

PERSPECTIVE, CRITIQUE, AND PLURALISM IN LEGAL THEORY

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Introduction

Theories of legal pluralism have not quite managed to persuade socio-legal theorists or, indeed, legal philosophers that legal pluralism can provide an attractive alternative to the way that the law is currently conceptualised or studied as a social phenomenon. On the one hand, it is yet to prove that it has enough explanatory force for understanding what the law is. On the other, it must also show that it has enough critical force so as to not fail to provide standards by which the moral value of non-State legal orders can be assessed.

I have elsewhere joined the critics of theories of legal pluralism on similar grounds. However, this did not lead me to abandon the idea of legal pluralism altogether. I, therefore, attempted to reconstruct the project of legal pluralism in a way that will lend to it both explanatory and critical potential. I have argued that “legal pluralism ought itself to be pluralistic”¹ and that legal theory ought to become more attentive to instances of the legal developing outside the State. Somewhat overstating the point, I argued that:

“[O]nly when the legal commitment of clubbers who queue patiently at a bouncer’s orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses”²

In this article I shall try to explain and develop in this article. My aim is twofold: Firstly, I want to highlight the failure of legal theory to become aware of its pluralist potential by relying too much on the assumption that the law is necessarily associated with the State. Secondly, and in a rather programmatic vein, I make a suggestion as to what direction legal theory ought to take, in order for it to make sense of and do justice to legal plurality. I turn my attention from how law and legal pluralism can be conceptualised to the methodological question of legal theory. I shall start by highlighting the methodological flaws of current legal theory, which result from its choice of perspective, which sets limitations both to its descriptive and its normative potential. I shall then consider more closely Brian Tamanaha’s account of a pragmatist socio-legal theory and argue that it is a promising path to take, but that it lacks critical force. Finally, I shall take an alternative methodological tack on socio-legal enquiry as inter-perspectival, practical, and critical, and

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¹ Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13(1) *Soc. & L.S.* 57 at 75.

² Melissaris, *ibid.*

argue that this shift of perspective can reorient the research programme of legal theory.

Methodology in Mainstream Legal Theory

There is little doubt that contemporary legal theory, at least in the English speaking world, owes much to and has been greatly influenced by the legal philosophy of H.L.A. Hart, who claimed to be offering a social theory of law, by describing his *Concept of Law*³ as an essay in descriptive sociology. Anxious to stick to his analytical guns and locate semantics in use and context, Hart argued that is only with a sociological observation of how participants in the law speak and communicate about the latter that we can arrive at conclusions as to what the law is or, rather, what the law *is held* to be.⁴ As is well known, a key distinction in Hart's theory is that between the internal and the external points of view.⁵ The former refers to the point of view of the participants in a legal system, whereas the latter to the perspective of the observer. MacCormick qualified this distinction and tried to address the fact that Hart clearly failed to consider the possibility of understanding social behaviour through a process of *Verstehen*. To do this he distinguished between hermeneutic and volitional aspects of the internal point of view. The former is assumed by the observer, the social scientist, who understands what participants in a legal system do but does not share their commitment. The latter accounts, in the final instance, for rule-following.⁶

There are several problems with the Hartian internal point of view which I shall argue are symptomatic of a more fundamental shortcoming. First, by singling out the point of view of officials of a legal system, the question arises as to whether a social theory can be sustained when the attitudes of the majority of participants in a social phenomenon are consciously demoted to second class.⁷ Moreover, it leads to circularity to the extent that officials, whose use of the concept of law is central, already embody a legal institutional fact.⁸ Secondly, and more importantly for my purposes in this article, Hart seems to be conflating the perspective of the participant with that of the observer. In order to draw his image of law as the union of

³ H.L.A.Hart, *The Concept of Law* (1994, 2nd ed.).

⁴ I am conscious of the fact that positivists, including Hart, have vehemently denied the charge of semanticism. Their defences are not entirely convincing not least because they have not yet told us what exactly their methodology is and to what extent they rely on (criterial) semantics, in order to "describe" the law. However, this is not a debate I want to enter in this context. I simply take as uncontroversial that positivism offers a description of paradigmatic cases of law from the external point of view. See, Endicott, "Herbert Hart and the Semantic Sting", p.39; and, Stavropoulos, "Hart's Semantics", p.59, in Coleman (ed.), *Hart's Postscript* (2001).

⁵ The distinction permeates *The Concept of Law* and it informs Hart's theory of obligation, the autonomisation of legal systems through the Rule of Recognition, as well as his account of the task of legal theory.

⁶ MacCormick, *H.L.A. Hart* (1981), pp.32-40.

⁷ Fitzpatrick, *The Mythology of Modern Law* (1992).

⁸ Kramer, "The Rule of Misrecognition in the Hart of Jurisprudence" (1988) 8 *OJLS* 401.

primary and secondary rules, he focuses on Western legal systems or, in any case, legal systems structurally resembling the one he was participating in as a former practicing lawyer and a teacher and researcher in a Law Faculty. Perhaps it would be too much to expect Hart to sever his theorisation entirely from his intellectual environment, which was marked by an adherence to “black letter law;” after all, the discipline of law had not then awoken from its 150 year-long lethargy.⁹ The teaching of law was still vocational in orientation and focused exclusively on the systematic and largely uncritical study of statute and precedent.¹⁰ Perhaps, then, it would be unfair to ask him to provide anything other than “armchair sociology”.¹¹

Irrespective of how much weight we place on historical and biographical explanations, Hart’s sociological method cannot be defended theoretically. His analysis seems to kick off from the assumption of the universality of the form that the legal has taken in specific cultural and political contexts.¹² Thus, his point of departure is necessarily *a posteriori* as he seems to have already tacitly or unconsciously selected the cohort of legal systems which qualify as such and then goes on to single out their commonalities and conceptualise the law in an abstract manner. Hence, first, his “descriptive sociology” becomes very much prescriptive, to the extent that the criteria of inclusion in the concept of law is formed from an epistemic, third person perspective, which is merged with the first person point of view. Secondly, it does not describe but one form of law rather than paradigmatic cases of the *concept* of law.¹³

MacCormick’s appeal to *Verstehen*, a suggestion which Hart accepted,¹⁴ does not provide a way out. The trouble is that *Verstehen*, especially if it is coupled with Hartian conventionalism, which MacCormick tried to refine rather than question, meets an insurmountable limitation. Namely, the observer, who assumes the standpoint of a participant, can only learn what she already knows.¹⁵ The hermeneutic attitude still maintains the distance between observer and observed and relies on the assumption that the states of the two parties are parallel, symmetrical and commensurable. In order for a Hartian legal sociologist to recognise legality, when she sees it, she will have to refer to those paradigmatic cases in order to see whether the *prima facie* normative phenomena that she observes fall under the core meaning of law,

⁹ Duxbury, “English Jurisprudence Between Austin and Hart”, (2005) 91(1) *Va.L.Rev.* 1.

¹⁰ Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004), pp.155-178.

¹¹ Penner, “The Current Debate: The Semantic Sting: ‘Soft Positivism,’ and the Authority of the Law According to Raz”, Chap.10 at 442, in Penner, Schiff, and Nobles (eds.), *Jurisprudence & Legal Theory: Commentary and Materials* (2002).

¹² Coyle, “Hart, Raz and the Concept of a Legal System” (2002) 21 *Law & Phil.* 275.

¹³ This point is made very convincingly by Brian Tamanaha, who tries to disentangle conventionalism, functionalism, and essentialism in Hartian jurisprudence, in order to formulate a project of positivist socio-legal theory. Tamanaha’s suggestions are extremely insightful and important – more on them will follow later in this article. See, Tamanaha, *A General Jurisprudence of Law and Society* (2001), pp.155 *et seq.*

¹⁴ Hart, *The Concept of Law*, (2nd ed. 1996), p.243.

¹⁵ Abel, “On the Objectivity of Social Science”, in Dallmayr and McCarthy (eds.), *Understanding and Social Inquiry* (1977).

or whether they occupy some place in a broader conceptual penumbra. But this method is bound to leave out a number of phenomena, which, seen from a different perspective, could be of a legal nature.

Moreover, this version of hermeneutic legal theory is stripped of any critical force in two senses. First, it is normatively inert. Positivists often reiterate the Benthamite argument that it is only prior knowledge of the law that can make law reform possible. Hart too was a moral pluralist, so we are told.¹⁶ As far as he was concerned, the law was an objectively identifiable crucible of diverse and often contradictory moral attitudes. So, it is only in the presence of a common point of reference that discourse about the merit or demerit of the law can become possible. In other words, if you don't know what needs fixing, how can you fix it or even want to fix it in the first place?

The Benthamite argument rests on two fundamental presuppositions. Firstly, it assumes that it is possible to conceptualise the law without reference to its normative content. This is easily recognisable as the never-ending debate in the philosophy of law, but thankfully I do not need to delve into it in much detail here. Secondly, the Benthamite argument presupposes that the law is imposed from above and beyond the community of people, which thus consider it law. This dichotomy is spelled out by Austin, and, with a careful reading, does not seem to have been abandoned by Hart. Despite the fact that Hart located meaning in use and rules in the fact of convergence of behaviour, when it came to conceptualising the law, he shifted the focus from the community of participants to the officials of a legal system. The participants in a legal community accept as such what officials consider law, but they do not also have to accept it as morally sound law. It is thus that, on a normative level, law reform becomes always external to the life of the law itself. Within such a depoliticised law, not only does the possibility of change evaporate but the role of the legal theorist also becomes trivial. The critical toolbox available to the Hartian legal philosopher is depleted and she falls in a trap set by none other than herself. She is faced with two options. The first is to reduce herself to a spokesperson for those with authority to enact the law. The second is to give up on her ability to make any meaningful comments as a legal philosopher about the content of the law. In order for her to be able to raise claims of law reform, she will have to switch the hat of the legal theorist for that of the political or moral philosopher or simply that of an informed citizen running, of course, the risk of not being taken seriously as either a legal or a political philosopher. But this epistemological schizophrenia is neither a reality, nor do I expect any legal theorist to find it desirable.

The second significance of the dichotomy between those employing the term 'law,' and those whose opinion concerning its real meaning in fact counts, relates to the conceptual question of *what law is*. According to Hartian positivists, it is the legal philosopher who is assigned the task of discerning and describing the meaning of the terms employed by a linguistic community. However, by drawing this divide between users of the term and those who can decipher its meaning, Hartian positivism does not allow for the possibility of the changing of beliefs concerning the concept of law held either by the participants in a legal-linguistic community or, indeed, by the

¹⁶ Lacey, *supra* n.10, at 221.

legal philosopher. If they stand in a distance with distinct roles, neither can learn anything from each other.

Dworkin has taken issue with that shortcoming. He criticises positivism, along with theories claiming to be *meta*-ethical, for claiming to assume the external, Archimedean point of view.¹⁷ This, he argues, is, first, impossible, because when entering a theoretical discourse about concepts such as law, equality, liberty and so forth, one inevitably raises substantive claims as to the content of those concepts. Second, it is an unattractive alternative, as the Archimedean point of view attitude makes for a legal theory which is morally and politically impoverished and, indeed, irrelevant.

Thus, Dworkin opts for a different methodology. He collapses the conceptual into normative analysis and argues that every legal theory cannot help being substantively engaged with its object of study and therefore offers interpretations which will shed the best possible light on the law. And through that interpretation, the concept of law, which is inextricably linked to its content, will be continuously revisited and clarified. Dworkin accepts that there is *some* differentiation between the law and other normative orders even in the very weak sense that we refer to some normative phenomena as law, whereas to others we don't. To the positivist objection that if there are no criteria that need to be satisfied in order for something to count as law in the pre-interpretive stage,¹⁸ then we would be led to indeterminacy as anything could be law, the interpretivist response is that all we need to look for in the first instance is widespread *prima facie* consensus as to what constitutes law.¹⁹ But what this response leaves unanswered is the logically prior question of why such consensus is present in the first place. Why does the linguistic category of law exist? It is only by asking those questions that we will be able to ascertain whether there is such a consensus at all.²⁰

Look at Dworkin's purportedly uncontroversial thin concept of law as the justification of prior political decisions. Despite the fact that interpretivists play down the importance of this *prima facie* concept of law, it is of paramount importance and inevitably taints the rest of their analysis. Interpretivism is meant to be essentially pluralistic. Every interpretation is acceptable, but only the one which passes the relevant tests set by the political community will prevail. But this pluralistic attitude comes one stage too late, in that it already rests on an assumption of the uniformity and homogeneity of the political community. Interpretivism has already defined the community in political terms, without explaining how this transition from the moral to the ethical/political takes place, and then goes on to promote the

¹⁷ Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24(1) *OJLS* 1.

¹⁸ Raz and Dworkin, "A New Link in the Chain" (1986) 74 *CLR* 1103.

¹⁹ Stavropoulos, *Objectivity in Law* (1996).

²⁰ As Frank Jackson points out, conceptual analysis is necessary at this very first stage, in order for us to single out the subject matter of our enquiry. See Jackson, *From Metaphysics to Ethics*. (1998). For an argument against normativism along the lines of Jackson's account of conceptual analysis see Rodriguez-Blanco, "The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited," *Ratio Juris* (2006) 19(1) 26 and Rodriguez-Blanco, "Method in Law: Revision and Description" in Coyle and Pavlakos (eds.), *Jurisprudence or Legal Science?* (2005).

internal point of view as the only possible vantage point from which to observe the law. Thus the interpretivist precludes the possibility of there existing other conceptual schemes, in the light of which the same data about the world of concepts and objects might be ascribed different meaning without this entailing that all but one will be *necessarily* and *objectively* wrong. Dworkin takes a rather robust tack on metaphysical and moral realism in assuming that *all* beliefs about the world are commensurable on *all* levels, simply because there are *some* things, the meaning of which is determined by themselves alone rather than by our mental states in relation to them. Such a robustly realist methodology would perhaps be adequate from *within* a conceptual scheme²¹ but it would certainly not allow us to even begin to examine whether there are other conceptual schemes out there. In the context of a social science, such as legal theory, this can be crippling and have long-reaching consequences. Whereas the Hartian objectivist claims to take the hermeneutic point of view and goes on to raise context-transcendent claims about the concept of law without realising that she merely projects her experience and beliefs about the legal onto other phenomena, the interpretivist opts for the internal perspective and assumes that it is all-inclusive thus losing sight of any alternatives.

Tamanaha's "Social Theory of Law"

Brian Tamanaha offers an insightful reworking of positivism as a conventionalist socio-legal theory. One of his starting premises is that positivist legal theory has not managed to shake off an essentialism as to the concept of law. This essentialism sets a yardstick of measuring the legal nature of various practices of rule following, and thus potentially leaves out of the picture instances of legality, although they are understood and referred to as such by participants in those 'laws.' Natural law (in all its manifestations), on the other hand, disregards the fact that the law is a social construction, a convention constituted by our linguistic rules, which ascribe the world of institutional facts its meaning. Once Tamanaha has laid out his critique of mainstream legal theory on the grounds of its methodology, he goes on to propose a way of capturing the concept of law by wedding conceptual and sociological analysis. He subscribes to the two main positivist theses, namely the *separation* and *social sources* theses, but qualifies them substantially and substantively. He extends the former so as to cover functionality as well as morality and modifies the latter as follows;

"Instead of applying this thesis only to state law, it will be applied to all manifestations and kinds of law, including customary law, international law, transnational law, religious law, and natural law. Their specific shapes and features will not be the same as those discerned by Hart for state law, but whatever distinctive features they do have will be amenable to observation through careful attention to the social practices which constitute them. All of these manifestations and kinds of

²¹ I take this to be Hart's argument too, when he claims that Dworkin's theory may be applicable to specific legal systems but not the concept of law as such.

law are social products. The existence of each is a matter of social fact”²²

It is on that basis that Tamanaha formulates his conventionalist social theory of law. His fundamental thesis is that the attention of the socio-legal theorist (indeed, any legal theorist, as the sociological ought not to be divorced from the philosophical) should be turned to the way people speak about the law. He explicitly privileges the external point of view as the appropriate one and argues that whenever a *sufficient number of people* (and anyone is a candidate here, not just those assigned with an institutional task like Hart’s officials) with *sufficient conviction* refer to a social practice as law, that practice automatically becomes an object of enquiry for the social theory of law. He acknowledges that this is a rather broad understanding of the law, which will probably upset mainstream legal theorists but this, he argues, does not reveal a problem with his suggestion but rather the inability of such theorists to abandon the colonising method of essentialism, which has haunted legal theory for a very long time. Finally, he portrays a conventionalist social theory of law as an essentially and substantively pluralistic one. Tamanaha argues that it addresses the problems of early sociological and contemporary anthropological theories of legal pluralism as well as the reductivism of functionalism and the vagueness of post-modern theories by abandoning the essentialism that haunts the former while still dissociating the concept of law from the state and by offering a criterion for differentiating the law from other non-legal social norms.

To be sure, Tamanaha is right to reject essentialism as methodologically and substantively flawed. And I would also agree with him on a number of other points. First, legal pluralism is a project of reconceptualising the law and it cannot be accommodated in and by the existing models of theorising the latter. Second, the way linguistic communities speak about the law should be taken seriously, in order for legal theory to be able to overcome its patronising and colonising tendencies. Third, Tamanaha is right in suggesting that sociological enquiry should not be kept separate from the philosophical study of the law, not least because the latter is by and large a social phenomenon (I hesitate to call it a social construction and I shall show later why).

So, Tamanaha convincingly addresses most of the problems of mainstream legal theory which I singled out above. However, two interrelated problems persist and do not allow his ‘social theory of law’ to get off the ground. First, it is not clear what the aim of that social theory of law is. Tamanaha subscribes to a pragmatist approach to social enquiry and states the objectives of the social theory of law as follows;

“[To] keep a close eye on what people – legal actors and non-legal actors – are actually doing relative to law, and to discover and pay attention to the ideas that inform their actions. These ideas, beliefs, and actions give rise to law, determine the uses to which law is put, and constitute the reactions to, and consequences of, law”²³

²² Tamanaha, *supra* n.13, at 159.

²³ Tamanaha, *ibid*, at 165-66.

At the same time, he insists that the law has no essence beyond the linguistic conventions and practices constituting it. Still, he argues that it is, of course, possible, and indeed necessary, to differentiate between uses of the term 'law' which are relevant for a general jurisprudence and those which are not, such as the law of nature, laws of grammar and so forth. The criteria of the distinction, however, are loose and intuitive rather than strict rules of usage. That aside, any other use of the word law meeting the minimum semantic conditions, in which Tamanaha includes authority as the source of rules, are acceptable as proper uses of the word law.

So, why bother? What will the socio-legal theorist gain from that enquiry? At best, she will have some more rough information as to what various communities refer to as law, which she will map in a necessarily inconclusive and indeterminate manner. But, If she has already given up on the possibility of there being a trans-contextual concept of law, one that can be formulated and grasped irrespective of the instances of its application, there is little point in engaging in that enquiry, as there seems to be very little to be learned from such cataloguing. In fact, by setting a threshold beyond which certain practices count as law-relevant-for-jurisprudence, Tamanaha already concedes that there are *some* semantic criteria which pre-exist and, indeed, guide social enquiry into the legal phenomenon. He unconvincingly attempts to play down those criteria by arguing that they only reveal a very loose and vague *prima facie* content of 'law,' making a substantive and contested suggestion as to what the minimum content of law is by including authority in it. In other words, Tamanaha implicitly accepts that the point of socio-legal enquiry is clarification of the concept of law, a vague picture of which is already accepted by the socio-legal theorist and guides her enquiry.

This brings us to the second shortcoming of Tamanaha's suggestion. If there can be no overarching concept of law, all the various phenomena which are experienced and referred to as legal by the participants in the respective communities will be incommensurable with each other. This means that the socio-legal theorist will not be able to question the legal nature of the practices which she observes. With no yardstick available to her, she will have to accept the beliefs of the observed as true knowledge. Similarly, she would be unable to use that new data in order to question her own beliefs about *her* concept of law. In other words, the socio-legal theorist is deprived of any critical faculty. Any attempt at criticising a conception of law will in turn always be open to the critique of essentialism and paternalism. Indeed, the problem becomes ever more acute when one thinks that the law is essentially normative, a fact which Tamanaha seems not to take very seriously when he discusses the law as a practice virtually indistinguishable from other social practices. Could it be that various 'laws' can be commensurable on the normative level but not on the conceptual? Could a socio-legal theorist claim that a rule of a different 'law' is right or wrong, while at the same time maintaining that it is impossible to judge it as law? Such a claim could not be justified simply with recourse to the separation thesis but would rather disclose a selective realism about the world along the following lines: whereas some concepts, such as moral rightness or wrongness, are objectively identifiable, concepts such as 'law' do not have a trans-contextual existence. But, one who raises such a claim also has the onus of proving that there is such a difference between various concepts, which accounts for their different modes of existence. Not only does

Tamanaha not set this task for himself but, on the contrary, he tells us explicitly that his pragmatist social theory of law sets an argument against any kind of transcendentalism, moral or conceptual;

“First, it [pragmatism] insists that any normative arguments based upon an alleged special insight into the Absolute are based on a false claim; secondly, it suggests that what counts when determining which normative assertions we should accept is whether, when acted upon, the assertions result in consequences we find desirable; thirdly, it reminds us that the best way to determine whether the consequences are desirable is to pay close attention to the facts of the matter”²⁴

There are various problems with this supposedly impartial and substantively thin pragmatism, such as the entailment of a clear-cut distinction between causes and effects, actions and consequences, as well as observing and being observed, which is far from uncontested. But, what I want to highlight for the purposes of this paper is that it is just as critically inert as Hartian positivism, as it does not allow for practical communication between different perspectives.

Inter-Perspectival, Critical Legal Theory

What can be kept from the analysis so far? Firstly, that mainstream legal theory fails in making any cogent claims as to the concept of law because it is riddled with methodological problems. In promoting either the internal or the hermeneutic points of view, that is the first or third/first person perspectives, as the only useful ones for observing the law, it fails to form a spherical view of the concept of law. Secondly, I agreed with Tamanaha that essentialism ought to be abandoned in favour of a methodology which will pay close attention to the views of participants in legal discourses in the light of the charity principle.²⁵ Thirdly, and this time *contra* Tamanaha, I argued that abandoning essentialism does not entail giving up on the possibility of critique. Gettier has shown us that justified beliefs do not necessarily constitute knowledge.²⁶ This does not necessarily clash with the charity principle. Not discarding what participants in a legal community believe to be law based on our essentialist preconceptions concerning the concept of law does not entail that those beliefs are necessarily true. By the same token, it does not mean that *our* beliefs of what the concept of law entails are necessarily true either. The combination of the two principles yields the following result: if law is, indeed, a concept and not simply a practice of social control, then there must be some thin description of it, which can serve as a basis for critique but also communication between various legal communities. Then, the question turns back to the methodological problem. How is it possible for legal theory to renounce essentialism and take a pluralist turn, while, at the same time, retaining its critical potential?

²⁴ Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997), p.246.

²⁵ Davidson, “Radical Interpretation”, reprinted in *Essays on Actions and Events* (2nd ed. 2001).

²⁶ Gettier, “Is Justified True Belief Knowledge?” (1963) 23 *Analysis* 121.

I would suggest that the pragmatism which Tamanaha advocates is a promising path to follow, but only if qualified so as to allow for a trans-contextual, thin concept of law and coupled with an intersubjective, discursive attitude towards social enquiry. In other words, the first and third person perspectives should give their place to the second person point of view. This is how James Bohman puts it;

“[The] second-person perspective has a special and self-reflexive status in criticism. It is within this perspective that the social relationship of critic and audience is established in acts of interpretation and criticism. Such dialogical relations employ practical knowledge in the normative attitude, that is, knowledge about norms and the normative dimensions of actions and conditions of success. It is knowledge of the normative from within the normative attitude. As the attitude of the second-person interpreter, such practical knowledge is manifested in interaction and in dialogue and proves itself in terms of the success of dialogue and communication: in the ability of the interpreter to offer interpretations of the normative attitudes of others that they could in principle accept”²⁷

This multi-perspectival social enquiry is inspired by Jurgen Habermas’ discourse theory and the pragmatic slant given to it by Thomas McCarthy. Its central aim is to do away with the main shortcoming of idealism, namely the illusion that there can be a grand, all-encompassing social theory, which can adequately, sufficiently, and uniformly explain all social phenomena. At the same time, it aspires to remain critical and allow for the possibility of falsification of beliefs concerning what are our practices consist in. The first and third person perspectives are still useful but only as *prima facie* indications of what those practices consist in or what, indeed, they may mean. However, as I argued above against Tamanaha’s suggestions, the plethora of possible interpretations brings the social scientist to an impossible epistemological position. She will either have to resort to extreme relativism or reconcile with the arbitrariness of her decisions.

The way out of that dilemma is to see social enquiry as a practical venture. That entails her entering into discourse with the participants in the practices which she observes, in order to start a process of self-reflection and justification under conditions of equal participation. Thus, the social theory will rid itself of the delusion of superiority, the Archimedianism that Dworkin argues against, while at the same time remaining committed to the possibility of theory. Inter-perspectival social enquiry makes the social theorist part of the social universe rather than a mere observer, whether it be an external one or one participating with a pretence of objectivity. All beliefs and practices, including those of the social theorist, are put to a constant test and they are always open to substantive intersubjective criticism and revision. The aim of social enquiry is, thus, not to find practices which fit

²⁷ Bohman, “Participants, Observers, and Critics: Practical Knowledge, Social Perspectives, and Critical Pluralism”, p.106, in Rehg and Bohman (eds.), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory (Essays in Honour of Thomas McCarthy)* (2001).

predetermined concepts, or to judge the effectiveness of the means and worth of ends from the external point of view, but rather to kick-start a process of self-reflection, which will result in the refinement of everyone's conceptions of their practices, a better mutual understanding and the regulation or, rather, co-ordination of the pluralistic universe by letting surface the loose connections between beliefs and conceptions facilitated by a thin metaphysics.

Let me explain, then, what consequences this inter-perspectival, intersubjective attitude has and how it can mark a turn for critical and pluralistic legal theory.

As Tamanaha also argues, the divide between legal theory and socio-legal theory is false. Inter-perspectival legal theory is necessarily sociological to the extent that it focuses on an examination of all instances of legality. At the same time, it is philosophical to the degree that it formulates general hypotheses about, and constantly revises, the thin and a-contextual concept of law.

The difference of that kind of legal theory to what seems to be the norm in Western legal discourses is striking. One can single out at least three distinct focal points in Western legal theory broadly conceived as any kind academic discourse about the law. First, there is the receding yet still prevalent discourse on State law often referred to in a derogatory vein as "black-letter law". Most legal commentators are preoccupied with following legislative and judicial practice, interpreting it in the light of the requirements of systematicity and, occasionally, putting forward normative claims as to the correctness of new law or court judgments. This kind of legal theory seems to have very little time for either a philosophical or a sociological study of the legal. Second, legal theory in the narrow sense, that is legal philosophy or jurisprudence, has still not managed to break free from the natural law-positivism debate. Most legal philosophers, although by no means all, are too busy locking their horns over the law and morality question. The debate is philosophical in nature and borrows heavily from metaphysics, philosophy of language, and moral theory. Thus it often becomes almost oblivious to law's necessarily social texture, treating it as another concept in the process of analysis rather than a reality which should somehow be observed and taken seriously. In the margins of that debate, critical legal theory, including post-modern and feminist legal philosophy, focuses on criticism of the presuppositions of mainstream legal theory and seeks to highlight the irresolvable tensions in the law as manifestations of its political genealogy and embarrass the law and mainstream legal theory by disclosing the fallacy of their claims to universality. However, very rarely does critical legal theory become aware, and try to rid itself of, its self-undermining aspiration of integration. While it highlights and criticises the imperialism of State law and its tendency to violently exclude the Other, when critical theory moves beyond criticism its aim seems to be the recognition and acceptance of the Other's point of view by State law.²⁸ On the methodological level, critical theory does not seem to have not managed to wed the sociological and the philosophical either. Legal sociological projects either take for granted a

²⁸ Costas Douzinas speaks of the *nomophilia* of critical legal theory. See Douzinas, "Oubliez Critique" (2005) 16 *Law and Critique* 47.

State-centred concept of law, they stretch the concept so as to include all forms of social control or deny the relevance of any philosophical enquiry.²⁹

Interperspectival social legal theory is well equipped to avoid these potholes. It combines the philosophical and the sociological in a substantive and organic way. Its focus is on the sociological exploration of how various communities employ legal language and engage in discourse with them in order to assess the rightness of their linguistic and normative practices. *Prima facie* indications of the legal nature of such discourses are provided by the concepts, terms, and practices that participants show a commitment to. This obviously entails active, empirical sociological research. At the same time, the starting point and the outcome of enquiry and discourse are both practical and philosophical, to the extent that they are based on a loose and thin conceptualisation of the law, which is shared trans-contextually and, indeed, is necessary for discourse to be possible at all and they result in the refinement and qualification of that conceptualisation of the law.³⁰

Concepts, terms, practices, and beliefs should not be bought into wholesale simply by virtue of them being employed by a community, as Tamanaha suggests. They should form the point of departure for a practical discourse concerning the truth of participants' beliefs and the justification of their actions. Thus it will be possible for them to reflect on their practices as well for the legal theorist to review her beliefs concerning the concept of law. But this does not mean that there is one right answer to everything or that, if all-encompassing convergence and consensus are not achieved, only one of the competing beliefs will be true or right. The point of socio-legal enquiry is not to expand and establish "law's empire", to colonise other legal discourses with one context-specific interpretation under the pretension that it is possible to integrate the plurality of *nomoi*. On the contrary, the aim is to bring to the surface that plurality and maintain and nurture it without, at the same time, painting a picture of the world as disjointed and therefore meaningless as a whole. And this should be the task of all legal theory and not only philosophy of law narrowly conceived. *Every* instance of theorising about the law should take an interspectival, critical turn and test the concept of law as well as concepts within the law discursively against the beliefs and communicative inputs of participants in other linguistic-legal communities. Thus, those concepts will be clarified through the identification of their context-determined limits.

²⁹ A typical and extreme, example of this fallacious attitude is, Leith and Morison, "Can Jurisprudence Without Empiricism Ever be Science?", p.147, in Coyle and Pavlakos *supra* n.20, where the argument seems to be more than just that the analytical legal theorist should do a little more empirical work than simply think about the law in an armchair, in order to see how the concept is employed. The claim that the authors seem to raise is that empirical work is prior to, more important than, and unconnected to any kind of conceptual analysis. If this is the case, then the fact that legal practitioners, the socio-legal theorist or, indeed, anyone who speaks about the law, actually manage to refer to the same data and communicate meaningfully about them must be nothing but a miraculous coincidence.

³⁰ I discuss this in more detail in, Melissaris, "Diversity and Order in the Legal Universe: Robert Cover and the Philosophical Groundwork of Legal Pluralism", *Issues in Legal Scholarship* (forthcoming, 2006).

The point has been made forcefully by critical theorists that institutionalised law cannot accommodate pluralism. The law codes its functions, fixes the meaning of concepts and the content of norms in a way that excludes alternative interpretations, worldviews, and normative universes. Institutionalised law cannot be attentive to the other without assimilating the latter or sacrificing some of its own integrity because of its historical and political baggage. This realisation often leads critical theory to despair thus exhausting itself in critique, which understandably makes its critics rejoice and accuse it of nihilism. Inter-perspectival, intersubjective legal theory offers a solution. The metaphysical and normative relative closure of the concept of law is one of its fundamental premises but it does not allow that closure to disable it or limit its scope as a practical, critical venture. On the contrary, inter-perspectival legal theory *becomes* the forum of politicised, practical discourse about the legal and its content. Dworkin is correct in not accepting any difference between conceptual and normative analysis in the context of law. Every utterance about the law is a substantive one concerning its content and everyone speaking about the law engages in legal theory in one way or another. However, Dworkin is wrong in reserving for State law the special role that he does as the forum of principle, in which the right answer on *all* questions will shine, because institutionalised law is necessarily univocal. The judge *is* a legal theorist, but not one who can assume the third or second person perspectives so as to understand the communicative inputs of all of the participants in institutionalised legal discourse. The legal theorist outwith the institutional confines of State law has that ability to realise that hers is only one perspective in the discourse concerning the law.

Thus, the distinction between legal pluralism and legal monism collapses. *All* legal theory ought to be pluralistic. Otherwise, it simply *is not* legal theory but rather a first-person account of intra-systemic coherence. Inter-perspectival, intersubjective socio-legal enquiry cancels out the distinction between legal pluralism and legal monism, which various theorists have been focusing on for so long. Legal pluralism ceases to be just another socio-theoretical strand or school, and legal centralism ceases to be legal theory at all. Every methodologically sound theorisation about the law is conscious of the plurality of its object of study, which is symmetrical to the plethora of ways of theorising the legal. The point of legal theory is the critical, discursive testing of tentative concepts of law, the self-reflection of every legal theorist and legal community on their practices and preconceptions and the establishment or re-affirmation of a thin and indeterminate common metaphysical and normative point of reference. Of course, a central question remains open. Can legal theory feed that knowledge, which it will acquire through inter-perspectivism, critique, and self-reflection, back into State law? With the current institutional arrangements, it is rather doubtful but, in any case, this is not a question that can be addressed in this context.