of legal historians. According to Betti and *method propré* advocates, the legal historian is concerned with the original meaning of laws whereas the task of the jurist is more comprehensive in that it includes the task of the legal historian, and it additionally tries to harmonise that meaning with the actuality (Gadamer, 2013: 334).

Betti's canonical approach where he thinks that the priority is with the intent of the author has three elements within it: *The cognitive, normative and reproductive stages* (Spaic, 2012).

A very similar approach has been offered by Ronald Dworkin. Although Dworkin cites Gadamer in the Law's Empire, when closely examined, it is rather Betti's form of interpretation that is akin to his project which includes three stages along the same line: *(1) The pre-interpretive stage, (2) Interpretive stage, (3) Post-interpretive stage*. (Dworkin, 1998: 176–276). In the form it is presented in the Law's Empire, Dworkin's theory can neither incorporate the Gadamerian positive account of prejudices, nor it can sustain the Kantian distinction between the question of judgment and the question of fact that I am insistent on. The underlying idea beneath the Dworkinian interpretive concepts and evaluation is not to claim that pure descriptions cannot be made or facts cannot be ascertained. On the contrary, Dworkin (1998) simply side-lines these as uninteresting or preliminary. So much so that he explains the problem with the empirical methodology by claiming that empirical data will always underdetermine any theory; not that they cannot be straightforwardly formed (Dworkin, 1998: 48–52).

In this regard, Dworkin seems to be guided by the same misleading ideas as Dilthey and Weber from the opposite end. What we want to obtain is, of course, an understanding or an explanation, not a prescription. It is just that in the case of the law these necessarily include elements of interpretation via the shared conceptual schemes that are built around its practice so that any understanding can be possible. To capture the disagreement here in a different vocabulary, according to Dworkin, legal positivism's idea of the internal point of view is *insufficient.* I argue that it is *incoherent.* Accordingly, his version of the internal point of view suffers from the same deficiencies that I explained in the previous chapter.

The incoherence at issue owes to the problem of application we have seen. It is impossible to attain a straight insight into the historical object that will objectively decide its value. The task of the historian and the jurist, in this regard, are one and the same (Gadamer, 2013: 336). The law which is the inquired practice puts constraints on the inquiry that derive from law's nature and the tradition in which it is couched. These enablers are, as we now know, theoretical presuppositions. In the case of the law, a central one is law's normative nature for "the need to understand and interpret arises only when something is enacted in such a way that it is, as enacted, irrevocable and binding" (Gadamer, 2013: 338). Hence, it is an essential part of the law to be normative. Without being normative, it is impossible to talk about the law at all as a meaningful category that cannot be reduced to more fundamental social phenomena.

The possibility of jurisprudence, accordingly, hangs on this issue. Borrowing Kelsen's terminology once more, "the relevant inter-human relationship may be, but need not be, interpreted as normative'… It means further: they can be interpreted without such presupposition (i.e. without the basic norm) as power relations… they can be interpreted sociologically, not juristically" (Kelsen, 2009: 218). The question, then, is whether this is indeed the case. In other words, are there indeed theoretical presuppositions that can make jurisprudence possible? I claim that there are, and a central one of them is what I refer to as *the hermeneutical reality of law*: It is the theoretical presupposition that everyone acting in a legal capacity has; the prejudgment that law is normative (binding).

Indeed, in a Gadamerian spirit, it is easy to see how the practice and the tradition to which an inquiry must belong provides for this presupposition. The everyday law-talk of law's practitioners, the reasoning and argumentation inherent in law are nothing but manifestations of the presupposition in the form of historical conditions: "…the great historical realities of society and state always have a predeterminate influence on any experience" (Gadamer, 2013: 288). Thus, we come again to the universal

problem of Gadamerian application. In order to truly understand and respect the thing-itself that is law, we must treat it as such:

> A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted. Similarly, the gospel does not exist in order to be understood as a merely historical document, but to be taken in such a way that it exercises its saving effect. This implies that the text, whether law or gospel, if it is to be understood properly— i.e., according to the claim it makes— must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application. (Gadamer, 2013: 319)

It is therefore not possible for there to be a difference between the understanding of the historian (or the sociologist) and the jurist. Both have to appreciate the horizon that illuminates the law as something normative. Therefore "…the legal meaning of a law is determined through adjudication, and fundamentally the universality of the law is determined through the concreteness of the case" (Gadamer, 2013: 582). The familiar problem of applying a universal to a particular now gains a specific and distinct sense for legal theory since the judge who thinks of her purposes not as arbitrary but as bound by the text and betterment of the law will have to refrain from applying the full rigour of the law. It is thereby that "…the idea of a perfect legal dogmatics, which would make every judgment a mere act of subsumption, is untenable" (Gadamer, 2013: 340). This untenability is the expression of the necessity of the normativity of law and its bindingness. Otherwise, the law becomes a mere instrument of power where the possibility of a legitimate and intelligible philosophical account of legal practice that treats it as a socially existent sovereign category vanishes.

To flesh out the hermeneutical reality of law more, I can again turn to Gadamer. He claims, very openly, that "it is an essential condition of the possibility of legal hermeneutics that the law is binding on all members of the community in the same way" (Gadamer, 2013: 338). The law's significance and its relation to the present has to be the same for everyone for only then is it possible to make sense of it and to count everyone bound by it: "The only belonging under the law necessary here is that

the legal order is recognized as valid for everyone and that no one is exempt from it." (Gadamer, 2013: 339)

This belonging is sharing the same public assumption about the law that makes understanding the law possible. On the one side of the coin, belonging to a tradition in this sense makes it possible for the interpreter to understand what she is trying to understand. On the other side, the hermeneutical reality of law makes it possible to read legal rules, statements and arguments at face value; it makes them intelligible. This is why Gadamer claims that "anyone who is immersed himself in the particular situation is capable of undertaking [the legal] weighing up. This is why in a state governed by law, there is certainty -i.e., it is in principle possible to know what the exact [legal] situation is" (Gadamer, 2013: 339).

Being immersed in the legal practice and expertise makes possible a certain truth in the way of *phronesis* and *knowing one's way around*. Once we begin reading legal statements at face value, once we begin to respect the law's reasoning, language and customs, we begin to understand it. This is the reason why traditional legal theory was possible at all. Once we tackle the *puzzlement* about the normativity of the law, the terms of the presupposition are also already accepted. For where it is not the case that law is not considered binding on every member of the community, "…-for example in an absolutists state, where the will of the absolute ruler is above the law-hermeneutics cannot exist, since an absolute ruler can explain his words in a sense that abrogates the general rules of interpretation" (Gadamer, 2013: 338). When there is an absolute ruler, the sovereign socio-ontological category that is law vanishes for what remains of the whole edifice of law is reduced to mere power relations.

To say that interpretation is abrogated is not to claim that there is no need for it anymore. It is an intelligibility claim. In order for the jurisprudent to depend on the hermeneutically determined content of rules, decisions or principles, there must not be significant disregarding of them. Otherwise, the intelligibility of the legal practice is

undermined. In a situation where even the central participants of practice cannot depend on the legally agreed content, or make plausible predictions concerning legal outcomes, legal theory cannot explain what is happening alone sufficiently on its own.

In such a case, the hermeneutical reality of law as a theoretical presupposition of legal theory no longer serves to understand but becomes an impediment to understanding. When the presupposition of normativity is left out of the picture, there is no point for us to understand the law as law. Its essential trait is lacking. Obviously, there may be other forms of explanation as they pertain to the situation. One explanation, as I have already suggested, is to render all in terms of brute power relations.

These considerations require us to treat the problem of the normativity of law genuinely. This may require us to do moral reasoning or political reasoning, but this is not to say that everything collapses into moral or political reasoning. It is important to realise the autonomy that arises out of the hermeneutical reality of law for it is the main reason that distinguishes my account from a Finnisian one. In my prior phase analysis, the ontological domain or the category of the legal still presents itself as autonomous without dependence on moral normativity.

Therefore, the hermeneutical reality of law, in relation to the necessity of belonging to a shared tradition, requires us to engage legal reasoning in the first place. There is no need here to ask ourselves "what point of view should we take" as Finnis (2011) does and then say that it is such and such a point of view. Similarly to the critique of the Weberian and Dicksonian approaches above, it would be trying to understand the otherness of the other in an understanding-preventing way. The hypothetical mode that is inherent in the internal point of view as a methodological move is wrong-footed. Taking the internal point of view into consideration without realising that its normative and cognitive aspects cannot be separated (as the Gadamerian example of the use of "the classical" and the problem of application shows) is to have only *a pretence of understanding* (Gadamer, 2013: 109).

The nature of theoretical presuppositions is such that they are requirements for understanding. Realising those presuppositions or honouring those requirements is to take their truth-claim seriously. Without realising that they exist and without respecting their claims to truth, no genuine understanding could arise, or no advancement on the current level agreement could be achieved. There is an analogy here to be made with logic and mathematics again. Without opening ourselves to the truth claim of their presuppositions, no further dialogue in their language could be fruitful.

Since Finnis (2011: 13), instead of pressing on the incoherence, claims that the internal point of view is merely insufficient, his views inherit the problems that trouble the Raz/Dickson approach. On the other hand, since Finnis's attempt to remedy this insufficiency is to depend on a further moral significance for the law, the autonomy of jurisprudence goes under serious tension from the other way. Finnis (2011: 14-15) claims:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation (and thus as of 'great importance', to be maintained 'against the drive of strong passions' and 'at the cost of sacrificing considerable personal interest') a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint.

When we subscribe to this view, the question of the possibility of jurisprudence is transferred to another realm. It is now tied to the problem of moral (and perhaps overall) normativity. This may still be a legitimate move, as long as it can be shown that there is a certain tradition just like the horizon the illuminates the law that renders morality intelligible. Then Finnis may also claim to have established the possibility of a legitimate jurisprudence; only that it is no more jurisprudence, but a chapter in moral theory.

CONCLUSION

Many of the current foundational worries of jurisprudence stem from the same single problem. Given the standard philosophy of science and understanding and their paradigmatic approach to objectivity and method, the normativity of the law and jurisprudents' hermeneutic approach to it come under serious pressure. The approach in question inevitably attempts to interpret legal phenomena as distinctly normative for this seems to be required by an adequate theory of law. The hermeneutical approach thus is the root of the challenges against jurisprudence. Meeting them requires the novel approach to objectivity and method which can only be found in *the prior phase* analysis. The key to the solution, in this regard, is the Gadamer-inspired account of theoretical presuppositions in the form of background conditions in which the practice is couched.

It is the hermeneutical reality of law that is a central theoretical presupposition in *the prior phase* for legal theory. It provides the answers for the two foundational questions that a philosophical theory of a normative social phenomenon must answer. The hermeneutical reality of law can be said to consist in the legal practice and the common language-game that grounds it. Therefore, in a Kantian jargon, not only there is nothing legally intelligible beyond the hermeneutical reality of law, but also there is no need to move beyond. The central presupposition expressed as belonging to a shared tradition, with all its concepts, requirements and history that derive from law's past and present in our public life is sufficient for the theory.

The life of the law, in this regard, is the public argument on the basis of the hermeneutical reality of law. It is of course considerations of normativity that we must adhere to, but just not "moral normativity" per se. Law must be understood not as a

theme under the subdivision of morality but as a distinct phronesis that goes hand in hand with that while retaining its own form of existence as a sovereign socio-ontological category. There is no other way to render the social practice of law intelligible thereby making jurisprudence possible.

REFERENCES

Austin, J., & Hart, H. L. A. (1998). *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*. Indianapolis, IN: Hackett Publishing Company, Inc.

Bix, B. (2015). *Jurisprudence: Theory and Context* (7th Revised edition). London: Sweet & Maxwell.

Bruun, H. H., & Whimster, S. (2012). *Max Weber: Collected Methodological Writings*. Routledge.

Danziger, S., Levav, J., & Avnaim-Pesso, L. (2011). Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences*, *108*(17), 6889–6892. https://doi.org/10.1073/pnas.1018033108

Dickson, J. (2001). *Evaluation and Legal Theory*. Oxford ; Portland, Or: Hart Publishing.

Dickson, J. (2004). Methodology in Jurisprudence. *Legal Theory*, *10*(03). https://doi.org/10.1017/S1352325204040200

Dickson, J. (2013). Law and Its Theory. In J. Keown & R. P. George (Eds.), *Reason, Morality, and Law: The Philosophy of John Finnis*. Oxford University Press.

Dickson, J. (2015). Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry. *Jurisprudence*, *6*(2), 207–230.

Dilthey, W. (1989). *Introduction to the human sciences*. Princeton: Princeton University Press.

Dworkin, R. M. (1998). *Law's Empire* (New Ed edition). Oxford: Hart Publishing.

Eleftheriadis, P. (2011). Descriptive Jurisprudence. *Problema. Anuario de Filosofía y Teoría del Derecho*, *1*(5), 117–145. https://doi.org/10.22201/iij.24487937e.2011.5.8111

Ellickson, R. (1991). *Order without Law: How Neighbors Settle Disputes*. Cambridge, Mass: Harvard University Press.

Farrell, I. P. (2006). HLA Hart and the Methodology of Jurisprudence. *Tex. L. Rev.*, *84*, 983–2135.

Finnis, J. (2011). *Natural Law and Natural Rights*. Oxford University Press.

Foot, P. (1972). Morality as a System of Hypothetical Imperatives. *Philosophical Review*, *81*(3), 305–316.

Gadamer, H. G. (2008). *Philosophical Hermeneutics* (30th Anniversary Edition edition). Berkeley, Calif.; London: University of California Press.

Gadamer, H.-G. (2013). *Truth and Method* (Reprint edition). London: Bloomsbury Academic.

Gardner, J. (2012). *Law as a Leap of Faith: Essays on Law in General*. Oxford, New York: Oxford University Press.

Gimbel, E. W. (2016). Interpretation and Objectivity: A Gadamerian Reevaluation of Max Weber's Social Science. *Political Research Quarterly*, *69*(1), 72–82. Retrieved from JSTOR.

Ginsburg, T. (2003, July). Judicial Review in New Democracies by Tom Ginsburg. https://doi.org/10.1017/CBO9780511511189

Hart, H. L. A. (1997). *The Concept of Law (Clarendon Law Series), 2nd Ed.* (2 edition; P. A. Bulloch & J. Raz, Eds.). Oxford; New York: Clarendon Press.

Healy, P. (2014). Truth and Relativism. In *The Routledge Companion to Hermeneutics*. Routledge.

Hegel, G. W. F. (2003). *The Phenomenology of Mind* (2nd Rev ed. edition; J. B. Baillie, Trans.). Mineola, N.Y: Dover Publications.

Heidegger, M. (2001). *Being and Time* (New Ed edition). Malden, MA; Oxford: Wiley-Blackwell.

Hershovitz, S. (2015). The End of Jurisprudence. *Yale Law Journal*, *124*(4), 1160–1204.

Hollingdale, R. J. (Trans.). (1996). *Nietzsche: Human, All Too Human: A Book for Free Spirits* (2 edition). Cambridge ; New York: Cambridge University Press.

Kelsen, H. (2009). *Pure Theory of Law*. Clark, N.J: The Lawbook Exchange, Ltd.

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

Leiter, B., & Rosen, M. (Eds.). (2008). *The Oxford Handbook of Continental Philosophy* (1 edition). Oxford England ; New York: Oxford University Press.

MacCormick, N. (1978). *Legal Reasoning and Legal Theory* (First Edition edition). Oxford Eng. : New York: Oxford University Press.

Malpas, J., & Gander, H.-H. (Eds.). (2014). *The Routledge Companion to Hermeneutics* (1 edition). London ; New York: Routledge.

Mootz, F. J. (2007). *Gadamer and Law* (New edition). Aldershot, Hampshire, England ; Burlington, VT: Routledge.

Murphy, L. B. (2014). *What makes law: an introduction to the philosophy of law*. New York: Cambridge University Press.

Ramberg, B., & Gjesdal, K. (2014). Hermeneutics. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2014). Retrieved from http://plato.stanford.edu/archives/win2014/entries/hermeneutics/

Runciman, W. G. (1972). *A Critique of Max Weber's Philosophy of Social Science*. Cambridge University Press.

Schleiermacher, F. (1977). *Hermeneutics: the handwritten manuscripts*. Missoula, Mont: Scholars Press.

Spaic, B. (2012). *Emilio Betti's Legal Hermeneutics: Between a Theory of Legal Interpretation and a Hermeneutical Theory of Law* (SSRN Scholarly Paper No. ID 2332187). Retrieved from Social Science Research Network website: https://papers.ssrn.com/abstract=2332187

Swift, J. (2010). *Gulliver's Travels* (Reprint edition). London: Penguin Classics.

Tamanaha, B. (2011). What is 'General'Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law. *Transnational Legal Theory*, *2*(3), 287–308.

Tamanaha, B. (2015). The Third Pillar of Jurisprudence: Social Legal Theory. *William & Mary Law Review*, *56*(6), 2235.

Waluchow, W., & Sciaraffa, S. (Eds.). (2013). *Philosophical Foundations of the Nature of Law* (1 edition). Oxford, United Kingdom: Oxford University Press.

Weber, M. (2013). *Economy and Society* (First Edition, Two Volume Set, with a New Foreword by Guenther Roth edition; G. Roth & C. Wittich, Eds.). Berkeley: University of California Press.

Wittgenstein, L. (2009). *Philosophical Investigations, 4th Edition (Trans. Hacker and Schulte)*. Wiley-Blackwell.