LAW AND THE CONCEPT OF LAW – BEYOND THE NATION-STATE

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By:
TALENE THOMASIAN B.SC., B.A.

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AUTHOR: Talene Thomasian B.Sc. B.A. (McMaster University)

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Abstract

Analytic legal philosophy has overwhelmingly based its agenda and its research upon the domestic law of nation-states, often at the expense of other candidates for inclusion under the concept of law. International law is one such candidate, the conceptualization of which has typically resulted in either a breezy rejection of its status as 'law,' or a lukewarm acceptance based on its similarities to domestic law. But neither of these options affords international law the careful scrutiny such an important phenomenon deserves. This project aims to provide a small step in the direction of such an analysis. It examines the applicability of the distinction between 'law' and 'politics' at the international level, and in the process evaluates some prominent traditional theories of law.

Two poles are presented with respect to the presence of the political and legal features of international law: at one end is an extreme legal realist position that claims international law necessarily lapses into politics, and at the other end, an extreme legal pluralist position that unreflectively accepts the legality of international law. These two poles are examined and subsequently rejected, and a middle path that acknowledges both features is sketched. A *prima facie* case for understanding international law as 'law' is presented: the requirements of the 'legal system' are reduced and its existence decoupled from the state, which provides a baseline according to which international and domestic law are similar enough to unite under a single analytic concept. What this suggestion does not do is judge international law according to domestic law as an ideal type. Instead it views domestic law as a stable form of law with its own contingent features, but the intersection of which with international law reveals important things about both, and the concept of law more broadly. It thus affirms the legality of international law.

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Chapter One: Introducing the Problem of International Law

> In pursuing such investigations it may turn out that municipal systems are not unique, that all their essential features are shared by, say, international law or by church law. If that is indeed so, well and good. But it is not a requirement of adequacy of a legal theory that it should be so or indeed that it should not be so. It is, however, a criterion of adequacy that the theory will successfully illuminate the nature of municipal systems.[1]

I. Analytic Legal Philosophy and the Nation-State

This quotation by Joseph Raz, a leading legal philosopher, does much in the way of introducing the problems facing a conceptual understanding of international law (IL).[2] In the pursuit of the universal concept of the legal system, as distinguished from other normative systems, Raz admits to three assumptions underlying his work. First, law must meet a threshold of efficacy, due to the theory's commitment to the primacy of social reality over pure abstraction; second, the concept must be universal, insofar as it applies to all clear instances of domestic legal systems,[3] and includes the necessary features common to them all; and third, as the abovementioned quotation illustrates, domestic law is of primary importance in constructing such an account.[4] This unapologetic appeal to

[1] Raz, Jospeh. *The Authority of Law*. Toronto: Oxford Clarendon Press, 1979. Print. 105.
[2] An important note: "international law" is the preferred term throughout this work, but as it quickly becomes apparent, the focus is not limited strictly to the laws that govern interactions among nation-states, especially as this project progresses. Modern terminology distinguishes between international, transnational and global law, and such laws of a "super" scope relative to the state are also a focus here. It must also be noted that "supernational" in this work means all instances of law "above and beyond" the state, in spite of what different usages may appear elsewhere.
[3] The term "domestic" will be used throughout this work to denote the law of nation-states, although the favoured term varies in the literature. Raz and Hart, for example, prefer "municipal."
[4] Raz, 103-5.

the domestic legal system as the paradigmatic example around which to construct one's concept goes even further, describing other forms of law, such as international or religious, as incidental to a successful account. From this foundation Raz developed a demanding set of criteria for legal systems, presenting a theory of legal systems both firmly rooted in antecedent theories, and influential in much of the analytic legal philosophy that followed him.[5]

The specifics of this or any one account are not the immediate focus here. The emphasis on domestic law, however, sometimes at the expense of other viable candidates worth investigating, is. Legal philosophy has traditionally and overwhelmingly taken the domestic law of modern nation-states as paradigmatic of law.[6] It is a methodological commitment not unique to Raz, but as IL becomes ever more important in the modern world, it is one that must be reevaluated.

This project begins with the contention that IL is too important a legal phenomenon (or collection of phenomena) to be dismissed so easily, and that the shortcomings in the traditional analytic concepts of law in characterizing it are an important alert to the need to reevaluate the dominant concept. This reconsideration includes not only of the content of the concept, but also its contours, for example, the

[5] Briefly, legal systems, unlike other normative institutions, must display some degree of comprehensiveness, supremacy and openness, and must reserve the ability to claim these features, even if they do not do so in practice (*ibid.* 115-120). This topic will be addressed in greater detail in chapter five.

[6] Hans Kelsen is a notable exception. He argued that the unified nature of law means that it can be viewed from either a state or international perspective – for example, the validity of law might derive its validity from the Basic Norm of IL. But this is obviously a far cry from recognizing IL as a potentially unique form of law. See *General Theory of Law and State* and *Pure Theory of Law.*

universality of any such concept. Without yet entering into what features are central (if not necessary) to 'law,'[7] it is important to observe that there is much debate about what it denotes, and that this difficulty is amplified at the yet more indefinite international level. For example, some conservative efforts admit public international law as law because it is reasonably analogous to state-based law.[8] Yet theorists such as William Twining insists that just as non-state norms cannot be subsumed under traditional legal frameworks, "To try and subsume European Union Law or *lex mercatoria* or international commercial arbitration or all examples of 'human rights law' under public international law similarly stretches that concept to breaking point, without any corresponding gains."[9] Keith Culver and Michael Giudice present cogent descriptions of the serious dilemmas surrounding novel legal phenomena, at what they call the intra-state, trans-state, supra-state and super-state levels, and in the inadequacies of the descriptions provided by traditional state-based theories of law.[10] For example, the shared governance displayed by the Canadian government and various First Nations bodies recognizes the autonomy of the latter, while remaining within Canadian borders. The complexity of the situation resists simple

[7] Following standard practice, "law" denotes the word, 'law' denotes the concept, and the absence of any marks denotes the social phenomenon as it exists in the world.
[8] The distinction between public and private law appears often in this debate, especially with respect to the distinction between the legal and the political. Public law governs relations among the state and individual agents (ex. the criminal law). Public international law governs relations among states, and sometimes between states and individual agents. Private law governs relations among individual agents (ex. contract law). Private international law, or conflict of laws, governs the relations of individual agents, but in international cases must also decide which sets of conflicting laws are to prevail.
[9] Twining, William. *General Jurisprudence: Understanding Law from a Global Perspective*. New York: Cambridge University Press, 2009. Print. (henceforth "GJ"). 363.
[10] Culver, Keith and Micheal Giudice. *Legality's Borders: An Essay in General Jurisprudence*. Toronto: Oxford University Press, 2010. Print. xvii-xxvii.

explanations of allocation of power by the superior federal government. While this example falls outside the scope of the international and related supernational laws of this project, it remains a helpful illustration that a growing contingent of legal philosophers and theorists argue that too great a reliance on familiar models runs the risk of distorting the phenomena. Whether IL is to be properly understood as a type of law, how it is to be incorporated into theories of 'law,' and whether traditional models are equipped to complete the task, are inquiries that will be addressed in due time.

This investigation will address the applicability of existing analytic legal theories in capturing and understanding the nature of IL. More specifically, it will address the ability of such theories to explain the distinction between the legal and the political at the international level, if such a distinction indeed exists. There is little conceptual work in the literature available to draw upon regarding IL, but the work of three prominent theorists, Hart, Koskenniemi and Weil, and also the Legal Pluralists, each with starkly different views and representative of wider theoretical approaches, offer a promising foundation for this investigation.

II. Existing Paradigms

A. H.L.A. Hart: International Laws, but not an International Legal System

H.L.A. Hart was an English lawyer and philosopher who revitalized Anglophone analytic legal philosophy.[11] Writing in the mid-20th century, Hart denied that IL

[11] Hart, H.L.A. *The. Concept of Law*. 2nd Edition. Toronto: Oxford Clarendon Press, 1994. Print. 79-110. (henceforth "COL").
Hart's work remains a foundation, albeit tinkered with, for much of analytic jurisprudence and in the largely dominant Legal Positivist tradition. Looking at *The Concept of Law* provides a sufficient introduction into his theory, which took domestic law as the

constituted a *legal system*, while defending the existence of international *laws*. He was, however, open to the possibility that IL could develop into a system of law.[12]

The title of his influential book *The Concept of Law* (1961) notwithstanding, Hart provided a theory of *legal systems*; the union of primary and secondary rules that in part identifies a legal system,[13] he was clear, is not sufficient or even necessary for law. Representative of his project, he explains:

> It is because we make no such claim to identify or regulate in this way the use of words like 'law' or 'legal', that this book is offered as an elucidation of the *concept* of law, rather than a definition of 'law' which might naturally be expected to provide a rule or rules for the use of these expressions.[14]

Hart was thus not interested in a universal *definition* of law, the lowest common denominator that would allow him to collect all instances of law under one heading, but instead strove for the theoretical understanding that came with a *concept* of law, focusing on the legal system in particular. Even as he noted some of the common concerns regarding the status of IL, such as the lack of a central legislature, courts with compulsory jurisdiction and centrally organized sanctions – a lack of secondary rules generally – he

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paradigmatic case from which to distill the central features of 'law.' His formulation of Legal Positivism is based on two main theses: the Separation Thesis, which asserts that law and morality need not intersect, and the Social Thesis, which asserts that law is a social fact

[12] *ibid.* See Chapter X.

[13] Legal systems occur once primary rules, regarding demands on behaviour, are reinforced with secondary rules, which allow for the identification, alteration and adjudication of the rules of the system. The Rule of Recognition, the ultimate secondary rule, identifies the system without reliance on any other rules. Additionally, only officials need actively accept the validity of the system (i.e. take "the internal point of view") and identify it through secondary rules, although general obedience among the population is necessary for the existence of law (*ibid.* 116-117).

[14] *ibid.* 213.

acknowledged the many primary rules of international governance.[15] In fact, he likened IL to primitive legal orders. But just as one cannot exclude IL by illegitimately privileging secondary rules, neither can one assert the legality of IL by pointing to common usage of the term, as if the word itself, rather than the concept, were in question. Both options settle a complex question too hastily.

The absence of a Rule of Recognition especially among the secondary rules, warrants special attention.[16] The validity or "binding force" of laws, Hart explains, is separate from the unifying and identifying role of a Rule of Recognition, making it a "luxury" of advanced legal systems, providing clarity and stability, but one that is not necessary for the existence of laws. Hart answers this one empirical question with certainty:

> ...but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties.[17]

Hart thus claims that IL does not have a Rule of Recognition; IL is not unified in any meaningful way. IL, is, however similar to domestic law in *function* and *content*, insofar as its laws provide instruction and invests some with normative power in similar ways, but it is unlike domestic law in *form*, since it lacks the unity of a system.[18]

[15] *ibid.* 214-6.
[16] *ibid.* 232-7.
[17] *ibid.* 236.
[18] *ibid.* 237.

B. Prosper Weil: The Relative Normativity of International Law

Prosper Weil, a French lawyer, academic and legal official, argued that by the 1980's, IL was losing its once robust claim to the title 'law.' The apparent deficiencies that IL suffered from that so worried other theorists were distractions for Weil, for the real issue was not the "undeveloped" state of IL, but that its increasingly hierarchical structure was eroding its ability to perform its primary function.

For Weil, IL must *function* to facilitate international relations among equal parties.[19] Although Weil acknowledged the many structural deficiencies of IL already widely noted, especially in contrast to domestic law, he stressed that was not a mark of inadequacy. IL often has unsystematic norms, and sometimes ineffectual, or even absent, sanctions, "which, of course, does not mean that it is inferior or less 'legal' than they [domestic law]: it is just different."[20] The problem, Weil argued, is that IL has endured in this form for centuries, ever since the rise of nation-states, but increasing power imbalances render IL incapable of fulfilling its "dual function" of contributing to the coexistence of states and their pursuit of "common aims." IL can survive in spite of a flawed structure, but not a failed function.

IL must meet three requirements if it is to continue to govern sovereign states to their benefit: it must be voluntarily adopted, to maintain the autonomy of states; it must be secular and neutral, so as not to impose particular ideologies; and it must recognize the

[19] Weil, Prosper. "Towards Relative Normativity in International Law." *The American Journal of International Law.* 413.3 (1983): 413-442. Web. 413.
[20] *ibid.* 414-5.

positivist distinction between the law as it is and as it might be.[21] But Weil argued that, increasingly, norms were being modified into "supernorms" - norms considered too important to leave up to state voluntarism. This was in contrast to the typically consensual norms of IL, and the prenormative norms that are unofficial but potentially weighty (sometimes referred to as "soft law"). As can be expected, the demands of powerful states often motivated the content of these transformed norms.[22] Furthermore, as the consensual nature of many norms were overridden in the name of moral progress, the general and loosely enforced nature of many such norms were simultaneously made to be universal in nature.[23] Often in the form of *jus cogens*, or peremptory norms, they do not permit derogation, and deal with issues such as genocide and slavery, which are considered in force even in the absence of consent by states. Even if the results seemed beneficial, Weil argued that instability and vagueness proliferated as the divisions between norms developed, in part because the divisions are in practice difficult to determine. Weil insisted that the results are grave, and that ultimately, this relativization of IL leads to its own undoing.

It is worth noting that this path towards unification, especially in the absence of a strong central governing body, need not be morally repugnant, and can offer the many benefits of systemization, but the risks associated with legal imperialism were too great for Weil.

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[21] *ibid.* 420-424.
[22] *ibid.* 425, 427.
[23] *ibid.* 433-8.

C. Martti Koskenniemi: International Law and International Politics

Martti Koskenniemi, a Finnish international lawyer and diplomat, departed from theorists who grappled with the contingencies of IL, to claim that IL is incapable of being law.[24] Representing a Legal Realist[25] perspective, he argued, with widespread influence, that IL is necessarily a political framework, where politics is loosely equated with discretion.

Koskenniemi argued that as a matter of historical development in modern secular democratic states, coupled with the ongoing desire to obtain objectivity in matters of governance, law is defined by the pursuit of the Rule of Law.[26] This objectivity and stability can only be achieved if the law is simultaneously *concrete*, that is, rooted in social behaviour, and *normative*, that is, removed from actual behaviour. But in the case of IL, those requirements cannot both be met, because of the unique nature of nation-states as both the authors and subjects of international law. Law authored by and applied to states does not leave the requisite space between actual and prescribed behaviour. As a result, decisions to settle conflicts necessarily turn to political principles rather than rules. The upshot is that no state behaviour can be genuinely constrained by laws and there is no uniquely correct solution to any dilemma. If behaviour is concrete but lacks normativity, it is apologist. If it displays normativity without being rooted in concrete behaviour, it is utopian. Any attempts to defend the legality of IL through various theories, Koskenniemi

[24] Koskenniemi, Martti. "The Politics of International Law." *The European Journal of International Law*. 1.1 (1990): 4-32. Web. (henceforth "PIL").
[25] Legal Realism asserts the indeterminacy of the law. It often contends that the apparent rules of a system hide the political nature of legal decisions.
[26] Koskenniemi, PIL, 4-10.

claimed, reduce into these poles, or are otherwise incoherent combinations.[27] He made a further claim as well, that the decisions among theories are themselves political, such that the havoc of discretion occurs at two separate levels in the search for a theory of IL as law.[28] Koskenniemi thus categorically denies the legality of IL.

D. Legal Pluralism

Legal Pluralism asserts that multiple legal spheres can coexist within a social boundary.[29] Its many versions, to varying degrees, open up 'law' to include phenomena not typically associated with the concept. It has frequently and easily embraced IL, and so deserves a place in this survey, even though its academic lineage is atypical for such a project.

Pluralism arose in the social sciences, and especially the legal anthropology tradition. It claimed exclusive descriptive accuracy through its rejection of the western academic dominion, and often at least implicitly fought ethnocentrism.[30] As a result of decades of studying a variety of societies, such as the "legal" systems of indigenous peoples,[31] to colonial and later postcolonial societies where European law was transposed

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[27] *ibid.* 13-27.
[28] *ibid.* 12-3.
[29] The terminology varies but this is the main idea. For example, Merry refers to social "spheres" and Griffiths to social "fields."
Merry, Sally Engle. "Legal Pluralism," *Law and Society Review*. 22.5 (1988): 869-896. Web.
870, 879. See also, Griffiths, John. "What is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law*." 24 (1986): 1-55. Web. 1.
[30] Tamanaha, Brian. "The Folly of the 'Social Scientific' Concept of Legal Pluralism." *Journal of Law and Society*. 20.2 (1993): 192-217. Web. (henceforth "Folly").
[31] See Bronislaw Malinowski's unfortunately named, *Crime and Custom in a Savage Society*. (1926).

onto existing indigenous norms,[32] anthropologists were often eager to expand the referent of 'law' to include what were often found to be rich and effective normative systems. Furthermore, when numerous such systems coexisted, each might have had its own role and supremacy by any one system was elusive.[33] There has been, however, internal debate among pluralists regarding the desirability of keeping 'law' as a concept distinct from other normative systems, and that debate is one this project is concerned with.[34]

One main goal of the school is relevant here: the rejection of the centrality of the state, either as the sole, or even predominant, form of social ordering.[35] If an overly strict emphasis on the state seems like a rather extreme view, it is one that has been defended even recently.[36] Today Legal Pluralism has expanded to deal with issues among many dominant and secondary groups, but the state remains an undeniably important aspect of the law that must be explained. It is a popular framework for many academic lawyers,

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[32] The British Empire, for example, was content to incorporate indigenous law into the law of particular colonies, so long as it did not cross the "repugnancy principle." The Colonial Laws Validity Act (1865) stated, "Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of repugnant, but not otherwise, be and remain absolutely void and inoperative." (Section II).

[33] Talk of "systems" is potentially misleading, but it accurate to say that pluralism denies that all can be subsumed under one system.

[34] Most, such as Sally Falk Moore, maintain that the distinction is required for analytic accuracy.
See Tamanaha, Brian. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney Law Review.* 30.375 (2008): 375-411. Web. ("ULP" hereafter).
Merry maintains the distinction for accuracy of analysis as well (878).

[35] Griffiths, 3. Griffith takes aim at theories where "law is an exclusive, systematic and unified hierarchical ordering of normative propositions" and cites both Kelsen and Hart as examples.

[36] See Roberts, Simon. "After Government? On Representing Law Without the State." *The Modern Law Review.* 68:1 (2005): 1-24. Web.

who take a largely empirical perspective with regards to the changing and novel forms of law; they deal with phenomena that are relevant to legal institutions, and are quick to accommodate much of them, without much loyalty to prevailing theories. The effects on IL theory are great. Paul Schiff Berman argues that the "hybrid legal spaces" cannot be defined away by insisting on a commitment to sovereignty classically understood, or a "universalist" approach that demands uniformity and hierarchy in IL.[37] Sources of IL include nation-states, but also other nontraditional sources, such as corporations, and yield rules of uncertain legal status.[38] What sets the pluralists working with IL apart for the purposes of this project is their willingness to accept nontraditional candidates as law, and their rejection of the belief that there exists a single form law must and does take, and with that abandon the traditional emphasis on hierarchy and singular legal validity.

III. Questions that Arise

These accounts provide very different, but also instructive, questions with which to begin a philosophical investigation into the nature of international law. The four views covered are in a loose sense exhaustive: IL as not yet properly law, or IL as formerly properly law; IL as a necessarily political endeavour that cannot truly be 'law,' or IL as one legal form among many, and for some, necessarily a legal phenomenon. A brief overview of some of the issues that arise is appropriate here.

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[37] Berman, Paul Schiff. "Global Legal Pluralism." *Princeton Law and Public Affairs*. 8:1 (2007). 1155-1238. Web. 1159-1165.

[38] Pluralists are not alone in uncertainty regarding the utility of concepts such as "soft law" or "quasi-law," for which definitions do not shed much more light than their face values.

Hart was ambivalent about the status of IL. He found it to be, at the time of writing, in an undeveloped state, lacking unification, but with the potential to develop the secondary rules necessary to constitute a legal system. Nevertheless, he thought it similar enough (in function and content, though not in form) to domestic law that comparisons were instructive. In contrast, Weil presented IL as an increasingly subverted system; IL was losing its ability to promote cooperative and equally beneficial relations among states. As norms develop into 'supernorms,' they both abandon the consensual element required of all states, and the states with disproportionate power enforce their hegemonic rule over the rest, such that the historic roots and intended function of IL cannot be met. Hart and Weil are in one sense at odds: the conditions that led Hart to deny that an international legal system exists, are the same conditions that for Weil presented the bygone era of a true international legal system. The existence of the hierarchy and strict organization that Hart thought was necessary, but lacking, for a legal system, was precisely what Weil, writing two decades later, thought was the undoing of IL. But their work may in fact be compatible, and with illuminating results. Weil is not against hierarchy and unification *per se*, but the non-consensual way in which it has proceeded, and admits the benefits such systematization offers. The instability and dominion over sovereign states that he is concerned about may not result if the hierarchy that Hart considers comes in a consensually-founded and institutionally-adjudicated manner. There is certainly a live question regarding the role of organization into a system in ensuring that IL performs its intended function.

Another dilemma is the legal nature of IL in relation to its political elements.

Koskenniemi thinks international "law" is a misleading characterization that distracts one from its essentially political nature. The unique nature of interactions among sovereign states, based on the commitments expressed to the ideal of the Rule of Law, have not been, and cannot be anything but, political in nature. It exists in stark contrast to a pluralist perspective, not attributed to any single theorist here, with its roots in the anthropology tradition. Pluralism in some form appears frequently in the literature today, with varying degrees of philosophical merit. It abandons the nation-state paradigm, and sometimes even abandons other apparent hallmarks of law, such as institutions. Here another debate arises: whereas for Koskenniemi the political aspect dominates IL, such that its legal aspect is but a myth, pluralists reject the narrow assumptions that underpin accounts such as Koskenniemi's, so that they can easily accept many different instances of normative power as law.

It is the objective of this project to investigate, if, and how, the distinction between the legal and the political applies at the international level. The emphasis will be on the debate that arises between Koskenniemi's realist view and Tamanaha's pluralist view. This project will not address the contrasting theories of Hart and Weil, either the question of their compatibility or their individual degrees of applicability, although it will draw upon their work when appropriate. This is in the interest of space, but also because of the especially pressing question of the political nature of IL at present. The realist and pluralist positions are often tempting and enjoy current popularity, and while the driving question here is a conceptual one, the debate between their views also has practical consequences. What is considered law, as opposed to politics or social norms, can

influence real world decisions.

The working hypothesis in this investigation is that IL is law, and that it can be distinguished from politics. There are two immediately charitable reasons for doing so. First, IL is called law, and so warrants preliminary benefit of the doubt, even as Hart's warning to not confuse proper names with concepts remains fresh. Second, 'legal' and 'political,' however indeterminate the concepts may be, have been useful thus far at the domestic level. This also offers a reason to be wary of prematurely abandoning either concept at the international level. Hypotheses, however, can only take one so far, and the fifth chapter puts forth an argument for including IL under a concept of law.

A continuum of the presence and the relative dominance of either law or politics at the international level will be investigated. At one end, IL is entirely reducible to politics. At the other, it is fully legal. Various intermediary positions exist between those two poles. Chapter two addresses the inadequacies of Koskenniemi's argument for the necessarily political nature of IL; although some instances of IL are political in their creation or application, as a conceptual claim, Koskenniemi's view is unsustainable. Chapter three addresses the shortcomings of pluralism in various guises, notably in the work of Brian Tamanaha who is inspired by their work. Chapter four presents a methodological stance, the product of having assessed the deficiencies and strengths of the realist and pluralist positions, and lays the foundation for the final chapter. The fifth and final chapter will suggest a revised path that breaks with the prevailing emphasis on domestic law, and argues that decoupling the 'legal system' from the nation-state allows legal philosophy to accommodate IL.

Chapter Two: International Law as Politics

The previous chapter dealt with four prominent theories of IL with which to begin this project. None, however, are completely satisfactory in their portrayal of IL, and it is the goal of this chapter to investigate the work of Martti Koskenniemi, who represents a legal realist interpretation that IL is reducible to politics, and is therefore not law. Koskenniemi's position forms one pole of a continuum that is skeptical of the legality of IL. The chapter begins with a detailed exposition of his theory, advances two central objections against it, and ends with an affirmation of the insights that remain. Although refuting Koskenniemi's argument alone is not sufficient to disprove the possibility that IL is essentially political, his argument is highly-regarded and influential among international lawyers, but also extreme in its embrace of the realist position. It is therefore taken to be fairly representative of the position that IL is really just politics, an argument this project aims to prove erroneous.

I. Koskenniemi and the Retreat into Politics

A. The Requirements for Law

Koskenniemi defends a legal realist position, arguing that IL necessarily reduces to politics, and he draws on numerous international cases to illustrate his claims. On his view, it is a mischaracterization to even call IL "law." The main source used here is his 1990 article, "The Politics of International Law."[39]

[39] It is necessary to note the existence of the follow-up article:
Koskenniemi, Martti. "The Politics of International Law – 20 Years Later." *The European Journal of International Law*. 20.1 (2009) 7-19. Web.
Two important points arise in that work. First, the "critical" vein of his work, if implicit in the first article, is explicitly stated in the more recent article. In it, he is clear that the

Of the many ways to distinguish the legal from the non-legal, the distinction from the political is especially important, and Koskenniemi frames it historically. The development of IL in Europe arose from a desire to implement the Rule of Law, as based on Enlightenment-era principles.[40] The intersection of liberal theory and the Rule of Law is based on the belief in the subjective nature of value. Modern liberal theory rejected natural, discoverable principles of governance, including virtues such as justice. Nothing was considered immutable. Subsequently, appeals to natural hierarchies became unviable, rendering all individuals free and equal, and the Rule of Law was determined to be the only appropriate form of governance to safeguard these new values. Without the Rule of Law, along with freedom and equality as governing principles, governance would fall into politics, a scramble to privilege one's own subjective preferences. As this framework unfolded at the domestic level, it was extended to the international level. Thus, legal solutions were deemed necessary to provide objectivity and neutrality towards the variable and sometimes competing values, and even whims, of individual and otherwise autonomous states. This framework still defines modern international relations - amid the

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"indeterminacy" of IL is at the heart of his "sceptism" (7-19). Second, he expresses support for his original position, such that reliance on a position that predates serious changes on the international scene remains a fair characterization. In short, he maintains his stance regarding the indeterminate and inevitably political (i.e. discretionary) nature of international governance, and the inadequacy of doctrines that attempt to describe the phenomena in legal terms, but adds an analysis of the strikingly predictable and politically driven decisions that are found across international institutions. Even though he finds the discussion of 'sovereign states' obsolete, and has now shifted to new legal "vocabularies" for the relevant institutions, the worrisome malleability of IL remains in much the same form. This project maintains the state-based terminology due to ease. Much of Koskenniemi's additional analysis is practical, not conceptual, in nature, which does not concern this project directly, and so the emphasis will remain on the original article.

[40] Koskenniemi, PIL, 4-7.

changes to IL in the last few hundred years, commitment to the Rule of Law as an ideal has remained, and the failure to achieve it has been blamed on practical shortcomings. Contrary to such optimistic interpretations, Koskenniemi claims that international relations cannot defer to legal rules in the hope of attaining the Rule of Law, because international conflicts can only be solved by political, discretionary means. But rhetoric obscures the fact that these decisions must turn to contested political (and indirectly moral) principles. It is not simply that the international Rule of Law as an ideal requires stronger commitment or effort on the part of participants and governing bodies, or that its practical role is illusory, but that it is unattainable as a *legal* structure.

The specifics of the argument require close attention. It is based on the claim that IL can only be law, that is, distinct from politics in the face of competing, subjective preferences, if it simultaneously satisfies two conditions: "concreteness" and "normativity."[41] Concreteness is a constitutive aspect of law; because law is a socially constructed institution, law must reflect the actual social patterns from which it arises. The many competing values of states, and the resultant "behaviour, will and interest," constitutes law, rather than appeals to the supposedly immutable and universal principles of natural justice.[42] There cannot be a single correct normative system, because any candidate would just be the prioritization of particular subjective value systems at the expense of others, so law does not have a single format to aspire to. The upshot is that because there is no single correct law to model itself after, law must be what it in fact is. Concreteness thus stresses law as a factual construction, without recourse to an abstract

[41] *ibid.* 6-10.
[42] *ibid.* 7.

ideal of what law should be. For example, if states come together and pass a law protecting human rights and prohibiting torture, Koskenniemi's analysis would claim that the new law reflects what they already intended to do, and the law is the result of what they in fact do. The law cannot claim any link to an ideal of law, only the social reality in which it is based - otherwise, it is just wishful thinking. In contrast, normativity prescribes behaviour, and constitutes law's guidance function; law must be distinct from what states actually do, or their "behaviour, will, or interest."[43] It must differ from what states do, or would do, if allowed to pursue their ends freely. It demands that laws be applied whatever the fleeting preferences of, or even principles developed by, states are. To return to the example of a law protecting human rights and prohibiting torture, the analysis on behalf of the normativity requirement would insist that there be space between what the law is as a matter of state action, and what the law demands, otherwise, it does not provide guidance. If there is an effective law in place, that space is absent. The law cannot, according to the normativity requirement, simply be what the state does.

It is apparent that for Koskenniemi, concreteness and normativity are fundamentally at odds. When law is concrete, the more descriptive it is and tied to a state's actual political actions, so that it becomes "apologist." But when normative, it is separate from "state will and practice" and becomes "utopian." Indeed, these two poles do appear to represent situations where the social interaction is not law-governed. If a law merely reflects what states do, it is superfluous. If a law makes behavioural demands but

[43] *ibid.*7-8.

cannot admit convergence with behaviour, it is similarly superfluous. It is tempting to admit that IL seems to lapse into politics.

What makes this criticism particular to IL, as opposed to state law, is that the parties involved, sovereign nations, are both the authors and subjects of the law. This places them in a unique position with respect to the goal of IL, that of providing stability and certainty in matters of guidance and conflict. Due to its lack of power compared to these states, which create it, IL remains subordinate, and thus is dependent on the actions of the state, whether that action is concrete or normative. The key is that the decisions regarding IL depend on the decisions of the states. By way of contrast, a citizen of a state does not have the same power in a domestic legal system, because he or she is subject to the law, but not its author – there is an authority with the machinery to create and enforce its laws. IL, however, lacks the substantive machinery necessary to transcend states' will, making IL vulnerable to either the thinly veiled political preferences, or the easily ignored moral aspirations, of states. The upshot, according Koskenniemi, is that neither option, apologist or utopian, relies on laws, and struggles must resort to political arbitration.

The nature of Koskenniemi's characterization is, it must be noted, a very external one. For concreteness, social facts are based on externally observable units, primarily behaviour. Similarly, the characterization of normativity makes no mention of the 'ought' that is customarily used to describe its guidance function, and focuses only on the distance between what is demanded and what is done. But the two requirements do appear to be legitimate demands, the absence of which is problematic.

B. The Doctrinal Level – The Construction of a Concept

The political aspect of IL has long since been acknowledged by its defenders, and Koskenniemi divides defences into what he claims are four exhaustive and mutually exclusive types. The "skeptical" and "idealist" positions simply avoid the challenge, by denying the existence of the problem or denying the inadequacy of the solutions offered, respectively. Responses that actually address the problem, in Koskenniemi's view, come in two forms.[44] The first, the 'rule approach,' arose in direct response to excessive state autonomy in the face of attempts at a robust IL, and stressed normativity. It demanded formal pedigree tests unattached to actual states' consent to identify applicable laws. The second, the 'policy approach,' grew from criticisms of the former, claiming that the political element cannot be removed, and it instead advocated basing IL on actual social processes. But this emphasis reduced IL to a descriptive enterprise. Modern attempts to chart a middle ground with pragmatic compromises between these approaches are quickly dismissed by Koskenniemi as obviously untenable. Thus, while both approaches attempted to tease apart law and political behaviour, the choice between approaches, regarding which best distinguishes law from politics, ultimately comes down to a political decision itself. He explains:

> The difficulty in choosing between a rule and a policy approach is the difficulty of defending the set of criteria put forward to disentangle "law" from other aspects of state behaviour...*To decide on the better approach, one would have to base oneself on some non-descriptive (non-social) theory about significance or about the relative justice of the types of law rendered by the two – or any alternative – matrices* [emphasis added]. Such a decision would, under the social conception of law and the principle of the subjectivity of

[44] *ibid.* 10-13.

> value, be one which would seem to have no claim for objective correctness at all. It would be a political decision [emphasis added]. [45]

Thus the discretionary nature of IL is found at two distinct levels: one, at the level of individual political decisions and actions themselves, and two, also at the metatheoretical level of the "choosing" an approach to, or concept of, IL. It is the difference between discretion regarding *laws* and regarding *'law.'* The latter form, as it described in the abovementioned quotation, consists of choosing between the rule and the policy approaches, and to call either law, requires a political decision.

C. The Substantive Level – The Content of a Concept

Furthermore, Koskenniemi claims that the recurring problems in legal argumentation at the international level all repeat the pattern of the irreconcilability between the concrete and the normative. The conflict between the two requirements is manifest in the two ways of explaining the origin of laws' content.[46] The first is that the content is based on the sovereignty of the state. This sovereignty requires that the state be autonomous in the creation of self-applying international norms unless there already exist norms constraining its behaviour (encapsulated in the Lotus principle[47]). In this interpretation, international laws come about if the sovereign state allows them, and they exist as a matter of social fact. This presents the origin of laws' content as *concrete*. In contrast, the second interpretation views states as powerful agents, capable of acting in conflict with laws. Because they can serve as sources of action contrary to prevailing

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[45] *ibid.* 12-3.
[46] *ibid.* 13-4.
[47] The Lotus Principle, named after The Lotus Case (1927 Turkey v France PCIJ), states that sovereign states can act freely so long as they do not disobey existing international laws.

social patterns, this highlights the *normative* nature of the origin of laws' content. The problem of the supposed fundamental incompatibility between normativity and concreteness, (and the resultant need to make a political choice between the two, and the theories that support one or the other), the foundation for Koskenniemi's claims against IL, is therefore revealed through the content of law. Standard formulations either start by describing the state as foundational to the structure of IL ("realist" doctrines) or by starting with the sources of IL, from which the content follows ("idealist" doctrines). But in reality the division fades, because in practice they rely on each other for justification, and ultimately "provide identical substantive systems." Although recent turns towards a pragmatic approach balancing both views provide not unjust resolutions to conflicts, the issue at stake is whether politics, and not law, decides cases.

The first option is to appeal to sovereignty, where states are autonomous and legislate self-applying norms, which supports its concrete, social nature.[48] Sovereignty itself is either viewed as a 'pure fact,' independent and external to the law, or takes the 'legal view' where sovereignty is internal to the law.[49] Yet Koskenniemi's investigation of case law reveals that sovereignty is simultaneously external and internal to the law. Laws can be insufficient, as when they "run out" and states have the power to legislate by default. Yet the indeterminacy of many laws also makes their guidance largely superfluous, and since clashes between sovereign states are clashes of liberty, appeals to

[48] Koskenniemi, PIL, 14-20.

[49] Hart displays the legalistic perspective at first glance, observing that: "There is no way of knowing what sovereignty states have, till we know what the forms of international law are." (COL, 224). But in line with Koskenniemi's claim about the inseparability of the two perspectives, short work can show that it also relies on the "pure fact" of sovereignty's existence.

liberty cannot settle disputes. Transboundary pollution is a notable example of such conflicts, where arbitration between states must appeal to political (and moral) principles, such as justice or equity. Solving such balancing requires a combination of (external) facts and (internal) legal rules together. But facts, chosen according to certain criteria, have normative significance, and rules, subject to interpretation, rely on concrete facts. Sovereignty thus is a circular concept, relying on both legal facts and legal rules, and cannot identify the origins of international legal content.

The second option is to trace the content of IL through its 'sources.'[50] Its emphasis is on states as powerful sources of the normative criteria for its creation and identification, however, attempts to bring the concreteness and normativity poles together to reinforce its politically objective content origins. While the social origins focus on the consent of states, the normative origins (which provide "binding force") focus on guiding principles that transcend consent, such as justice, that apply regardless of political preference. Unsurprisingly, the poles are intertwined. For example, it is just to deal with consent, and justice is a standard often consented to. Arbitrations where the sovereignty of opposing states must be handled delicately reveal the difficulty involved in balancing these two factors. Thus, the concrete existence of sovereignty and its consent is at odds with the normative nature of political interjections, even at the level of laws' origin. Attempts at incorporating active belief in law, in addition to its determinate nature, once again runs across the interwoven nature of law. That makes the two unidentifiable as separate entities, with the now familiar refrain that the behavioural aspect alone is

[50] Koskenniemi, PIL, 20-7.

apologist, and the psychological is idealist. Neither stands alone, and the latter in particular cannot be identified by any independent criteria, and is extrapolated from observed behaviour only, a risky method. This circularity once again renders the content of law indeterminate. Thus IL must be seen as simply a pretense for international politics, even if the outcomes are acceptable. This realization, he argues, allows for a more candid appraisal of states' actions.

II. Two Objections

Two central problems arise with this account. First, this argument does not work on its own terms because of its exaggeration and incorrect rejection of the role of discretion. Koskenniemi falsely presents the concreteness and normativity requirements as strictly incompatible, leading him to overestimate the role of discretion at the level of individual laws and their content. He also caricatures the role of uncertainty and discretion at the level of an underlying concept of law. Second, the argument relies on too narrow an idea of what law is, an idea based on a historically and culturally contingent development, especially with respect to his strict commitments to hierarchy and sovereignty. As such, Koskenniemi misses an opportunity to reevaluate the concept of law according to information IL provides. However, he does offer many tools and partially applicable claims that do aid in such a reevaluation, which must also be reviewed.

A. Discretion and the Incompatibility of Concreteness and Normativity

Foundational to Koskenniemi's argument is that the unique position nation-states occupy in relation to IL, as both the authors and subjects of its norms, renders

international laws, and thus IL as a whole, incapable of meeting both the concreteness and normativity requirements. Yet this argument relies on a misleadingly strict characterization of the division between concreteness and normativity, one that denies that the two elements can be simultaneously constitutive of laws. While laws can be wholly concrete or wholly normative, the existence of an intermediate position is made clearer by reviewing Hart's analysis of "rule-sceptism," an early response to legal realism. In fact, laws by states are capable of fulfilling both requirements; international norms are capable of bridging the subjective nature of state preference and the demands of objectivity of law, and need not result in uncertainty. This can result in two ways. The first is that the observed behaviour (or will or interest) of states can be *constrained* by norms, potentially even involuntarily. The second is that some of these norms are followed *voluntarily*, whether or not their content contradicts state preferences, because their social basis provides legitimacy. Finally, a brief assessment of the supposed problems regarding the uncertainty surrounding a concept of law will be presented.

i. Rule-sceptism

Hart addressed the role discretion plays within a system of rules, and since Koskenniemi loosely equates 'politics' with 'discretion,' the connection is promising.[51] Hart noted that it is unlikely that rule skeptics deny the existence of secondary rules, such as those that empower officials, but rather that they deny the binding role of primary

[51] Moreover, there is a clear foundational congruity between the two theories. The concreteness requirement is relevantly similar to Hart's Social Thesis. The normativity requirement is also discernable in Hart; in *The Concept of Law* he states, "...where there is law, there human conduct is made in some sense non-optional or obligatory." (82). This makes the argument Hart sets out all the more relevant.

rules.[52] Skeptics, often in the form of legal realists and later critical legal studies theorists, point to the unreliable application of laws, which allow for uncertain results, but which in fact often favour the powerful. The complexities of legal systems are therefore reduced to predicting the way the privileged decide, and although some patterns might be observed, uncertainty plagues the law. Yet Hart offered a compelling argument that such views rely on oversimplifications, that rules need not simply be distractions from exercises of power. One of Hart's enduring observations was that many in legal systems, and on his view *at least* the officials needed to uphold the system, take "the internal point of view" towards law, accepting the validity and normative authority of its rules.[53] Rather than treating rules as foreign impositions on their behaviour, "they continuously express in normative terms their shared acceptance of the law as a guide to conduct."[54] Thus, following a rule may be in some sense obligatory; a concrete and externally observed behaviour may itself incorporate a normative attitude.

Rule-sceptism in the form Hart addressed focused on the discretion allotted to judges, and the uncertainty that it was claimed to sow. The shortcomings of Koskenniemi's argument can be elaborated upon by drawing an analogy between judges in domestic legal systems and nation-states participating in IL, to show that Koskenniemi also displays a form of rule-scepticism. Just as states are officials in IL who act as authors of the norms of IL, judges in domestic legal systems act in a similarly central and official capacity to determine the norms of the system. Admittedly, there are problems with this

[52] *ibid.* 136-7.
[53] *ibid.* 89.
[54] *ibid.* 138.

analogy. Judges act in conjunction with legislatures to develop the law of nation-states, and that ability is not universal to all domestic legal systems, while Koskenniemi takes nation-states to be the sole creators of international norms.[55] As well, within Koskenniemi's framework, the official actions of nation-states are indivisible, whereas judges can be separated from the states within which they operate, and so might be susceptible to acting contrary to their official duties. But the important parallels override these dissimilarities. Both judges and nation-states act according to a variety reasons, even if Koskenniemi is suspicious of the reasons of the latter, and both are accorded a degree of supremacy within their respective systems. The two are thus sufficiently analogous for the purpose of applying Hart's analysis.

The problem is one of extremism; rule-sceptism of the sort to which Hart responded and Koskenniemi represents takes a possibility and treats it as an inevitability. Such sceptism, Hart contended, "amounts to the contention that, so far as the courts are concerned, there is *nothing* [emphasis added] to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do."[56] And just as one can insincerely obey a rule, as Hart observes, it "is necessary to distinguish an action which is genuinely an observance of a rule from one that merely happens to coincide with it."[57] Judges follow many normative

[55] This focus on states as the sole creators of IL will be criticized in section C. But for now, even if Koskenniemi is given the benefit of the doubt, this aspect of his argument faces serious internal problems without introducing new information regarding the origins of IL.

[56] Hart 138.

[57] *ibid.* 140.

guidelines in their decisions, and it is too simplistic to claim that behavioural patterns can explain the entire picture. Consider Koskenniemi's claim that:

> For if the law could be verified or justified only by reference to somebody's views on what the law *should* be like (i.e. theories of justice), it would coincide with their political opinions. Similarly, if we could apply the law against those states which accept it, then it would coincide with those states' political views.[58]

Those options, however, take a simplistic approach to the complex question of action and their underlying political motivations. It thus becomes apparent that Koskenniemi demonstrates an illegitimately strict distinction between the two options. Even appealing to 'will,' rather than behaviour, does not provide a more palatable version of the argument: a state can be conflicted regarding what to believe or prefer, and welcome guidance, or admit its utility. To claim that whatever a state does or wills is the one true result of its political values is too simplistic an account. When judges make decisions, they can do so based on difficult deliberation, and states can act on similarly complex reflection. And since instruction and constraint result in newly evaluated and even altered behaviour, there is evidence of normativity. Thus, defining IL based on verifiable social behaviour, as modern liberal beliefs demand, does not necessarily exclude normativity, nor does it mean that such an understanding of law must be simply an apology for state behaviour.

As well, there is, Hart notes, an important difference between courts that can decide laws as they please, and actual constitutional systems that have settled rules that

[58] Koskenniemi, PIL, 8.

must be respected in the extension of law.[59] Clearly, professing commitment to settled law to prove the existence of law is tautological. But if 'constitution' is understood in its weak sense, as some minimal limits imposed on legal authority,[60] IL, if a coherent practice, can and often does have some secondary rules of governance, even if its characterization as a system is debatable. While it is true that many such *concrete* patterns of behaviour exist as patterns of behaviour, this does not mean judges can act any way they like.[61] As Hart notes, "The adherence of the judge is required to maintain the standards, but the judge does not make them."[62] Such standards are based on social practices, but provide normative force as well, and furthermore, this normative force follows through to the good-faith expansion of existing laws.

Of course, part of the problem Koskenniemi raises is that much of IL is yet undeveloped, and that its development follows a political, and not legal, path. But without the underlying incoherence of an international law, it is possible to recognize IL where it exists, and recognize that states can act in accordance with established, even if limited,

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[59] Hart, COL, 145.
[60] See Waluchow, W.J. - *A Common Law Theory of Judicial Review: A Living Tree*. New York: Cambridge University Press, 2007. Print.
"In some minimal sense of the term, a constitution consists of one or more rules or norms constituting, and defining the limits (if any) of, government authority." (19).
[61] *ibid.* Even a society with an absolutely supreme ruler, "in which legislative, executive, and judicial powers inhere in one person, does not in fact represent a *conceptually* [emphasis added] incoherent attempt to achieve constitutionally limited government." (40). Such a supreme governing body may be *de facto* free because it has supremacy, but it might simultaneously not be *normatively* free to ignore relevant limitations on its power (148-9). Such rulers are expected to put in a "good-faith" attempt to fulfil their duties, even if they sometimes err (167).
[62] Hart, COL,146.

legal patterns. That is not to say that they will, or that they will not, only that Koskenniemi's claim that they *cannot* is unsuccessful.

ii. Voluntary and Involuntary Acceptance

International laws can be both rooted in social behaviour and display a normative stance, and a striking example comes from an early stage in modern IL.

Jennifer Martinez has argued extensively that an overlooked precursor to modern international courts, such as the International Criminal Court (ICC), were the 19th century courts that enforced the ban on the slave trade.[63] Britain was a key agitator for the end of the slave trade; it and the U.S. had banned the slave trade, in 1807 and 1808, respectively, but other European powers had not. Engaged in the Napoleonic Wars until 1815, Britain could legally board and search ships flying neutral flags in order to confirm their status, and it took advantage of this technicality to inspect ships suspected of transporting slaves and try slaveholders. The latter element of this enforcement was defended on the grounds that slavery was against the natural law, such that in the absence of positive law allowing slavery, Britain could act as it did. This piece of history appears to be a perfect example of apologetic behaviour by the undisputed naval superpower of the time. But the goal here is not to deny that Koskenniemi's portrayal is completely inapplicable, but that it does not exhaust legal behaviour.

Following the war this loophole disappeared, and Britain, still committed to the cause of ending the slave trade, could either illegally police the oceans, as it was quite capable of doing, or enter into treaties with the relevant nations. It chose the latter.

[63] Matinez, Jennifer, S. "Antislavery Courts and the Dawn of International Human Rights Law." *Yale Law Journal.* 117:4 (2008). Web. 550-579. (henceforth "Antislavery").

Through various methods, from bullying to bribery to moral exhortation, from 1817 on, it entered into several bilateral and multilateral treaties. As a result, the first international courts were developed, permanent and with judges from different countries. The aspect especially important here is that Britain entered voluntarily into treaties that it did not need for practical effects, but which was considered necessary to achieve the rule of law. Moreover, it accepted its own submission to the law, and acquiesced to its ships being subject to the same potential searches and penalties it demanded of others.

Realists might point to many facts in their favour here. There was a military and cultural hegemony imposed by Britain in this effort; it relatively easily swayed weaker nations, such as Portugal and Spain, while France and the U.S. were more difficult to win over.[64] As Britain's military supremacy eventually waned, it guaranteed a path that it could not have enforced indefinitely. Also, debate remains whether or not ending the trade did not drastically impair her future prosperity. So concessions to Koskenniemi and liked-minded realists are appropriate. But to call IL in such a case "a mere epiphenomenal artifact" is too sweeping an analysis.[65] Britain did incur great costs in the decades of this effort, and the profitability of slavery in their colonies has been underestimated. Furthermore, a goal of these treaties was, "mutual long-term gains for all participants." Thus, Martinez claims that the situation was much more complex, "...than either hard-nosed foreign-policy realists or idealistic human rights advocates today acknowledge."[66]

[64] *Ibid.* 636-41.
[65] Martinez attributes this phrase to Goldsmith and Posner from *The Limits of International Law*, see 114-7.
[66] Martinez, Jennifer S. "Slave Trade on Trial: Lessons of a Great Human Rights Law Success." *Boston Review*. September/October 2007. Web.

Here is a case where a powerful nation initiated international treaties to encourage a state of affairs it could have at least partially brought about without any legal scaffolding. As well, it entered into such an agreement as an equal party; it voluntarily subjected itself to the same standards which it desired for others. To either underestimate the role of states in IL, or to deny the efficacy and influence of IL in this case, yield gross oversimplifications.

It is clear that significant voluntary acceptance of laws was displayed by Britain. Even though it propelled the birth of the relevant treaties and in some sense pursued its own desires, the situation is more nuanced than legal apology alone. The treaties were not overall to the benefit of Britain; the economic costs and losses, for example, were significant. And yet it also bound itself according to conditions that were required to achieve the rule of law; as a superpower, it reciprocated in the requirements it demanded of other nations. Involuntary acceptance can similarly be found in this situation. Economically and militarily dependent countries such as Spain and Portugal, who had much to lose in the stoppage of new slaves arriving to their colonies, and who were convinced to accept treaties for a variety of reasons, did honour the laws. Although not as zealous in their pursuit to end the trade or prosecute offenders, the countries, and their judges who sat on the international courts, acted according to the wishes of their governments, and did for the most part according to what was required of them. And as sentiments in their countries changed towards voluntarily denouncing the slave trade, their opinions of the laws changed, although their behaviour was already largely compliant.

Overall, it is clear that these treaties and courts significantly altered the course of action by many states and individuals, and in no states was the outcome one that entirely corresponded to their prior "apologetic" commitments or ineffective "utopîan" moralizing. This aspect of IL bound states and effected change, both voluntary and involuntary, from numerous powerful nations.

iii. Discretion at the Conceptual Level

The focus thus far has centred on the compatibility of the concrete and normative aspects of international laws, and the subsequent rejection of Koskenniemi's insistence that substantive international governance is discretionary. On a related note, another problem is Koskenniemi's insistence that the uncertainty surrounding approaches to theorizing about law forces one to commit an illegitimately political act.

The rule and policy approaches are the two doctrinal approaches with which theorists evaluate the social phenomena that is identified as IL. Koskenniemi claims that as interpretative theories about the law, they fall into the same trap as individual laws. Just as international laws can either be concrete (and apologetic) or normative (and utopian), he argues that theories about the law are similarly divided. The normatively based rule approach slips into utopianism, and the socially based policy approach into apology. The possibility of compatibility between these two elements was demonstrated in the previous sections, and here the focus is instead on the role discretion plays in deciding between approaches to, or concepts of, law.

As examined above, Koskenniemi claims that to choose between the rule and policy approaches is to set the parameters of law as distinguished from politics. To

partially quote him again: "To decide on the better approach, one would have to base oneself on some non-descriptive (non-social) theory about significance or about the relative justice of the types of law rendered by the two – or any alternative – matrices. Such a decision... would be a political decision.[67] The rule and policy approaches differ in how to interpret the process of law. The problem, he claims, is not just that neither can adequately describe IL, but that to determine the criteria for defining 'law' that would decide between the approaches is a political choice as well. Non-descriptive criteria must then decide how to distinguish between law and not-law, and that such discretion must take on a moral element.

The inappropriateness of such discretion is not an uncontroversial assertion. It is claimed by Koskenniemi that there cannot be a neutral criterion to define the law. While the political discretion at this foundational level is important, and furthermore grossly exaggerated, its analysis will be left until the fourth chapter, where methodological questions regarding the discovery and construction of concepts regarding socially constructed institutions will be taken up.

B. Problems with the Hierarchical Depiction

In addition to the mischaracterizations internal to his account and the methodological problems of his stance, Koskenniemi's account suffers from an unnecessarily narrow understanding of 'law.' His theory is based firmly in the western, liberal-democratic tradition, and not amenable to the serious changes many call for.

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[67] Koskenniemi, PIL, 12-3.

Setting aside his recent disavowal of the terminology of states and sovereignty for the new vocabularies of international organizations,[68] in his recent work Koskenniemi still does not offer an account that breaks with his traditional description of IL and its sources. Obviously, a discussion of IL begins among nations, but many relevantly similar agreements go beyond the state. It is for this reason that a project concerned with "international" law must engage with other "supernational" legal phenomena. Moreover, as Twining is keen to stress, they interact with each other in increasingly fluid, multi-level and non-hierarchical ways. Twining adapts Karl Llewellyn's "law-jobs theory" to characterize law from the global perspective.[69] His affinity to Llewellyn is based on their shared rejection of the traditional distinction between conceptions of law from conceptions of broader normative social systems, although practical differences exist.[70] Particularly important for Twining's purposes is the inclusiveness of the theory, and that it is an analytic (non-falsifiable) theory that relies on its accuracy and applicability for its success. His theory summed up explains, "From a *global perspective* it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between *subjects* at one or more *levels* of relations and of ordering."[71] Global law occurs in a variety of ways, through a variety of subjects that display some minimal degree of institutionalization. The theory is based on an impressive familiarity with 'global' law, and examples to support his basic depiction abound. As a simple

[68] See note 39.
[69] Twining GJ 104-8.
[70] This rejection of the distinction between law and other social normative orders is a bit baffling, and a deficiency in a theory that is otherwise instructive.
[71] *ibid.* 117.

example, the "Convention on Long-Range Transboundary Air Pollution" includes nation-states and the "European Community" and signatories as ratifying parties.[72]

The need to reassess the concept of law goes beyond the question of who can sign a convention or treaty, but also the direction in which law develops. Here some instruction from modern legal pluralism is fitting. Some pluralists, such as Janet Koven Levit, maintain that whatever the motivations for IL may be, states are not immune to pressures from either internal or external sources. Her work argues that IL often developed in a "bottom-up" manner, in an organic and unplanned manner, through the efforts of bodies such as NGO's, in addition to the formal treaties coordinated by sovereign nation-states.[73] She therefore offers a very different description of the origins of IL than Koskenniemi presents. Her work investigates the boundary between 'soft' (as in informal) and 'hard' law (having official pedigree and binding force).[74] Much IL crosses that boundary; the informal rules of practice developed by public and private "practioners" (Levit's favoured term), might eventually be adopted into hard law. Levit's key example in the finance world is the Berne Union, an informal and rather secretive alliance whose rules of self-governance regarding export credit insurance have become

[72] "Convention on Long-range Transboundary Air Pollution." www.unece.org. United Nations Economic Commission for Europe (UNECE). 2009. January 2009.
[73] Levit, Janet Koven. "Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law." *The Yale Journal of International Law*. 32.3 (2007). Web. 395, 408-19. (henceforth"New Haven")
[74] Although this again raises the question of how one can distinguish between 'law' and 'not-law,' Levit is aware of this problem and does not such labels are fruitful to pursue. Neither is placing much stock in the distinction of the intermediary "soft law," the transformation of which into "hard law" is often unmarked and practically superfluous. *ibid*. 413-5.

authoritative, and have even been incorporated into WTO treaty and EU law.[75] The "soft, unchoreographed process" of the approach has various private sources, ranging from the legislative-like to more informal pressure groups. Thus, soft law can often enter into law, "hardening" through a messy and unpredictable procedure, although it is necessary to note that they remain influential even if not so incorporated.[76] While one can debate when and how such norms become law (similar to debates that centred decades past on customary law), with corresponding debates about what exactly law is (a debate Levit for one is not interested in pursuing), the point here is that the source of the content of what enters into indisputable 'law' is quite different from what is often thought, and that private practioners play a much greater role.

Additionally, not only is the existence of the bottom-up approach considered a reality among many legal theorists, it is often considered a beneficial process.[77] For example, the approach of the international Desertification Convention from 1995, which accedes a share of authority to NGOs and local agents, is claimed to be an effective manner with which to deal with the relevant environmental issues, because of its bottom-up manner. This sort of evaluative claim, while not the focus here, is indicative not only of an acceptance of its existence, but also a positive opinion of such new procedures.

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[75] Levit, Janet Koven. "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments." *Yale Journal of International law*. 30.125 (2005) Web.

[76] Levit, Janet Koven. "Bottom-Up Lawmaking: The Private Origins of Transnational Law." *Indiana Journal of Global Legal Studies*. 15.1 (2008). Web. 49-57.

[77] Danish, Kyle M. "International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention." *Indiana Journal of Global Legal Studies*. 3.133 (1995) Web. 1995-6.

Recognizing this plurality of interactions among many levels and sorts of parties certainly has serious implications for the foundation of Koskenniemi's theory. He relies on the unique and contradictory nature of nation-states both exerting their will and being subject to the resulting laws, yet even if the concreteness and normativity requirements were incompatible, which they are not, Koskenniemi describes too tidy a situation. NGOs, for example, cannot occupy the same space in his theory as states, yet recent literature seems to agree that many types of such institutions take part in the creation of IL. Thus, Koskenniemi takes too narrow a perspective to a changing phenomenon, and his theory suffers as a result.

III. Keeping Some of Koskenniemi's Insights

Despite the inadequacy of Koskenniemi's argument for the non-legal nature of IL, there are particular international laws that epitomize the political posturing he describes, and many are relevant to Canadian politics and law.

Examples of aspirational but ineffective international laws are not difficult to find. Environmental laws often suffer from such deficiencies. The Kyoto Protocol (1997) to the United Nations Framework Convention on Climate Change (UNFCCC) was part of a lengthy process of talks in regards to reducing pollutants that have set in motion Climate Change.[78] A protocol itself is a diplomatically-minded rule specifying how the targets set by treaty are to be enacted, in this case, that of the UNFCCC treaty.[79] It was signed by

[78] "Kyoto Protocol to the United Nations Framework Convention on Climate Change." www.unfccc.int. United Nations Framework Convention on Climate Change (UNFCCC). 1998. January 2009. (henceforth "Kyoto Protocol")

[79] The mechanisms are Emissions Trading, Clean development mechanism (CDM) and Joint Implentation (JI).

Canada in 1997, formally ratified in 2002, and aimed to come into effect in and display progress made by 2005.[80] A 2006 Report on Climate Change by the Canadian government contrary to the commitment from Canada to reduce the relevant emissions by 6% relative to the baseline of 1990 levels, by 2004 the country's emissions had increased 26.6% from the baseline.[81] Furthermore, efforts were susceptible to the political climate. For example, the election of the federal Conservative party in 2006 ushered in an anti-Kyoto stance. Worldwide, Canada represents the rule rather than the exception with respect to this issue; global emissions increased just as they did in Canada. The fanfare with which the protocol was received, and the subsequent failure of the involved states to live up to its goals, means that little cynicism is required to rank this as a paradigmatic example of the utopian norms Koskenniemi condemns.

Similarly, international laws can be simply convenient masks for state behaviour. A recent example is the extensive reinterpretation of the Rush-Bagot Treaty. Following the War of 1812, Britain and the U.S. agreed to demilitarize the borders of the Great Lakes and lake Champlain. Agreed upon in 1817 and ratified by both nations in 1818, it allowed each four vessels weighing a maximum of 100 tons and armed each with one canon fitted for 18-pound cannonballs.[82] The treaty was long dormant; in 1901 one American judge noted that, "...for more than half a century it has been practically

[80] Kyoto Protocol.
[81] "Canada's Report on Demonstrable Progress Under the Kyoto Protocol" Demonstration of Progress to 2005." www.unfccc.int. United Nations Framework Convention on Climate Change (UNFCCC). 2005. January 2009.
[82] Canada. Department of External Affairs. *Treaties and Agreements Affecting Canada in Force Between His Majesty and the United States of America with Subsidiary Documents, 1814-1925*. 1927, 12-7.

obsolete."[83] Its modern role was largely symbolic for some years.[84] Despite this neglected state, it was called upon by the U.S. post-September 11 to allow for the arming of ships patrolling the Great Lakes. Plans to arm U.S. cutters with 7.62 mm machine guns, capable of firing 600 bullets a minute, for the purposes of border protection, especially against possible terrorist threats, were said to correspond to the spirit of the original treaty, such that both Canada (the law had become part of Canadian law upon independence) and the U.S. were reported to support the reinterpretation.[85] Yet the sincerity of this reinterpretation is questionable. It is unlikely that Canada could have refused had it wanted to. It is similarly unclear what the *legal* reason the U.S. had in utilizing this treaty in some form. Furthermore, if some substantial legal obstacle had materialized, it is unlikely that the project would not have proceeded. Thus, regardless of the practical merits of this project, it appears to have been a clear example of apologetic legal maneuvering on the part of the states involved.

The conclusion here is that although Koskenniemi incorrectly presents concreteness and normativity as incompatible, and thus depicts international laws as either apologetic or utopian, there are laws that do fall under one heading or the other. It

[83] Hon. Henry Sherman Boutell. "Is the Rush-Bagot Convention Immortal?" *The North American Review*. 173.538 (1901): 331-348. Web. 331.
He adds, "For the past sixty years both parties have violated the agreement with the same persistency with which they have both maintained at all times that the agreement was in full force and effect, and its faithful observance essential to their mutual welfare."
[84] O'Neill, B. "Rush-Bagot and the upkeep of arms treaties." *Arms Control Today (United States)*. 21.7 (1991): 20-23. Web.
[85] "U.S. puts machine-guns on Great Lakes coast guard vessels." www.cbc.ca. *CBC News*. March 15 2006. April 2010.

would thus be rash to dismiss the political aspect of IL in either form, and a complete concept will account for this politically-influenced reality.

IV. Denying the Legality of IL More Generally

There exist many variations to the claim that IL cannot be law, or cannot complete its function of legal governance of international issues. Thus, the extensive treatment of Koskenniemi's work is helpful in assessing similar criticisms of IL, many of which pit IL against the favoured domestic law.

Simon Roberts, for example, argues this on the basis that IL is fundamentally different than the ideal - domestic law. He argues that "negotiated orders"[86] of any level cannot be equivalent to "legal orders," where the latter are necessarily linked to the state.[87] Efforts to expand the phenomena included under 'law' weaken the concept and its analytic power.[88] He claims that law occurs only with the development of strong and centralized governance, but that "instinct" encourages the inclusion of IL under 'law,' although the sort of order it provides is importantly different. IL lacks, "the imposed order of a third party."[89] And taking aim at the problem that often plagues pluralism, he points that, "Uncoupled from governing, de-centred law – like de-centred regulation – may well be found everywhere; but in representing it like that, we risk losing all sense of what it is."[90] Like Koskenniemi, he relies on a traditional conception of the law. Unlike Koskenniemi, the impossibility of IL is at most implicit; it is not clear whether a strong

[86] Negotiated orders describe social interactions that occur through negotiation and culminate in a settled solution to a problem.
[87] Roberts, 2.
[88] *ibid.* 14-8.
[89] *ibid* 23.
[90] *ibid* 24.

central international government would allow for the inclusion of IL, and it is possible that on his view it might.

In a slightly different vein, the legal realist position also remains prominent. Eric Posner and Jack Goldsmith for example argue that although not unimportant, the utility of IL has been greatly exaggerated, when in fact it is largely a vehicle for advancing state agendas.[91] The optimism associated with IL is thus unjustified. As Posner put it regarding his more recent book, *The Perils of Global Realism*, IL scholarship is "heavily legalistic, or doctrinal," which requires "an excessive faith in the efficacy of law."[92] While this legalistic approach works to understand domestic law, they argue, the weaknesses of IL mean it cannot solve problems at the international level.

Thus, even though Koskenniemi represents an extreme version of this position, his view is representative of a popular approach to understanding IL, and one whose strengths and weaknesses cannot be ignored.

Conclusion

Koskenniemi does not present a convincing case that IL is impossible. On its own terms, the argument is inadequate. It claims the impossibility of attaining both the normative and concrete elements of law when in fact the two features are compatible. It exaggerates the uncertainty surrounding individual laws, and extends that false uncertainty to the more basic level of a concept of law. In rejecting this extreme view of the political nature of IL, however, care must be taken to not neglect the very real

[91] See Goldsmith, Jack L. and Posner, Eric A. *The Limits of International Law.*
[92] Farrell, Henry and Posner, Eric. "Worldwise: The Perils of Global Legalism." *Blogginheads*. www.bloggingheads.tv. Oct. 19 2009. April 2010. 2:30-3:00.

political elements present, especially in its relatively undeveloped, and thus vulnerable, state. Moreover, from an external perspective, the account is based on an oversimplification of the parties involved in IL, ignoring the non-traditional but increasingly important global actors. Ultimately, Koskenniemi is unsuccessful. A reassessment of the traditional, and narrow, understanding of how IL relates to the nation-state, and what phenomena must be accounted for while remaining a distinctly legal enterprise, is needed.

If Koskenniemi falls on one end of the spectrum, Tamanaha falls at the other with a theory that rejects much of the traditional picture of law, and by extension, IL. The following chapter will investigate his attempts to provide a solution.

Chapter Three: International Law as Law

Having rejected one pole of the continuum studying the relationship between IL and politics, it is time to investigate the other end of the continuum. It is represented by Brian Tamanaha, who very readily accepts IL as law. His theory is purposely inclusive and minimal, so as to accommodate what he and other pluralists consider to be all of the relevant phenomena. As such, claims about the political nature of law, whether accurate or not, are not a disqualifying feature. This chapter begins with a detailed exposition of Tamanaha's theory. It proceeds to review and expand upon some commonly raised criticisms of his theory. It then puts forth a new objection against the theory, one that is based on the possibility of IL consisting entirely of political actions, and the inability of Tamanaha's test to identify such false, and perhaps even fraudulent, labelling. At this point, the foundations of the project will have been laid, allowing for the presentation of the methodological and conceptual positions of the final chapters.

The tenor of this chapter is that Tamanaha brings some important insights to this inquiry, but that his overall theory, which frames the question of what law is in a helpful manner, is ultimately misguided in the solutions it offers. As such, his work helps one break into a wider perspective, but ultimately acts as a warning against where that path may lead.

I. Pluralism, Tamanaha and the Identification Test

Tamanaha has long advocated a pluralist perspective and the adoption of its insights into legal philosophy, even if he has not been very successful. Legal Pluralism, introduced in chapter one, asserts that multiple forms of law can coexist within a social

setting, and that law need not be tied to the state or to government. Tamanaha adopts this inclusiveness as the basis for his theory of law.

Tamanaha offers substantial historical evidence purporting to show the high frequency of overlapping, competing and partitioned legal systems throughout even Western history.[93] Awareness of various eras of pluralism throughout history, he thinks, provides a more complete historical perspective that has for too long been overlooked, and which sheds light on current debates in legal theory. A review of one such era is sufficient here, and it is one that illustrates the pluralist view but also relates to the history of state-based law.[94] In the "mid-to-late" medieval period in Europe, there existed a plethora of legal orders without "any overarching hierarchy or organisation." Law came from the Church, trade guilds, local custom and many other sources. Disagreements over jurisdiction occurred, but coexistence also thrived. Legal orders applied variously to subjects depending on their personal affiliations and background. All this led to flexibility but also uncertainty and room for abuse. The beginning of the end to this heterogeneous era came with the signing of the Treaty of Westphalia in 1648, a frequently referenced event in the rise of the modern era, which settled the boundaries of newly secular states and gave them sovereignty and control over their internal affairs. The modern state was thus born, a unified and clearly demarcated entity, and with it the unification of the law under these states.

Pluralists, Tamanaha among them, furthermore argue that just as this unification developed, colonization in other parts of the world by European powers resulted in

[93] Tamanaha ULP 377-390
[94] *ibid.* 377-381.

pluralism of another sort, as the colonizing powers met with indigenous laws and customs, and that the decolonization period saw much of this pluralism remain. The developments of "globalization" (a notoriously indistinct term) similarly have provided yet another wave of pluralistic law in various forms, from migration of peoples to world trade. Pluralism is thus argued to have been the dominant state of affairs throughout history. Tamanaha's often cited example of Yap in Micronesia is an illustrative example of modern pluralism. Yap was formerly under American trusteeship, and its legal system was modelled almost entirely on that of the U.S. But the transplanted laws are largely overshadowed by strong cultural norms that govern daily life, making it a key example of the diversity of social orders in Tamanaha's work.[95] Often functioning in opposition to the law on the books, the presence of this important social order has been used to raise many questions about the nature of law, including the status of the largely ineffective official legal system to the case for extending the title 'law' to other non-state phenomena.[96] Because the situation eludes simple characterization, it remains one of his most evocative examples and effectively prods one towards the debate. For Tamanaha, when one takes the global perspective and keeps in mind the historical predominance of pluralism, its existence becomes an obvious fact.

Despite this inclination, Tamanaha also examines pluralism's deep conceptual problems. Pluralism, it is worth repeating, arose from the legal anthropology tradition, and was originally developed in colonial and post-colonial settings. It denounced the

[95] Tamanaha, Brian. *General Jurisprudence of Law and Society*. Toronto: Oxford University Press, 2001. Print. xi-xii. (henceforth "GJLS").
[96] The main objective of the example to argue against the efficacy requirement (see SLP 14) but it is a versatile example. Cite first time here.

narrowness of western academic legal theory as ideology, with the intention of extending recognition to ignored forms of 'law' very different from secular, state-based law.[97] Part of their aim, at least implicitly, was also to extend the mark of "civilization" to societies and peoples that had been previously denigrated.[98] Yet admirable goals are not enough for a sound theory. Pluralists by their own admission had been unsuccessful in producing a convincing definition of law over the decades, a definition necessary to providing evidence for the truth of its other claims and goals and thereby proving the superiority of the theory. They recognize, as does most any scholarship that deals with law, that it is a socially constructed phenomena, otherwise known as a "social kind," dependent on human social agents for its very existence in way that water and gold ("natural kinds") are not. According to Tamanaha the lack of success is unsurprising when dealing with a socially constructed phenomena; no singular definition is possible.[99] If pluralists desire a robust scientific definition, he argues, one that is based purely on empirical observation, then their attempts at an objective definition of law will fail, because socially constructed phenomenon are not directly accessible, as water or gold are. This dependence on social agents to access the phenomena is used to argue that the analysis of law is always filtered through the social trappings all humans carry. If instead the definitional goal of the

[97] Tamanaha, Folly 192-217.
[98] Compare this to Hart's designation of many such societies as "primitive" or "pre-legal" (91). These terms should, however, be understood as developmental, if not simply an ahistorical aid to understand law, and not pejorative, but not everyone has read him so charitably.
[99] In "Folly," Tamanaha frequently flip-flops between discussion of a "definition" of law and a "concept" of law. As will be argued later on in the chapter, and as Hart observed in the tenth chapter of COL, the former is an especially weak and even impoverished foundation for legal theory. A charitable reading will instead read his work as working towards a concept.

pluralists is a lesser one, to claim that there is some subset of normative order called 'law' that is manifest in different forms across time and place, then, Tamanaha argues, an objective scientific formulation is inapplicable for this essentially socially-dependent (i.e. subjective) and malleable definition. What law is, on Tamanaha's account, is simply what is socially defined as law; law is what social agents treat as and label as law, and why it eludes scientific certainty. While this observation represents a good start, since law does undeniably depend on human agents, the dichotomy present in Tamanaha's argument is ultimately misleading – there is room for empirical work to inform the question of what law is, even if it remains more fluid than fixed physical objects. This issue will be addressed as the investigation goes on, and at length in the fourth chapter, but it is important to note for now that Tamanaha's view is that scientific or empirical study of the law cannot answer the question of what law is, and it is a path serious theorists should abandon. The previous attempts by pluralists to fashion such a definition and Tamanaha's objections to them, however, are instructive.

Early pluralists defined law according to observed social behaviour, or "concrete patterns of social ordering."[100] In contrast, state-centred models, of the sort theorists as varied as Max Weber and Hart developed, appealed to "institutionalised public norm identification and enforcement."[101] The former opened up law to be inclusive to the point of meaninglessness; this is often referred to as the "Malinowski problem," after its founder, the famed field anthropologist and pluralist. At this extreme, law is indistinguishable from any other social normative order. But even most pluralists value

[100] Tamanaha, Folly 205-212.
[101] The use of "public" in this formulation is emphasized in later works, notably ULP.

the distinction between law and normative order.[102] In contrast, the latter option is claimed to bar many worthwhile candidates. For example, public institutions associated with law are typically affiliated with state governments, and so the focus remains on state law. The powerful social normative order of Yap, which is far more effective in the day to day lives of the population than the imported U.S. legal system, or the unofficial economic norms of the Berne Union that effectively control large sections of the global finance world, do not display the same sort of institutionalized order that has traditionally defined law. But there is a strong inclination by some to consider them as law, and in the process to reconsider the limits on what law is. Sticking strictly to the "institutionalized normative system" model does not allow for such inclusivity. Attempts at a pragmatic union of the two prove untenable. The criterion of the former perspective, which identifies law according to observed social behaviours, ignores the role of institutions, which are often definitive in traditional forms of law, and the oversight is serious. For example, to describe the law of Canada in terms of observed social behaviour, but without reference to its institutions of law, is to provide a deficient account. In contrast, the institutional perspective easily captures traditional forms of law, but when applied to less obvious candidates, it can only accept them as law under its own authority, so that they are transformed from independent orders to ones dependent on the recognition of the very sorts of institutions whose absence makes them novel. For example, the law of the First Nations of Canada is distorted if they are only considered law insofar as the

[102] Some pluralists bit the bullet, and accepted the conflation of 'law' and 'social order,' John Griffiths being a notable example. But Moore and Merry, for example, key pluralists, maintained the accuracy attained, and needed, by keeping law as a distinct category. See Tamanaha ULP.

institutionalized government of Canada extends them recognition (or even is said to do so tacitly), rather than being recognized as law in virtue of the fact of their social efficacy and apparent independent validity.[103] Without selecting criteria, Tamanaha argues, this gap cannot be bridged to include what appear to be instances of law from both perspectives; there is an "ontological divide."[104] Tamanaha thus claims that a single social scientific conception of law must be abandoned.

The need to collect instances of law from both sides of the institutional divide is an important observation, and one that is relevant to the task of understanding IL. With respect to this project, it is a real option that many new forms of IL are not affiliated with traditional institutions, and to force such an affiliation distorts their nature. Tamanaha thus appears to be correct in insisting that instances of law occur on both sides of this divide, and that they are properly understood according to their own criteria, the same dichotomy that results in the divide. But he goes further still than just arguing that there is no purely objective way to combine the kinds of law, that the task requires some overarching criteria. He even argues that the two sorts of law are qualitatively different; the patterns of interaction under either sort of law are undeniably different, that institutionalized norms radiate outwards in their societal demands while socially based norms radiate inwards. As a result, "...properly seen in terms of their different criteria of existence, state law norms and non-state 'law' norms are two starkly contrasting

[103] This is the case even if there is significant overlap between the two, and some dependence on the Canadian system in its current form.
[104] Tamanaha , Folly 206.

phenomena, not at all alike. Stated more strongly, that they are ontologically distinct."[105] As will be argued in the fourth chapter at length, however, Tamanaha overextends this insight, exaggerating the illegitimacy of selecting criteria and the difference between different types of law, and appeals to these errors to construct an unnecessarily resigned methodological stance. A review of his proposed solutions instead follows next.

From the ashes of pluralism Tamanaha develops his Socio-legal Positivism. Legal theory of the type Hart reinvigorated, and to which many legal philosophers subscribe, typically relies on state law as its paradigm case from which to extract the key features of law generally. Tamanaha denounces this as narrow in scope and distorting. Socio-legal positivism claims roots in Hart's work, keeping the Separation and Social theses but eliminating previously central requirements, such as the efficacy and supremacy of law's guidance functions.[106] Specifically, he rejects one of Hart's two necessary and sufficient conditions for a legal system, that the general population must be largely obedient, whatever their reasons. As well, he denies that law must be institutional in nature. He thus strips away any "essentialist" and "functionalist" conditions from his 'core concept of law.'[107] His reworked Separation thesis added functionality and institutionalized norm enforcement to morality, relegating these previously essential features to be only

[105] *ibid.* 209.
[106] Tamanaha, see GJLS. Tamanaha does so by rejecting the necessity of Mirror Theory of law, that claims that law reflects society, and the Social Order Thesis, which claims that law maintains (at least partially) social order. He does, however, accept that they are both often observed – the law can reflect society, as it can maintain social order. But neither are necessary, and their roles can both be fulfilled in other ways as well.
[107] Tamanaha, Brian. "Socio-Legal Positivism and a General Jurisprudence." *Oxford Journal of Legal Studies*. 21.1 (2001) 1-31. Web. (henceforth "SLP").

commonly observed. He provided a necessary and sufficient condition in their stead, asserting:

> Socio-legal positivism recognizes that law is a human social creation. Law is whatever we attach the label law to. It will be unflinchingly conventionalist in the identification of what law is."[108]

Thus, law is whatever social agents identify it as. If his test appears a bit preoccupied with linguistic labels, a second formulation reemphasizes the social practice as well: "Law exists whenever there are social practices giving rise to 'law'" and that, "*Law is whatever people identify and treat through their social practices as 'law' (or droit, recht, etc.).*"[109] Here the emphasis is less on linguistic labels and more on behaviour and intention. Overall, however, the message is clear: law depends on the social actors who give rise to it, and what they call "law" must be taken very seriously. For Tamanaha, any member of the relevant social group can provide this recognition, and the deliberately vague minimum of members needed for this recognition is cited as sufficient people with sufficient conviction, barring the "lone lunatic."[110] This removes the process from the realm of expertise, a positive attribute in Tamanaha's mind, and trusts in the gravity with which members undertake this task.[111] The significant departure this "labelling test"[112] presents cannot be overemphasized. This core concept was meant to include non-state law and law-like phenomenon, while excluding other social institutions that over-extend the

[108] *ibid.* 18.
[109] *ibid* 27.
[110] *ibid* 28.
[111] "...as a matter of general social practice people do not lightly apply the label law." (*ibid* 28)
[112] Twining's term, used throughout GJ.

concept.[113] Tamanaha thus keeps his pluralist leanings, yet asserting the futility of the pluralist definition of law, appeals to a folk, rather than analytic, conception of 'law.'[114]

This general, "single framework" is, however, extremely thin; the breadth acquired comes at the expense of depth.[115] Tamanaha's account was summarized well by Twining: "Thus, law can be said to exist even if it has no functions, is ineffective, has no institutions or enforcement, involves no union of primary and secondary rules, and even if there is no normative element."[116] Having rejected the ability to discover the essential features of law, or that such features exist, Tamanaha provides an account based on simple conventionalist origins.

II. Practical Shortcomings and Their Underlying Methodological Problems

Three serious objections to Tamanaha's theory will be reviewed here. Some have been addressed directly at some length in the literature, and others will be developed based on the ideas common in the discourse on concept construction.

A. Tamanaha's Test

The first problem with Tamanaha's theory regards well-established doubts about the feasibility of his "labelling test," or identification test. It quickly runs into troubles well known to comparative legal studies. Tamanaha dismisses translational problems, and

[113] Tamanaha, Folly 211. He claims, "Clearly there is a compelling intuitive impulse to describe as law or law-like certain dispute resolution institutions and norms found in pre-state societies, and in post-colonial societies…Just as clearly, however, there is little intuitive attractiveness in saying that the customs of the garment industry or the normative relations within the family are law….They operate on two different axes."

[114] "Law is a 'folk concept', law is what people within social groups have come to see and label as 'law'." See ULP 396.

[115] It is worth noting that his use of 'general' is better understood as 'universal.' See Twining GL 91, footnote 13.

[116] *ibid.* 95.

optimistically assumes that the title of 'law' is applied with appropriate gravity, such that its use can be taken at face value.[117] Yet translations can be difficult even on a superficial level (for example, why include the French "droit" but not "loi?").[118] Even more troubling, translation requires having a fairly concrete idea in the first language before translation (which he claims 'law' eludes), and if the usage is equally amorphous in the second language, the difficulties of translation are compounded. Even the labelling of law may not be so seriously undertaken as he speculates it will be. For example, there does not appear to be a principled difference between the 'laws' of cricket and the 'rules' of football.[119] Social ideas about the law may vary, leading to absurdities: the self-identified state law of one society might be seemingly identical to the self-idenitified social conventions of its neighbour, demanding a different assessment of what appear to be the same sort of phenomena.[120] Clearly, this anti-analytic solution is not practical.

B. Methodological Negligence

An even more serious issue regards Tamanaha's unsatisfactory reasons leading to the rejection of an analytic concept of law. The "ontological divide" between the socially-observed norm perspective and institutionalized norm perspective of defining law is a convincing description of two different ways in which law draws its authority. There do appear to be instances of 'law' on either side of the divide: there are indisputable institutionalized legal norms that are inadequately described as simply social norms, and

[117] Tamanaha, SLP, 28-30.
[118] Twining, William. "Review: A Post-Westphalian Conception of Law." *Law & Society Review*. 37.1. (2003): 199-258. Web. 223-228. (henceforth "Westphalian").
[119] Twining, GJ, 101.
[120] Twining, Westphalian, 225-8.

there are socially based candidates for law that would be misleadingly adopted under the institutional model just to provide easy acceptance. The previous examples were the law of Canada and the law of the First Nations in Canada, respectively. Global examples of non-institutional candidates for law include the agreements of the Berne Union, and modern *lex mercatoria*, the self-imposed and regulated rules of global trade. To include them under the title 'law' does present a challenge. But what follows from this discovery is questionable on Tamanaha's part.

The first problem is that Tamanaha abandons his distinction between the social practice and the institutional accounts of law in favour of the preference that law is found on both sides of the divide. Faced with what his distinction means, he rejects the possibility that a feature of law has been discovered, that law might necessarily be affiliated with public institutions because of its unappealing consequences. This is, as he admits, largely based on intuition.[121] This is an unsettling move: although law may be an amalgamation of very different phenomena, it may also fall in line with a particular category to which one is alerted through such a discovery. Neil MacCormick, in contrast, characterizes law explicitly as a type of institutional normative order, requiring a degree of organization in its structure, with norms that are relevant to its agents and interconnected and systematized into a shared framework.[122] And while MacCormick takes the law of municipal nation states as a central example, his 'institutional theory of law' keeps the 'law' and the 'state' conceptually separate, recognizing that law is found

[121] The term "intuition" is called for here.
[122] MacCormick, Neil. 2005. *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. Toronto: Oxford University Press, 1999. Print. 2-6.

in many other forms.[123] As is probably clear, this project does not advocate a necessary link between law and public institutions, and it is sympathetic to Tamanaha's claim that law might be found in both forms. But, if one is partial to the idea, there is no need to give up the analytic approach to conceptualizing law. It may still be the case that there are other, still discoverable, ways of carving up the phenomena that can inform the concept, some of which may even shed light on this distinction. In chapter four, a defence of this analytic approach will be presented. For now, it is clear that Tamanaha's response to an intriguing problem is underwhelming.

In particular, Tamanaha's later criticisms of institutional theories of law, citing examples including Hart, are decidedly weak. He points to the difficulty in identifying the "public" institutions that are said to be distinctive of legal systems, and the fact that some theorists reject any theory that would not recognize law in all societies.[124] The second objection, that of dissent regarding the universality of 'law' across societies, while an important alert for reevaluation, is not itself substantive. It simply states a preference by some for a theory that will recognize law in all societies. And while any claim can be disagreed with, without convincing argumentation behind it, challenges lack force.[125] The first objection is immediately apparent as a simple fallacy - that a decisive line between "public" and "not-public" institutions is yet undiscovered does not mean that the

[123] MacCormick, Neil. "Questioning Sovereignty: Law, State and Nation in the European Commenwealth." Toronto: Oxford University Press (1999). Print. v, 9-15. (henceforth "QS").
[124] Tamanaha, ULP, 392.
[125] The especially strange thing is that he makes this same point himself in an earlier paper, discussing the political reasons for this very view. He states, "While opposition to ethnocentrism is laudable, that in itself does not supply a persuasive reason for adopting legal pluralism." See Folly 197.

distinction does not exist, nor that it cannot be known. But although Tamanaha himself does not address the topic in any more depth, it is actually a long-debated topic with some surprisingly relevant implications for this project. A deeper investigation follows.

Historically, the distinction between the public and private realms in political and legal discourse, as contemporary readers are familiar with the terms, arose from the sixteenth century on in Europe, as the sovereign nation-state developed. Morton Horwitz provides a helpful legal history.[126] As the state assumed sweeping authority, there was a corresponding effort to carve out areas free from state power. The public sphere, and its institutions, was associated with state government, and the private sphere, with individuals and their rights. By the nineteenth century, the distinction became central to the legal system: the economic market became a key institution around which the law developed, in part encouraging the distinction between public law (ex. criminal law) and private law (ex. torts and contracts). Central to this project is that the driving force behind this increasingly sharp distinction was the desire to separate *law* from *politics*. It was meant to shield the law from political intrusions, and shield individuals from excessive legal intrusions. But, as many have noted, the distinction's popularity fluctuates. It suffered severe criticisms from the Legal Realists in the 1920's, who found its supposed political neutrality suspect. Public power, by their accounts, permeated even private interactions. Yet the distinction resurfaced. This partial history backs up what sociologists readily admit, that the distinction is contingent upon cultural and historical forces. Their literature gives the impression that the difference is not one of kind, but degree: "It

[126] Horwitz, Morton J. "The History of the Public/Private Distinction." *University of Pennsylvania Law Review.* 130.6 (1982): 1423-8. Web.

comprises, not a single paired opposition, but a family of them, neither mutually reducible nor wholly unrelated."[127] This philosophically popular sort of response is anticipated by Duncan Kennedy, and he is not swayed. He outlines the stages of "decline" for a distinction, including this one, from the first recognition of its inadequacies, to attempts at intermediary classifications, until there are more intermediates than poles, and those poles finally loop together so that the poles resemble each other more than the intermediates, to create a useless descriptive tool.[128] Kennedy's assessment sounds much like the epistemological problem Tamanaha focuses on in describing the many problems that plague the distinction. But he does not present a striking case for the rejection of a supposedly outmoded distinction. However, care must be taken with respect to this brief investigation. The goal is not to distinguish between public and private IL, but public and private institutions that may aid the understanding of law, and hence the understanding of IL. On that thread, Kennedy's analysis looks at a range of factors that may be too narrow for these purposes; he looks at the economic market and judges and parents as guardians, but not religious organizations or customs or the ignored law on the books. For this reason, although Kennedy presents a thorough description of why the effort he deals with may be so convoluted that it is no longer helpful, the question is unsettled with respect to public and private institutions in a much larger context.

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[127] Weintarub, Jeff, and Krishan Kumar. *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy.* New York: The University of Chicago Press, 1997. Web.
[128] Kennedy, Duncan. "The Stages of the Decline of the Public/Private Distinction." *University of Pennsylvania Law Review.* 130.6 (1982): 1349-57 Web. 1348-57.

An interesting question that arises from this discussion is Tamanaha's commitment to skepticism regarding the distinction between the public and private realm and the consequences for a distinction between law and politics. The ultimate goal of engaging with his work with respect to IL is to argue that his theory cannot allow for a practical distinction between the two at the international level, even though he appears to value to it. What is not clear is whether he intended any such connection in his work - whether his scepticism regarding the ability to distinguish between the public and private spheres reflects a scepticism regarding the ability to distinguish between law and politics. Such conjecture will be avoided, although it seems likely that Tamanaha would deny any strict or immutable divisions within either pair. What is apparent thus far is that he does not display much rigor in his treatment of an interesting discovery about a facet of law, and it is a question many take to be relevant, even if he does not.

The question "what is law?" cannot be proven to resist an analytic solution by wishing away the implications of this particular analytic division. Dissatisfaction with his treatment aside, Tamanaha's position is a sympathetic one. Despite the inadequacy of his rejection of the institutional model of law, there are good reasons to suspect that it is not sufficient, that it does not capture non-institutional norms that are indeed viable candidates for inclusion under 'law.' What follows is thus a critical study of Tamanaha's hastiness to dismiss the place for an analytic concept on the grounds that law is a social kind, and the claim that the socially constructed nature of law does not allow any form of discretion in its analysis.

C. The Role of Discretion

Finally, special attention must be directed towards Tamanaha's suspicion regarding selective criteria to conceptualize the law, or "discretion." While a thorough presentation of why and how discretion can be defended will be left until the fourth chapter, the immediate deficiencies in Tamanaha's objections will be reviewed here. This topic is especially important because it is at the heart of this project's attempts to bring IL more fully into legal philosophy.

It is true that as a social construct, law is prone to investigators' bias. It depends on social agents for its existence, changes according to changes in social structure, means many different things to many different people, and research into its nature necessarily incorporates the fallible opinions of social agents. Yet as was touched on in the previous sections, even socially constructed phenomena display a certain degree of objectivity and stability – law is not anything to anyone.[129] For example, in a given legal system, there is an objective fact about whether the norms are obligatory. Even though this may one day change, at a single point in time, it is a researchable and discoverable fact about that system. Consequently, concepts about phenomena with a social basis are not unrestrained, and neither is the conceptual work to describe them. The key is the degree and kind of discretion used in the conceptual analysis, as will be argued for.

Tamanaha's position is ultimately a pragmatic one. Having claimed the inaccessibility of a social construct such as law for direct analysis, he concludes that an analytic concept is impossible. He explains:

[129] This will be addressed in greater detail in the fourth chapter, relying heavily on John Searle's account of social institutions.

> Concepts that specify what law is are not right or wrong, or testable and falsifiable; they are more useful or less useful, and their value is determined by the purpose for which the concept is constructed. The ultimate test for the approach I set out is whether it enhances our ability to describe, understand, and evaluate legal phenomena.[130]

But this purely pragmatic approach needs to be reigned in, because it relies on the dubious premise that there can be no other legitimate path to understanding law. Tamanaha depicts traditional legal philosophy as essentially choosing the state as its standard and then proceeding in a tautological manner, going to great lengths to show that other legal phenomena, at no great shock, do not meet the standard that is set. There is some truth to this – the overemphasis on state law has sometimes excluded worthwhile candidates. Recall here the first introductory quotation of this project by Raz, who freely admitted that his theory, a widely influential and well-regarded theory, considers the analysis of IL to be peripheral to understanding law. This emphasis cannot accommodate even some surprisingly important phenomena - an example that will be investigated in depth in the final chapter is the law of the EU. Yet to take such past challenges to legal philosophy and to then deny any possible role for structured analysis to answer them is rash. Instead, Tamanaha's concept is assembled from folk usages. There is on his account supposed to be enough familiarity present in folk usage to identify "legal phenomena" of strikingly different types, omitting things like "the law of the schoolyard," but spanning across time, place and culture. The resulting concept, Tamanaha argues, a compilation of these many phenomena, can then be tested for their utility in understanding the social world. But even if the role of institutions does not shed light on the role of law (which he

[130] Tamanaha, SLP, 2.

so poorly argued for), the shared folk understanding that he relies on, and the ability to test concepts based on their ability to enhance the understanding of 'law,' at the very least implies some connection among the types, and does not immediately exclude the possibility that even the concept of a socially constructed entity is based on something at least partially discoverable through rigorous study. The familiarity and more-or-less agreed usage that he requires must rely on something, and it is a reasonable inference that there is a real justification for a unifying concept.

As such, Tamanaha treats what is likely an epistemological problem as reason to defer to a folk concept rather than analyzing the phenomena critically. It is a difficult task to observe the features of a social construct, and one that may not have a single correct answer, but there are tools available he unfairly dismisses. First, it must be noted that discretion necessarily plays a role in getting the idea off the ground - the investigation cannot begin *a priori.* Discretion is present in the very beginning of the project, from the selection of the relevant data and the goals of the analysis, and so appeal to it is not the intrusion that it is made out to be. Second, Tamanaha rejects the role of expertise in this project, on the grounds that stratified participation in conceptual analysis must be harmful. He noted preemptively that the openness of his identification test might arouse concerns about an explosion if recognized sorts of 'law,' in part through excess authority allotted to untrained members of social groups. This concern, he responded, was unwarranted, because, "Social actors already possess this authority, since law is and has always been a social creation. Conventionalism merely recognizes this reality."[131] Law is

[131] *ibid.* 29.

a social construct, it has been duly noted so far, and one that is constituted in part by the perceptions of those who use it. But that does not mean that all participants are equally aware of the nature of the phenomena they take part in, or that confining analysis to what the participants think will yield useful insights. Tamanaha's deference to the folk concept means just that – deference, by simply accepting law at face value without an attempt at deeper reflection or clarification. Of course, it is possible that the folk concept is dead on, but without the work to back up that possibility, it is a premature assertion. In the meantime, the observations of some members do express greater familiarity with the concept. As well, Tamanaha's view of law as rather fragmentary is itself self-contradictory, in denying that there is a discoverable connection among the different manifestations of 'law.'[132] If the phenomena are really so different as to lack any core or valuable overlap, 'law' simply preserves a historically contingent word usage. Pluralists, it was previously noted, generally do not deny the utility or probability of law as a distinct concept. And in a certain sense, neither does Tamanaha, given his optimism for the utility of a folk concept of law. While it remains a possibility – the instances of law may not display relationships among themselves of any philosophical note – it is an unlikely situation, and thus one that should be treated as a last resort, the conclusion to arrive at after repeated efforts to discover whatever relationship may actually exists.

Tamanaha too easily forfeited to this challenge, and this skepticism is infectious. There are many social constructs that must turn to folk standards according to this account, and with simpler examples the discomfort surrounding his recommendation

[132] It probably is unwise to demand necessary and sufficient conditions from a concept of law, and as will become apparent in the fourth and fifth chapters..

becomes more obvious. There are phenomena that should be included under a concept even in the absence of the correct label, and phenomena that should be excluded despite the label. For example, 'soccer' has set, custom-based rules that define it, with appropriate flexibility to include pick-up games in park and children playing with a miniature net, and there is compelling reason to think throwing darts at a board should not count, even if for some reason darts is now called "soccer." Tamanaha would allow for self-identification to determine inclusion under the term. It may be a socially constructed game, prone to change and narrow-minded domination of what warrants inclusion, but the sceptism that rejects the ability to unearth what 'law' is leads *ad absurdum* to this scenario. Allowing the discretion in the assessment of borderline cases, such as children playing in the park, or a darts game that maintains a superficial link to soccer, does not mean that there are no objective facts that constitute the foundation of the game, or for any other phenomena. Facts that are created and maintained by social participants, but better or worse conceptualization and extrapolations of the phenomena can occur.

Although Tamanaha asks many probing questions about legal theory's previous liberties, he is too permissive in his pursuit of inclusiveness. Law as a social construct, while not open to scientific discovery to the extent that natural kinds may be, still displays some objectivity. 'Law' is not a nominal kind. Tamanaha's position is unwittingly pessimistic, and his identification test resigned the supposed inability of theorists to differentiate between legal and non-legal phenomena in any meaningful way. What this emphasizes is that although "what is law?" is a difficult question, perhaps even an unsolvable or even misguided one, Tamanaha has not satisfactorily dismissed the

possibility that it is worth investigating, or that an analytic solution does not exist. There is more room for optimism than he allows for, and this is made all the more apparent when compared to Koskenniemi's views of regarding the ultimately political nature of IL.

III. Problems with the Identification Test: Disingenuous Law

Tamanaha's theory faces a serious problem in its inability to distinguish between "sincere" and effective laws and laws that are simply political pretense.

Koskenniemi's argument for the rejection of IL as law and the focus of the second chapter, despite its faults, did uncover a real concern regarding the political malleability of at least some aspects of IL. There are many examples of the limited reach of IL at its current stage of development, such that many international norms rely on legal rhetoric. Nation-states do sometimes proceed according to self-interest if inclined and able; they similarly do sometimes agree to unattainable or unenforceable laws. Examples of each were presented in the second chapter, but another example here helps illustrate the point further still. The inattention paid to human rights treaties is paradigmatic of such political maneuvering, and displays both political poles. The US, for example, is often hesitant to ratify such treaties, and then only with many qualifications that render them ineffective, making them simultaneously tools for state power and self-interest, but also utopian for the "aspirational" public relations fodder they supply.[133] Although there are, to adopt Koskenniemi's language, norms that are both concrete and normative, in addition to the norms that represent the concrete and normative poles, Tamanaha's identification test cannot distinguish between them. Presumably, it is beneficial to be able to distinguish

[133] Levit, New Haven, 405.

between concrete political behaviours based on the actions of states or officials that do not take any normative attitude towards the law, and normatively intended but illusory commitments by states or officials that only result in the opposite type of political abuses of IL. There is therefore an obvious *pragmatic* motivation for such a distinction, the very standard Tamanaha sets for himself. Here one may look back to the discussion of the difficulty in drawing a clear division between the public and the private, and Tamanaha's potentially similar view of the legal and the political. But caution demands attention to the likelihood that the distinction does reflect an aspect of social reality, and that it is worth investigating even if the division is difficult to locate.

The comparison between the two emphasizes the shallowness of Tamanaha's identification test. Tamanaha would respond easily to Koskenniemi: international law is law because of its social status as law, as observed at multiple levels of recognition. If some law does reduce to politics, then its nature is importantly political, and it has been argued here that Koskenniemi's claim is partially applicable, for example with respect to human rights treaties. Therefore, on Tamanaha's account, when IL is ultimately political in nature, it is displaying unique characteristics that it is entitled to display as a distinct type of law, but it is ultimately recognized as law. But this simple affirmation quickly reveals shortcomings.

The problem regards the disingenuous labelling of IL. If Tamanaha promotes the requirement of concreteness, given its rough equivalence to the Separation and Social theses, then he cannot maintain the normativity requirement. This much is explicit in his theory; recall Twining's description that Tamanaha's theory identifies law even if it,

"...has no functions, is ineffective, has no institutions or enforcement, involves no union of primary and secondary rules, and even if there is no normative element."[134] Yet this is exactly what Koskenniemi, for good reason, identifies as one pole of a non-legal international norm. An "international law" that simply disguises what a state would have done anyways is characteristic of apologist political maneuvering. This is even more apparent if it is likely that the state would have proceeded in the same manner regardless of whether a legal option was found. A discretionary and political act does not offer the stability and objectivity that the law is meant to provide. Alternatively, a state that commits itself to an unattainably ambitious law, or one that is unlikely to be realized due to practical restriction on its behaviour, also acts disingenuously, this time choosing normativity over concreteness. Such laws resemble the 'laws on the books' that Tamanaha describes in situations like that of Yap, which retain some claim to law, despite their lack of observed social basis, but are importantly different than similar norms when followed. That a nation-state (for that is the source of 'law' with which Koskenniemi's argument is the most compelling) can make such "legal" decisions, misrepresents law, if it to be distinguished from politics.

Tamanaha could insist that such political interaction is simply what IL reduces to, for he is well aware of the radical nature of his view. Along with all of the other "essentialist" and "functionalist" criteria he rejects, he might simply reject that law must be distinguishable from politics, and reject the view that IL must be legal in a way similar to the law of the nation-state. Yet such a stance reveals an inconsistency in his own work.

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[134] See Note 112.

If granted that Koskenniemi takes a conservative approach to what law is, his characterization of law as being distinct from politics is not the problematic aspect of that conservatism. The distinction conflicts with Tamanaha's own pragmatic standard with which to test concepts of law. No doubt Tamanaha wants to distinguish law from politics if law is a unique social phenomenon, a successful theory about which is important in the self-understanding of social agents in the modern world. The desire to implement and maintain the Rule of Law, for example, certainly an important feature in Koskenniemi's account, is a central feature of many international and global interactions. To deny the separateness, or the need to understand the separateness, of law and politics, is to misunderstand a very real aspect of the social interaction. Tamanaha wants to include in his account anything that is largely recognized and treated and claimed to be law, but failing to exclude misleading phenomena results in a theory that is ineffective due to its inclusivity, in the battle against exclusivity. He is easily forced into accommodating phenomena that do not figure in the best explanation of law. As a result, his pragmatic standard suffers if a useful distinction were to be glossed over for the sake of the identification test, while the test itself offers no solution to exclude disingenuous law. It is worth repeating again that it is this ability to understand the phenomena that Tamanaha takes to be the standard with which a conception of law should be judged. The distinction between law and politics is a useful one, even at the international level, bearing in mind evidence that social actors take the distinction to exist, and Koskenniemi's cogent theoretical explanation of why at least some IL really is political. Thus, if Tamanaha's identification test cannot distinguish between law and politics at this, or any, scale, it is

too blunt a tool.

In particular, Tamanaha cannot claim that fraudulent (not simply inaccurate) labelling disqualifies norms, appealing only to the identification test. Although he does make exceptions for misuse in his presentation of this method, a state claiming to be acting according to international law cannot be dismissed as a "lone lunatic." Its actions are taken to be authoritative and its motivations are murky, and ultimately, states are often the source for IL. Yet if a state presents political posturing as a contribution to IL, either in terms of legislation, interpretation or application, to include such instances as law, when they are emblematic of the legally-veiled politics that Koskenniemi describes, IL is opened up to the discretion of states. Consider again the examples offered in chapter two in defence of Koskenniemi's theory in some cases: the Kyoto Protocol as an example of a normative but ineffectual norm, and the Rush-Bagot Treaty to authorize activities that would have likely proceeded even without it. The reason those examples demonstrate the partial applicability of Koskenniemi's view is that they are discretionary actions that do not demonstrate stable, objective interactions among states. The actions are indistinguishable with or without the supposed law. That a state can decide to paint its actions as law so that its actions gain approval, or to superficially accept laws that will not be enforced for the sake of reputation – to call these instances of law is a caricature. Such conflation is not bad because it is not what law has traditionally meant, but because it is not a helpful guide to understanding the world. If the permissiveness of Tamanaha's identification test includes essentially political phenomena, the test does provide useful direction. This renders Tamanaha's theory unable to undertake the critical analysis

required of an instructive legal theory. To follow Tamanaha's advice is to abandon a theoretical method committed to critically assessing the success or failure of a conceptual account.

A final matter merits consideration. One might object that this concern about the inability of Tamanaha's theory to distinguish between political acts and laws reveals that his identification test fails with respect to some test cases, and that this shortcoming might only reveal a subset of laws that are problematic. In such a way, it may be claimed that the difficulties facing the labelling test are exaggerated to apply to all of IL. But a tool that only performs part of its job successfully is still unsatisfactory. So if the identification test suffers from serious problems with respect to this class of norms, it is reasonable to reassess it as a whole.

V. Conclusion

The rejection of an analytic concept of law by Tamanaha is unsuccessful. The identification test he provides is impractical, his reliance on intuition suspect, and his rejection of the role of discretion in concept construction ill-founded. Many of his conclusions are premature – he treats epistemic problems and historical obstacles in the search for an analytic concept of law as conclusive, and so rejects a rigorous concept for a folk understanding. If these shortcomings are set aside, his theory still cannot account for disingenuous law, and thus cannot tease apart the legal and the political, a serious shortcoming for a theory that is to be judged on its ability to characterize the world accurately. If the way to understand law must be expanded to move beyond the nation-state but also to remain distinct from politics, Tamanaha does not provide a promising

method with which to do so.

Many methodological issues were raised in this chapter, focusing especially on the role of discretion in conceptual analysis. In the following chapter, this and other concerns will be reviewed to present a recommended methodology for a theory that accommodates IL.

Chapter Four: Methodology

The objections raised against Koskenniemi and Tamanaha thus far have relied upon methodological commitments that must now be explicated. First, the shortcomings of the theories will be reviewed, and second, a modest but renewed account of the methodology of legal theory will be put forth in response. This account will form the basis of the final chapter.

I. Problems

What follows are two general problems with the main theories studied thus far, issues that are raised frequently in contemporary philosophy.

A. The Concept of a Concept

A problem shared by both Koskenniemi and Tamanaha is their commitment to a "classical" theory of concepts. A classical theory is generally one that is definitional in nature and typically requires criteria (or possibly, a single criterion) that are individually necessary and jointly sufficient to identify the referent of the concept.[135] As was summarized in the second chapter, Koskenniemi identifies two constitutive elements of law, concreteness and normativity. Although the inadequacies of that theory were elaborated upon in detail in the second chapter, here the emphasis is on Koskenniemi's structural demands. By presenting two immutable and non-negotiable requirements, which he uses to construct his argument that IL is an inescapably political phenomenon,

[135] Laurence, Stephen and Eric Margolis. "Concepts and Cognitive Science." *Concepts: Core Readings*. Ed. Laurence and Margolis. Cambridge Mass: MIT Press, 1999. 3-81. Print. 9-10.

Koskenniemi relies on a strict classical formulation of 'law.'[136] In contrast, Tamanaha began by observing:

> The problem [in constructing a theory of law] is not only that social phenomena are difficult to delimit, but that there is a great deal of variation, and furthermore that social practices change. Given this complex and fluid situation, it is difficult to see how any concepts relating to social phenomena, like law, can make claims about necessary or essential elements.[137]

Yet he then went on to provide his own necessary and sufficient criterion for law with his identification test, which was addressed in the third chapter. His commitment to inclusivity drove him to produce a very thin standard, but it did remain an attempt to capture all instances of 'law.' Both Koskenniemi and Tamanaha, however, are in good company; the desire to find such definite criteria for the existence of law is pervasive. It remains debatable about whether Hart relied on a classical concept.[138] Raz clearly demanded necessary conditions for law in his early work;[139] Julie Dickson, his torchbearer, similarly requires them.[140]

But the classical view has largely fallen out of favour in philosophy. It is widely acknowledged to face many serious obstacles, many of which are relevant here.[141] First, enduring definitions for concepts are notoriously difficult to acquire, and often even the

[136] It is worth repeating that "law" denotes the word, 'law' denotes the concept, and the absence of any marks denotes the social phenomenon as it exists in the world.
[137] Tamanaha, SLP, 16.
[138] The aspects of his theory reviewed in chapter one makes a strong against attributing to him a classical view, while the requirements of general efficacy and the internal point of view required of officials points towards it.
[139] See *The Authority of Law*. His more recent work reveals a different approach, which be addressed later in this chapter.
[140] Dickson, Julie. *Evaluation and Legal Theory*. Portland, Oregon: Hart Publishing, 2001. Print. 17-19. (henceforth "ELT").
[141] Laurence and Margolis, 14-27.

best candidates eventually face serious criticism,[142] and an uncontested concept of law certainly has remained elusive. As a result, prevailing thought tends to doubt the utility of the definitional structure, rather than a lack of access to such elusive definitions. But other difficulties are also worth reviewing. A second problem is that since W.V.O. Quine's powerful criticisms of the distinction between the analytic and the synthetic, it is widely acknowledged that concepts cannot be defined *a priori*, or at least, such definitions cannot provide "epistemological significance." As such, exercises in analyticity do not provide *knowledge* about the referents. That concepts, and conceptual analysis, are typically desired to reveal things about the world made this is a serious shortcoming. Thus, a concept of law detached from the *a posteriori* provides no practical information. Third is the problem from "ignorance and error." Descriptivism is the theory that to use a linguistic term successfully, its meaning must be known and its referent identified correctly. It requires that the exact and complete set of necessary and sufficient conditions be known, otherwise the phenomena that do not precisely meet those criteria are not instances of the concept. A traditional example is the Platonic concept of piety.[143] Strict classical theories of concepts are necessarily descriptivist theories of concepts, and therefore are compelled to cast severe judgment upon mistaken or incomplete concepts. Yet such judgments are contrary to the prevailing sentiment that one can be mistaken about, or ignorant of, the key features of a phenomenon yet still be using the corresponding concept, just as are better informed agents. Fourth, the classical theory is

[142] The usual example is the doubt Gettier cast on the concept of knowledge. See Gettier, Edmund. "Is Justified True Belief Knowledge?" *Analysis*. 23 (1963) 121-3. Web.
[143] See *Euthyphro*.

faced with the fact that concepts may also be "fuzzy" around the edges: doubtful examples are often found of many concepts, and the classical theory is ill-equipped to deal with such instances. Common examples abound, such as whether an egg loaf counts as 'bread.'[144] While a modified theory might include borderline cases, or treat them individually, on a case-by-case basis, at that point the necessary and sufficient conditions are not providing a unique answer to the classification question. This route diminishes one of the key strengths of the classical account, that of certainty and decisiveness. Examples from IL are plentiful. Culver and Giudice provide as an example the Greenland Conservation Agreement, a seven-year commercial fishing moratorium.[145] As the product of non-governmental and commercial organizations, it is an example of what they call "trans-state legality," created by non-state actors but with far-reaching effects, including constraining state citizens. Whether this constitutes 'law' in the traditional sense is troublesome question, and one that they think displays the difficulty of the ambiguous borders of the Hartian or Razian theories, at which they take aim.[146] While neither Hart nor Raz, as representatives of analytic legal philosophy, insisted upon strict boundaries for 'law,' it is not clear *how* either theorist would deal with such problem cases.[147] Finally, examples from psychology reveal a propensity for language users to rank

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[144] Where the sweetness and presence of egg in the loaf may place it in the 'dessert' category, as opposed to a traditional 'bread' category.
[145] Culver and Giudice, xx-xxv, 77.
[146] Importantly, Culver and Giudice certainly do not rely on anything resembling the classical model in their theory of 'legality' in answering such dilemmas. This will be addressed in greater detail in the fifth chapter.
[147] The debate regarding Hart's views have already been mentioned. Even in Raz's earlier work, where he insisted upon necessary features of law, he did note the folly in hoping to draw clear and distinct borders for law, and the need to treat borderline cases cautiously. See *The Authority of Law.*

instances within a concept as more or less representative of the class (for example, apples are often considered to be more "fruit" than olives), a feature that classical theories of concepts cannot account for easily, because it expects all instances of the entity to fulfil its criteria equally, and without reliance on additional features. This is related to the previous concern: deviation from ideal instances, such as domestic law as paradigmatic of law, to lesser but likely examples of law, as IL has often been treated, often trickle down into indeterminate borders. Moreover, such gradations might even be used to exclude candidates that stray from the ideal of the concept – IL is often unreflectively taken to be 'law' insofar as it resembles domestic law. Recall Weil's argument that true public international law has been supplemented by "supernorms" that cannot embody the true task of IL – it similarly displays a related sort of progression away from the ideal. Of course, while these might not be best understood as degraded forms of law, but simply different ones, that such psychological tendencies and even argumentative results may reflect a reality of the world lends more evidence to the suggestion that the classical model may not be able to fulfil its role.

It is sufficient here to note that the literature dealing with the structure of concepts is large and varied, but that the shortcomings of classical concepts are widely accepted. Moreover, many of the issues reviewed here surround attempts to understand 'law' and much as they do concepts such as 'knowledge' or 'the good.' Modified versions of the classical theory exist, but they suffer from some collection of these same problems. Thus, a concept of law that can accommodate a wide array of phenomena, including the borderline cases that are typical of IL, in a philosophically fruitful manner is not

obviously one that demands necessary and sufficient conditions. Given the unimpressive treatment of IL and other non-paradigmatic candidates for inclusion under 'law,' it likely does require a different structure. If this is a non-contentious claim, so much the better, but its review allows for the presentation of a different approach to 'law' in rest of this and the final chapter.

B. Discretion

A second, and more serious, problem surrounds the role of discretion at the level of concept construction. Despite having wildly disparate theories, both Koskenniemi and Tamanaha are similarly skeptical about the ability of a theorist to maneuver through the landscape of candidates for inclusion under 'law.'

To exercise discretion in this context is to decide between carefully weighed options, in the absence of an objective standard that determines a unique answer. It does not mean arbitrariness in that decision-making process, but a careful assessment of the situation where the answers to theoretical questions are not uniquely determined, and where observation and empirical research alone cannot settle debate. But neither theorist accepts even this limited defence of discretion. Koskenniemi, it will be recalled, took issue with discretion at two levels: the first was at the level of the decisions themselves in international cases, the second at the level of concept construction. Although he focused on the former, discretion surrounding the choice of a concept of law was deemed just as problematic, and this was used to argue for remaining firmly within the state-based paradigm. This sort of skepticism, however, exaggerates the importance of what Brian Leiter calls the Banal Truth, that the extensions of concepts dealing with human affairs

(as opposed to natural kinds) inevitably require discretion in their construction.[148] To set the foundation for a concept of a social phenomenon is something that cannot be avoided; such concepts cannot be based on "presuppositionless inquiry." In the section putting forth a positive theory it will be argued that Leiter himself exaggerates the banality of this fact, but Koskenniemi is surely wrong in treating the existence of this inescapable and basic form of discretion as disqualifying a concept of law from any claim to objectivity.

From a different perspective, Tamanaha and like-minded pluralists have decided that the expansion of 'law' through analytic means is an impossible task. They argue that while there is a dominant concept of law in academic circles, it is founded on historical contingencies and cultural biases. This much is accepted here. But they also argue that all attempts to alter the concept, such as reassessing the demarcation between law and not-law, cannot be done in any sensible manner; the project is so vulnerable to bias that the task is impossible, and so for Tamanaha, a concept that relies on anything more than a completely inclusive folk usage must be abandoned. This is the flip-side of the coin: whereas Koskenniemi denies the legitimate use of discretion and so reverts to a strict framework, Tamanaha appeals to a similar sort of skepticism to deny the sense in an analytic concept of law. Once again, one cannot deny (as Leiter would say, post-Quine) that some discretion is needed in regards to such concepts, and that observation is not limited to law. But Tamanaha both underestimates the ability of certain skilled participants, especially those well acquainted with the phenomena, to use discretion in a

[148] Leiter, Brian. *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*. Toronto: Oxford University Press, 2007. Print. 168. (henceforth "NJ").

way that is not enslaved by their own prejudices, and overestimates the utility of his egalitarian suggestion. An alternative to his suggestion, at the end of this section, is the key to a concept of law that sensibly deals with the diversity of phenomena.

II. Suggested Route

A few requirements are suggested in constructing an analytic concept of law. These points are generally moderate, and the goal is a reasonable and compelling basis for how IL might be assessed with respect to law and politics generally. Ultimately, balance between a degree of objectivity (which Tamanaha lacks) and responsiveness to changing phenomena (which Koskenniemi lacks) is required.

A. Concepts

First, the goal of this project is to add to the *analytic* study of a *concept* of law. This may seem like an obvious objective, but a defence of concepts and conceptual analysis is put forth against the leniency of Tamanaha but also, in part, against the naturalized philosophy of Brian Leiter.

The question, "what is law?" can be investigated in a number ways. Twining outlines four ways to answer: with 1) a proper definition of law 2) a general theory about the essential nature of law 3) the construction of multiple broad concepts to study law, without clearly delineating it, or 4) the development of a coherent framework of analytic concepts.[149] The first option is that of a simple semantic response, and is presented as obviously irresolvable and unhelpful to the philosopher. The second, the search for a general theory based on general features, is that which is attributed to Hart and Raz, and

[149] Twining, GJ, 64-6.

which Twining claims neglects the diversity and irreducibility of a properly wide set of phenomena. Twining prefers to focus on the latter two, to construct "an organising concept" for law. This is in part because of his own inclination towards inclusivity, but also because although he is convinced by Tamanaha's criticisms of legal philosophy, he finds him to be unfortunately bound to the traditional questions of the discipline, namely, the pursuit of a concept of law. He explains:

> I maintain a quite skeptical position about the feasibility and value of a general conception of law outside a given context of inquiry and argue that Tamanaha inadvertently provides support for this position by effectively criticizing leading positivist conceptions of law, but failing to provide a workable alternative.[150]

He is thus even less accepting of the traditional routes of philosophical inquiry into law than Tamanaha – he thinks Tamanaha adequately demolished the failed theories of Hart and his successors, but that his identification test and commitment to a universal concept of law hold him back. But as has been argued thus far, Tamanaha's project suffers from numerous shortcomings; he has not uprooted decades of legal philosophy. Without Tamanaha's critical body of work to appeal to, Twining's second option, a concept that looks to identify the essential features of law is not obviously unattainable (although the first option, that of a definition of law, is not endorsed for reasons outlined previously). As for Twining, his own interest does not lie with a single concept of law, but with a very different project. Thus, two legal theorists actively interested in IL are quite skeptical that the objectives of legal philosophy are worth pursuing, but it remains (at least provisionally) the objective of this project. It is the goal of the rest of this chapter to

[150] It will be recalled that Twining provided some of the serious practical shortcomings of Tamanaha's identification test (see chapter three).

outline how such a single concept can be defended, and the goal of the fifth chapter to present one aspect of such a non-traditional, but unified, concept.

It is worth reiterating that what is desired is not a list of the instances of the term 'law,' or a list of what actors uncritically take to be law, and it is this where Tamanaha's theory errs. The demand for a richer analytic result is endorsed by most legal philosophers, and its goal is taken here to be the correct one. As Leiter puts it: "To start, there is the obvious point that the philosophical interests in "concepts" (or "meanings") is not like the lexicographer's interest in "meaning": the philosophical aim is not to track and then regulate linguistic practice and usage."[151] Similarly, recall Hart's warning that his project, and that of philosophy, is not that of the lexicographer, who compiles instances of the term 'law, and that it is not enough that IL is called 'law' to include it under the concept, as if 'law' were a proper name. And while there are undoubtedly problems with the structure of concepts in philosophy, abandoning the project as Tamanaha does by turning over the concept to folk usage results in the absurdities reviewed in the third chapter.

B. Law is Socially Constructed

The second consideration is that law is a social kind. Few theorists deny this,[152] but it is worth preemptively defending this claim, and gaining from the explanatory value of the process.

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[151] Leiter, NJ, 123.
[152] Although some express uncertainty. Twining claims that "...there is no agreement about whether [law] is a kind of social fact or something else." His usage of "social fact" does not come across as non-standard, and so his hesitancy to call law social fact does seem odd (Westphalia, 201 footnote 4).

John Searle presents a simple but very useful account of the existence of "social facts."[153] Entities like money, sports, and law exist in the social world, and are generally accepted to be different than entities like water or gold.[154] He explains that such social entities are not *ontologically objective*, that is, their "modes of existence" are not independent of perceivers, but are instead *ontologically subjective*. The existence of entities like law depends on social participants. But the regularity and stability of such social facts is derived from the fact that they are *epistemically objective*: the truth or falsity of these social phenomena relies not simply on the attitudes or perspectives of individual agents, but on a collective social agreement that gives rise to propositions that can be judged according to a collective standard. Agents acting with *collective intentionality*, that is, acting with an intention not reducible to that of individual agents, create what are thus called *social facts*. Examples range from the simple, such as two people taking a walk together rather than simply coincidentally walking side by side, to the complex, such as money, which are also embedded in a web of other social facts and allow for many interactions that are epistemically objective. To elaborate, while money is itself a social fact, it requires and effects endless other social facts to exist, such as the concepts of *purchases*, *stealing*, etc.[155] Importantly, social facts are *constituted* by the

[153] Searle, John. *The Construction of Social Reality*. New York: The Free Press, 1995. Print. 1-29.
[154] Some might argue that "natural kinds" are socially constructed as well, but that perspective to the similarity only reinforces the point here.
[155] Consider the insight in the satirical headline, "U.S. Economy Grinds to Halt as Nation Realizes Money Just a Symbolic, Mutually Shared Illusion." *The Onion*. www.theonion.com February 16, 2010. February 2010.

rules that allow for their construction, and those *rules* (as opposed to *conventions*) provide normative force insofar as they determine correct manifestations of the fact.

This description is helpful in two ways. First, law as it exists in the world is a "social fact" according to this account.[156] It exists as a result of social agents acting with collective intentionality, according to social rules, in a manner that relies on their continued collective recognition and assignment of function that results in its ongoing existence.[157] This allows for a reasoned response to Tamanaha's resignation about a concept of law. He argues, "Conventionalism, which is another label for usage or social practice, suggests that law is whatever we attach the label law to; law is a human social creation that lacks any inherently necessary qualities."[158] Tamanaha is right to note the absence of inherently necessary qualities; as was examined briefly in the last chapter, law is not a natural kind. But that does not mean that discoverable, *epistemically* objective features are *impossible*. They are in fact common, because "whatever we attach the label law to" in fact follows *rules*, even, as will become important later, not everyone is conscious of these rules. A basic, but important, observation of Hart's, was that, "...where there is law, there human conduct is made in some sense non-optional or obligatory."[159] The final chapter will put forward a defence of this claim, but for now, it will be treated as an example. Such a fundamental element of law is part of the

[156] More accurately, it is an "institutional fact," a subset of social facts, but this level of detail is unnecessary.
[157] "Function" might be a red herring here. Searle notes: "It is perhaps worth pointing out that by using the notion of function I certainly do not intend to endorse any sort of "functional analysis" or "functional explanations" in sociological investigations." (114).
[158] Tamanaha, SLP, 15.
[159] Hart, 82.

phenomenon because law has in fact developed to require it. Although it could have developed in some other way, in a manner water or gold could not have, it is a discoverable fact of law and 'law.' Unless its social basis brings about changes in the relevant social facts, it will remain a discoverable, and potentially necessary, fact. This basis in collective social agreement also allows for a stable sort of phenomenon because there is relative permanency and objectivity to the constitutive rules. Moreover, discovery of these sorts of elements might not be sufficiently grasped from conventional usage; deeper investigation is required to uncover the true state of affairs. It will be recalled that Tamanaha set a pragmatic standard for his theory: it succeeds if it increases understanding of the phenomena. Yet his conventionalism does not allow for the possibility that some entities called "law" may not belong with the rest, and that some lacking the title, do. For that reason, his own pragmatism would be better met if instead of appealing indiscriminately to usage, discretion were allowed to influence the understanding of the concept. On the important topic of discretion, as a form of selection on the part of theorists when singularly objective answers are unattainable, more discussion follows shortly.

This leads to the second point Tamanaha neglects, that of normativity in social kinds. Searle's account draws attention to the normative (though non-moral) force of social facts, in that they can be used or applied incorrectly. Law being a social fact does not preclude that many will be ignorant of the finer points of 'law,' and that they may even be mistaken. As such, those in a position of familiarity with the phenomena and in possession of sophisticated theoretical tools are often better placed to investigate such

epistemically objective features. Being endowed with expertise in the matter, one can better assess potentially epistemically objective facts about the phenomena, and better apply the discretion that is required in that task. While this cannot exclude the possibility of bias creeping into investigations, it is a risk that must be taken, and hopefully guarded against diligently.

C. Concepts of Law as Hermeneutic Concepts and Change

One of the key goals of this section is to argue for the use of discretion in concept construction. This is an especially helpful tool with respect to changing phenomena. What is presented is a defence of the compatibility of discretion in a concept of law with the concept's hermeneutic function.

Leiter defines a hermeneutic concept according to two criteria: "(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."[160] The first condition requires that hermeneutic concepts be part of the self-understanding of participants in the phenomena. The goal of conceptual analysis, a defence of which is also put forth here, is to add to that self-understanding by refining it. Law and 'law' are dependent on the social actors who constitute it. That a concept of law is a hermeneutic concept is almost unanimously accepted within mainstream legal philosophy,[161] and it is accepted in this project. It is a socially constructed kind that figures importantly in the

[160] Leiter, NJ, 173.

[161] Hart and Raz certainly accepted this view, while the Scandanavian Realists were, according to Leiter, an exception. Indeed, realists in general would reject the claim. Leiter himself, however, is not entirely sure of the truth of the claim.

lives of people, is constituted by their beliefs and attitudes, and awareness and understanding of it makes those practices comprehensible to them.

It is not clear in regards to the second condition, that the referent of the concept be "fixed" by the explanatory nature of the concept, whether the referent is determined completely by hermeneutic function. This question is where discretion gains a foothold. If the concept is fixed wholly by the hermeneutic role, it is adversely affected by the plethora of errors social participants are prone to make. How the participants make the practice intelligible may be very wrong, and that would render the concept defective in the wider scheme of a phenomenon that displays certain objective facts. That does not seem to be a sensible option. If instead the hermeneutic role must only play at least a part in fixing the referent, insofar as law is a social construct and is dependent on social agents, but also in the possession of epistemic facts, then discretion has a place. In such a way, features that are important or distinctive can be maintained, even if they are not explicitly part of the self-understanding of the participants, because there is analysis and refinement of the brute social beliefs. Dickson, another defender of the hermeneutic nature of 'law,' seems to provide support for this option when she writes on the topic:

> "...it may further be claimed that in the case of theories of law, legal theorists making evaluations concerning the important and significant features of their subject matter *must be guided by, and must be sufficiently sensitive to* [emphasis added] what is already regarded as important and significant about law by those who create, administer, and are guided by it [internal citations removed]."[162]

[162] Dickson, Julie. "Descriptive Legal Theory." *IVR Encyclopedia of Jurisprudence, Legal Theory and Philosophy of Law*. http://ivr-enc.info/index.php?title=Main_Page. April 23, 2009. June 2010.

Dickson presents the hermeneutic role as important, and integral to an accurate understanding of law, but not one that will itself settle the question of the nature of law. As such, discretion allows the responsible theorist to navigate the views of participants and other observable data, to construct a concept of law. But contrary to what Dickson claims, this project does not insist upon a single correct description of law. It does claim that some are more correct than others, and that discretion must be used with that goal in mind, but past some threshold of practical utility, more than one concept may work.

This leads to the role of experts. If there is a place for discretion in the construction of a hermeneutic concept, which there appears to be, then that discretion is most effective if exercised in a reflective manner. Those with superior theoretical skills and familiarity with the phenomena are best able to undertake this task. This does not mean that the views of the general population can be ignored, but they themselves might not be (although they might be) the ones to take analysis up. Law may be a hermeneutic concept, but that does not mean that its construction must be thoroughly democratic.

A related point to the hermeneutic aspect of law is the likelihood that the concept of law has changed. As a social construct, law is constituted in part by the agents that use it in their daily lives and their use of it in their self-understanding. It seems entirely plausible that the pluralism of medieval Europe, the legal-monopoly present at the height of the nation-state, and the substantial revival of pluralism at the global level cannot be subsumed under a single concept that is of much philosophical interest.[163] That there is

[163] A similar point is made by Schauer:
Although not every change brings about a change in the concept, concepts can change over time: "Indeed, when we consider such events as the Second World War, the

continuity in such cases is probable, but staking philosophical inquiry on their sameness seems excessively optimistic. This can be accommodated, however. As Searle notes, "The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts."[164] And if the law (and thus, also 'law') is importantly determined by what its constituents (probably spearheaded by those acting in official capacities) collectively intend, the extension of the concept and thus the concept of law may not be temporally consistent.

There are two minor points to be addressed regarding this claim. The first is that the concept need not have changed, only that it might have. Second, where one concept starts and another stops is a difficult question of identity, and is not the focus here. It is sufficient to note that there may be enough differences present to reveal significant changes. And as with most phenomena that elude a clear division between kinds, different phases in the concept might be apparent without identifying the division itself.

But whether or not the concept has changed, the question remains of how to best investigate it. The current understandings may be accurate or not; they may or may not be

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Holocaust, the Nuremburg trials, the use of law as progressive social force un the United States during the period of the Warren Court, the transformation of legal systems in the communist world from 1989 to the present, the creation of new legal system in post-colonial societies, and the effect on law of information and technological revolution of the last two decades, among many others, it is not unreasonable to conclude that not only law but also out concept of law itself is at a particularly fluid period in the concept's history, and that this fluidity has characterized out culture's concept of law for roughly the past 70 years."
Schauer, F. "The Social Construction of the Concept of Law: A Reply to Julie Dickson." *Oxford Journal of Legal Studies.*" 25.3 (2005): 493-501. Web. 498-9.
[164] Searle, 117.

different than those of previous decades, or they may currently be in a state of important change; finally, there may not be, as the first concerns raised about the structure of concepts warn, a single classical, *homogenous* concept. If these questions can be addressed in an analytic manner, without succumbing to the pluralists' leniency or the realist's skepticism, the elements covered thus far might be investigated with a permissible level of discretion.

D. Discretion and Conceptual Analysis

The role of discretion is at the heart of the methodological view presented here. Discretion is not only acceptable, but required in the construction of the concepts of social kinds, in part through conceptual analysis.

There is currently great debate about whether a concept of law can be part of a purely descriptive project, or if its construction necessarily involves a moral element. This debate goes beyond the scope of this project, but the perspective taken here is generally that of Dickson. She argues that unlike propositions that directly assess the *value* or *moral worth* of a phenomenon, "indirectly evaluative propositions" assess the *importance* of features of a phenomenon, but without making claims about its value.[165] A description of law can be achieved through indirect evaluation. One can identify the existence and significance of features that must be accounted for and explained in a complete theory, but the assessment leading to the inclusion of the features need invoke a moral judgment.[166] Furthermore, indirect evaluation is sufficient to achieve an understanding of

[165] Dickson, ELT, 51-6.
[166] Hart similarly claimed: "description remains a description even when what it describes is an evaluation" (COL, 244).

the *nature* of law – moral evaluation is not necessary, although it is in other, non-descriptive, endeavours.[167]

Discretion in this context means the use of judgment in assessing the options available and deciding matters according to those judgments. It need not and in the form advocated here, it does not, connote arbitrariness. It does, however, accept that a single correct concept may not exist. It aims to uncover the features of law that are important, which as Dickson puts it, "the features of the law which are important to explain are those which best reveal the distinctive character of law as a special method of social organisation."[168] Even when developed according to the best techniques available and one's best ability, concepts regarding social kinds are always shrouded in a degree of confusion and bias that directly observable phenomena are not. To use Searle's terminology again, the facts about them are not ontologically objective, but epistemically objective. With the additional element that the law is partly constituted by the views of its social participants and figures importantly in their self-understanding (its hermeneutic role), the difficulty surrounding assessing 'law' according to a single correct standard, and producing a single unique answer is compounded, and the need for discretion becomes apparent. In fact, it seems likely that there will be multiple reasonable ways of carving up social phenomena, each with a claim to refining the self-understanding of social agents. Raz makes a related point. In more recent work, he argues against necessary and sufficient conditions for 'law,' instead claiming that, "There is no uniquely correct explanation of a concept...There can be a large number of correct alternative

167 Dickson, ELT, 68.
168 *ibid.* 58.

explanations of a concept."[169] He adds that the appropriateness of these various explanations depends on the purpose they are intended for, and the context, which changes frequently and easily. While the discussion here is on concepts, the sentiment is quite similar. According to different goals, certain phenomena can be explained, or conceptualized, in numerous plausible ways. And it is here where discretion enters again, allowing for the judgments necessary to constructing a concept one way or another, depending on both the demands and the social facts.

Recent attacks on conceptual analysis and the related reliance on the use of intuitions raise important issues. Some consider the intuitions that fuel conceptual analysis illegitimate sources for knowledge; Robert Cummins reduces all intuitions to some form of bias or prior knowledge.[170] Leiter complains that, "Philosophy becomes unsatisfying, though, when it turns into intuition-mongering and armchair sociology about what is really fundamental to "our" concepts."[171] He similarly comments on the dominance of the intuitions of a class of scholars affiliated with Oxford. Furthermore, the very method of conceptual analysis is said to fall with intuitions; following Quine, "...the claims of conceptual analysis are *always* vulnerable to the demands of *a posteriori* theory construction. It is, in many ways, a strange state of affairs that philosophers continue blithely with conceptual analysis, considering the disastrously bad record of pseudo-truths

[169] Raz, Joseph. "Two Views on the Nature of the Theory of Law." *Hart's Postscript*. Ed. Jules Coleman. Toronto: Oxford University Press, 2001. 1-37. Print. 10.
[170] Cummins, Robert. "Reflection on Reflective Equilibrium." *Rethinking Intuition: The Psychology of Intuition and Its Role in Philosophical Inquiry*. Ed. Michael R. DePaul and William Ramsey. Maryland: Rowman and Littlefield Publishers, Inc. 1998. 113-127. Print.
[171] Leiter, NJ, 133.

delivered by this method."[172] Despite these strong claims, Leiter allows for *modest* conceptual analysis, which allows for the "testing" of concepts against intuitions (which he thinks is more limited by the biases that creep into such testing).[173] It is *immodest* conceptual analysis that concerns him, because, "A jurisprudential theory that employs conceptual analysis to deliver *necessary* truths and illuminate *essential* properties would plainly involve conceptual analysis in its *immodest* form," (178). For Leiter, the solution is to turn to a naturalized jurisprudence, one that is continuous with the natural sciences, and that abandons conceptual analysis in any robust form.

The issue here is the delineation of law from politics, and the role of discretion in such a concept of law, and ultimately if, and how, IL is law, must be engaged. Contrary to Leiter's view, the delineation of law is not a banal question, and it is not one that can be dealt with in the course of empirical study with the aid of only moderate conceptual analysis. A concept of law precedes the sort of empirical work Leiter recommends. A (lengthy) quotation here is valuable:

> Yet the very talk of "legal phenomena" may invite a different kind of objection to the proposed naturalization of jurisprudential questions. For how is it, one might wonder, that the social scientist knows these are *legal* phenomena he is explaining, and not phenomena of some other kind? Does that not already presuppose an analysis of the concept of law? It is not obvious, though, why a shared language and dictionaries won't suffice to get empirical science off the ground; it is not that empirical science *needs* conceptual analysis to tell his explanatory story, it's rather that *after the fact* the philosopher may be able to offer some greater reflective clarity about the concepts invoked in the explanatory story. Conceptual philosophers are keen to insist that they are not lexicographers; but the intelligibility of empirical science can get a long way with lexicography alone. To the extent a

[172] *ibid.* 134.

[173] Once again, the Gettier case makes an appearance, this time as an example of the sort of modest conceptual analysis Leiter finds acceptable.

> conceptual analysis helps, it helps *after* we discover which way of cutting the causal joints of the social world works best, according to the naturalist. [174]

Yet it is not obvious why dictionary definitions *will* suffice to get an empirical study of the nature of law off the ground. They will largely suffice for many other types of studies, those that take the borders of law to be uncontroversial and work within its limits to uncover facts about its machinery and effects. In the case of IL, however, it is just the case that there is much debate about whether it should be included in the concept of law, and a dictionary sort of affirmation of calling it "law" is a shaky foundation. It is not at all clear why, or even probable that, empirical studies that implicitly rely on a certain concept of law will lend any useful information about a concept whose demarcation is in question. Consider, for example, a study that takes for granted that law is a normative institution closely associated with state governments, and tracks the correlation between the political affiliation of judges and their rulings. The predictive success by which an empirical study is measured depends on the parameters set prior to the study. In this example, 'law' has already been delineated, and a hypothesis that is housed within its limits will be tested. But the study, and studies like it, cannot assess the standards on which they are built. Some observations will lend help to the questions of what law is, because they will reveal some "causal joints," but they cannot uncover the limits of the institution, especially one that is likely in a state of flux, or may be delineated in more than one plausible way. Another example, pertinent to this project, would be a study on the relationship between official legal bodies and NGOs. It might offer great insight into

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[174] Leiter, Brian. "Naturalism in Legal Philosophy." *Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu. 2007. April 2010.

power dynamics, and a philosopher can then elucidate the underlying concept of law, but such a study will not raise the question of the legal status of the NGO, or settle its status. Moreover, such an assessment will rely on an "indirectly evaluative" decision on the part of philosophers. It will not be entirely "value-free," as Dickson puts it, insofar as it has to use discretion in selecting the important features from a sea of empirical observations, but that task is not arbitrary. How the important features are incorporated into a concept may have many equally plausible interpretations, specific to different goals

At the same time, a concept of law as a hermeneutic concept means that it must be addressed according to the intentions of its actors. Tamanaha asks,

> But why should legal positivists presuppose anything about the nature of law at all, whether about its possible functions, or about its supposed primacy in some respect, or indeed about any other aspect of law, including that it must be institutional? These views about the nature of law are normative (or ideological, to use a more contentious label), no different in principle from the natural law insistence on the inseverable link between law and morality.[175]

The answer is that there are some discoverable features of law that are objective insofar as they arise from the collective intention and collective actions of social participants. It is possible that individual social agents are mistaken about the *epistemic facts* of law - that because many agents are involved with the phenomena does not mean that they *all* must play a role in the construction of the concept. Those better acquainted with the phenomena can better assess that situation and uncover those facts. Thus, the features of 'law' are not simply "presumed." Tamanaha, in response to an anticipated criticism that his identification test yields too much authority to social actors. He writes, "Social actors already possess this authority, since law is and has always been a social creation.

[175] Tamanah, SLP, 11.

Conventionalism merely recognizes this reality."[176] The problem is that he equalizes all such agents. They may all be taking part in a social creation, but they do not all have the necessary familiarity with the creation to assess it *intelligibly*, as Leiter's formulation requires. He also argues, "Usage cannot dictate the construction of analytical categories or appoint their membership."[177] But insofar as a concept is a hermeneutic concept, those better acquainted with the phenomena are likely in a better position to analyze it. This is especially the case if such agents are also equipped with greater theoretical skills. This need not be the case, for even outside observers might be better placed to assess the situation, so long as they understand the mechanics of the institution and the hermeneutic role the concept plays. It may even be the case that almost all social actors misunderstand the institution that their actions constitute and that they take part in-unlikely but possible. But it certainly is not the case that just because social agents are involved in the practice of an institution, that they are capable of conceptualizing it in an effective way.

Two points are worth noting. First, even Tamanaha, who denies that a concept of law benefits from conceptual analysis, does engage in the practice himself. He states, "These various manifestations of law do not all share the same basic characteristics – *beyond the claim to represent legitimate normative authority* – which means they cannot be reduced to a single set of elements for social scientific purposes."[178] That itself is a feature of law he finds common to all the manifestations, and one that is a traditional and demanding requirement. Perhaps conceptual analysis is not so easy to escape, after all.

[176] *ibid.* 29.
[177] *ibid.* 31
[178] *ibid.* 32.

Second, one may object that the very choice of the experts to study the phenomena begs the question towards a certain outcome. While this is a form of the bias that is admittedly present in any study of a social kind, it can be mitigated. The theory advanced in the fifth chapter is a version of a paradigmatic theory, one that draws upon domestic law as a foundation, extends the analysis to other phenomena, and evaluates both the new candidates and the traditional account. This is in line with the methodological commitments espoused thus far. In a similar way, experts affiliated with an indisputable example of law are better positioned to carry out the task of reevaluation than those without any such familiarity.

Conclusion

What is required is a concept of law that incorporates the important and distinctive features of the phenomena, but does not demand necessary or sufficient features of law. Different types of law will be unified in some less stringent manner. Folk usage and dictionary definitions are indeed a part of the process of constructing a concept, but at a preliminary stage. From there one must combine empirical observations, those that concern the important and distinctive features of law as it understood at that point, with evaluative analysis, which may demand that modification of the concept, and may even result in a novel concept. The evaluative element need not be of a moral nature, but it will require discretion, which is both acceptable and inescapable. Moreover, accepting the role of discretion in a concept of law draws attention to the likelihood that there are multiple sound concepts, even at the descriptive level, in part because of the indeterminacy that surrounds social kinds and in part in response to different theoretical goals. Decisions

about the concept and how it may need be to modified, however, is ultimately based the phenomena, such that the concept, while in part dependent on theoretical purposes, must still always strive to be an accurate representation of the world. It is with this background that the fifth and final chapter will attempt to present changes to a concept of law to accommodate IL.

Chapter Five: The Legal System and International Law

The preceding chapters have argued against two polar views of IL. The first was the realist position, that IL is reducible to politics, represented by Koskenniemi, but held by a number of contemporary theorists. It takes too narrow a perspective of 'law' and repeats some of the errors of earlier realists. But despite its ultimately untenable view, it did bring to the fore important instances where IL does appear to lapse into pure politics. The second was the pluralist position, which accepts IL as 'law,' as represented in quasi-philosophical form by Tamanaha. That view, however, for all its admirable desire to break away from a state-based bias, was revealed to acquire inclusivity at the expense of depth and rigour. IL is not accurately described by either of these extremes, so an intermediate view must be carved out.

The view advanced here is that the 'legal system' as a conceptual tool still holds analytic purchase in understanding 'law' and thus IL. It does so by presenting a *prima facie* case for understanding IL as 'law,' linking it clearly to domestic law through the legal system, but not treating domestic law as anything but a clear and distinct example from which to begin the study. Legal philosophy has a rich and detailed (if sometimes inconclusive) account of what a legal system is. Efforts to understand IL according to theories of the legal system have not met with great success, and many are eager to relegate IL to the quasi-law, or even politics. Others who accept it as law prefer to do away with the legal system as a primary part of the concept, in an effort to lose many of the biases and incompatibilities the legal system brings to the discussion. The solution proposed here is a thinner concept of the legal system, in particular, one that is decoupled

from the nation state to which it has frequently been attached. This is a promising option that has not received much attention. It may thus provide a productive framework for investigating IL as law, to maintain a reasoned distinction between 'law' and 'politics,' responding to both the realist and the pluralist. IL can be defended as 'law,' and as forming 'legal systems,' although both of these concepts must be altered. This solution is closely associated with the topic of IL and the contingencies that surround it, especially IL of a certain developed nature, and so may not offer the same aid with other candidates for inclusion. This is to be expected, and is acceptable. A non-traditional concept of law need not deal with all of its instances in the same manner. In this case, though, at the international and supernational level, the concept of a legal system, appropriately modified, (i.e. decoupled from the nation-state legal system) might remain a versatile tool.

I. The Legal System

Analytic legal philosophy has produced an abundant body of work about the legal system, much of it based on the work of Hart and Raz. A brief review follows.

All legal systems and their laws are instances of law, while it is possible but not clear whether law is exhausted by the laws found in legal systems. The latter question will be set aside for now. What can be said about 'law' can inform the 'legal system' at this first stage of conceptualization. A common claim is that law renders some human behaviour non-optional. Hart identified this as a key feature of law: "It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is

made in some sense non-optional or obligatory."[179] This results in primary norms. This claim, which Hart based on his observations of domestic law, was also extended to the international level; Hart accepted that the primary rules of IL must also be non-optional, even as he called into question its characterization as a system. Moreover, Raz claimed that "…it is an essential feature of law that it claims legitimate authority."[180] It is through these claims to authority that law claims the right to render behaviour non-optional. As such, it can be said that a foundational feature of law is that is renders behaviour non-optional.

Much more has been written regarding legal systems. For Hart and Raz, the legal system offered the best explanation of the law of nation-states and similar political bodies. What follows is an examination of the basic features of the legal system, which will later be examined with respect to IL. The results will inform the relationship between domestic and international law, and the relationship between the legal system and the state. As Hart effectively showed, there are problems associated with simple sets of primary rules that lack organization. Without either a system, or the homogeneity and like-mindedness of a "primitive society," primary rules suffer from the problems of uncertainty, difficulty in affecting change, and inefficiency.[181] These are rectified in the development of the legal system with the introduction of *secondary rules* – rules that govern the primary rules - that are the first element in establishing a stable system. The

[179] Hart, 82.
[180] Raz, AL, 30.
[181] Hart, 91-4.

rule of recognition is the foundational secondary rule,[182] "a defining feature."[183] With the addition of secondary rules, the stability and effectiveness of most modern (domestic) law is facilitated. It was the apparent lack of secondary rules, and especially a rule of recognition, that was for Hart the most serious shortcoming of IL, and which kept it from being a "legal system."

Hart also claimed that general obedience among the population, and the additional acceptance of the validity of the rule of recognition and thus the system by its officials, are necessary for a legal system.[184] The two criteria were also claimed to be sufficient for a legal system, but that seems obviously false (if one intends to keep 'law' distinct from other social institutions), so the claim to necessity will be emphasized instead. Demands for efficacy are certainly a popular way of casting doubts on the legality of IL. Also, the lack of a rule of recognition on Hart's telling made it impossible for officials to accept the rules as valid because there is no rule of recognition according to which they can be judged.

To this account Raz added some key elements. The first is that the domestic laws must be housed within legal systems. He claims, "Laws are part of legal systems; a particular law is a law only if it part of American Law or French Law or some other legal system."[185] This requirement removes the space between law and legal systems, and is thus restricting. But it also unifies laws under a single sphere. It is noteworthy that this is

[182] *ibid.* 94-5.
[183] *ibid.* 111.
[184] *ibid.* 112-7.
[185] Raz, AL, 78.

in contrast to Hart's assessment of IL, that it might be law, and possibly composed of laws, but that it certainly does not compose a system.

Finally, Raz identifies three features that are characteristic of legal systems. Law is, he claims, an *institutionalized normative system*, and at the heart of this system are primary norm-applying institutions, such as courts. They reinforce the recognition that is foundational to the system. But law's nature is defined not by what role it plays in society, but *how* it plays its role.[186] First, the system must claim the authority to be comprehensive, even if it is not comprehensive in practice.[187] Second is the claim to supremacy, that law always reserves the right to pass final judgment on any issue. Third, it is open, in that it can allow the recognition of alien norms without including them within the system itself. The way legal systems perform their social role is thus definitive of the legal system, in its supremacy, comprehensiveness and openness.

It is against this account of legal systems that IL will be compared, and this account that will be modified.

II. The European Union – A Study of Systematic Law

The European Union (EU) arose over decades of increasing partnership in Europe. What began as an economic partnership between six countries (the European Economic Community, or EEC) has become a union of law, economies, people and politics across 27 European nations (the European Community, or EC).

MacCormick notes the well-known shift in the characterization of EEC to EC law. A review of the cases of the ECJ shows that, "First, this [legal order] was characterized as

[186] *ibid.* 105-6.
[187] *ibid.* 116-121.

a new legal order of international law. But later the concept of 'international law' was dropped, and there was said to be simply a new legal order, or an order *sui generis*."[188] There is much written on the novel nature of EU law; it may indeed be an order *sui generis*, an order that cannot be subsumed under traditional legal categories, but warrants it own unique characterization. But whether it is so unique or not, it can still be judged in regards to the mainstream concept of a legal system, and affect the concept itself.

The EU is a stable and organized source of law, and in many ways meets the requirements of a system. It makes behaviour non-optional for its citizens, although whether (or how) it makes behaviour non-optional for its member states, is a slightly different question, and one that will taken up in turn. It makes claims to legitimate authority. The rulings of the European Court of Justice, for example, repeatedly make references to its authority.[189] The EU also has rules of recognition,[190] in the key treaties that led to its development (such as The Treaty establishing the European Community),[191] and other secondary rules of identification, change and adjudication, especially through the ECJ.[192] It also meets Hart's demands that the norms of the system be generally

[188] MacCormick, QS, 106.

[189] The EU website explains, "The Court has the power to settle legal disputes between EU member states, EU instit utions, businesses and individuals." This claim is repeated in case decisions.
See "European Court of Justice." *Europa*. http://europa.eu/. 2007. June 2010.

[190] It was Raz's modification to Hart's theory that asserted that there may be more than one rule of recognition. The details of that issue will not addressed here.

[191] For example, Article 189 states: "The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty."
See "Treaty Establishing the European Community." *Europa*. http://europa.eu/. Lkefj. June 2010.

[192] For example, Article 234 states:

efficacious, and that the officials treat them as valid. On these counts, the EU by and large meets the criteria for a legal system.

Difficulty enters in at Raz's requirements of supremacy, comprehensiveness and openness. Julie Dickson's examination of the nature of the EU grapples with its systemic nature, and while she does seem to favour the possibility that it does constitute a system of some sort, the question is a difficult one. [193] Its relationship to the legal systems of its Member States is her main inquiry, and from that target stems many "puzzles." The EU claims to be a supreme legal system and one whose decisions are valid independent of states (after the fact of its inception), as evidenced by the declarations of separateness and primacy in the decisions of ECJ, and the "activism" of its judges.[194] Such primacy accords with Raz's requirements for a legal system. Moreover, through the efforts of the ECJ, its decisions have often been given priority over the laws of member states, resulting in the alteration of state behaviours.[195] One such example from many is the Laval (2008) case, where an ECJ decision took clear priority over state laws in Sweden.[196] These facts

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."
ibid.

[193] Dickson, Julie. "How Many Legal Systems?: Some Puzzles Regarding the Identity Conditions of, and Relating Between, Legal Systems in the European Union." *Problema* 9.50 (2008). Web. 2. (henceforth "HMLS").

[194] *ibid.* 16-9.

[195] *ibid.* 20.

[196] In the case, the Latvian company Laval and its Latvian workers, working at a job in Sweden, could not come to an agreement with a Swedish labour union, which subsequently called a strike at all Laval sites. The right to strike, and the desire to avoid

seem to reveal the EU to be a separate legal system, one that has subsumed those of its members, to form a single unified system.

Simultaneous to members' apparent deference to EU law, however, the member states do not appear to accept the supremacy claims of the EU through the ECJ so completely. Whereas the ECJ presents itself as inherently supreme, states take a more reserved approach. Dickson explains: "for many national legal systems, EC law has in the end usually been granted supremacy over national law albeit sometimes conditionally, but it has been granted this on the say so, and under the terms set by, the national courts and the national constitutional order more broadly."[197] If the Razian requirement of supremacy is to be maintained, it may be instead that the member states are the proprietors of legal systems. They may be allowing EU law to "prevail" in these cases, while remaining supreme themselves,[198] which Dickson argues they can be "plausibly" read to be doing.

Yet another possibility is that the norms of the EU become part of the norms of its member states (which is not the same as an overarching, unified system). A discernible vein in ECJ rulings claims that their rulings must be enforced because they become internal to the law of the member states, rather than acting as external or foreign norms.[199]

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putting workers in countries with strong labour laws at a disadvantage compared more exploitable workers, were admitted to be important, but priority was given to freedom of EU workers to migrate and work freely within the Union, as is guaranteed in Article 49 of the EC Treaty. Thus, EU law took precedent.
See "Laval Case." *Eurofound.* http://www.eurofound.europa.eu/index.htm. 2008. July 2010.

[197] Dickson, HMLS, 25.

[198] *ibid.* 25-6.

[199] *ibid.* 31-5.

Turning to Raz's account of legal systems does not help solve the dilemma this option presents. Even though Raz distinguishes between a system's own norms and those that are foreign but are granted legal powers under the system, but applied by the system, it remains uncertain whether states are *allowing* this intrusion by the EU, or if the ECJ is, in its supremacy, injecting new norms into the subsystems of its members.[200]

Dickson accepts Raz's emphasis of the motivation for the behaviour of the EU and its member states; it is not just what function the law provides, but how it provides that function.[201] Understandably, she finds her own analysis of the problem of supremacy in EU inconclusive. And with uncertainty regarding supremacy claims come related issues with comprehensiveness and openness, whose own necessity comes into question. If the EU is taken as a sort of IL, (*sui generis* claims and all), the issue of supremacy presents a serious problem to conceiving of IL as a legal system.

III. The Legal System Modified

There is a parallel to be drawn between the decoupling of law from the state, and decoupling the legal system from the state legal system.[202] Just as law can be conceived of separate from the state, and that the combination reflects a common but contingent union, so too is the legal system only contingently associated with the state. It is difficult at first glance to conceive of a state legal system that does not make claims to comprehensiveness, supremacy and openness. But that is in part due to the dominance of

[200] *ibid.* 37-8.
[201] *ibid.* 41-3.
[202] This view was also advanced by Waluchow.
Waluchow, W.J. "Response to Culver and Giudice." York University, November 27 2009. Oral Response.

the model, and its close association with the dominance of domestic law in the modern world. It has led to a situation where candidates not meeting those criteria have been excluded, or creatively described to fit the requirements, when instead a reappraisal is in order. EU law is the example this project focuses on, but others exist. Culver and Giudice point to federal systems, where the division of responsibilities among groups might not be best explained with the hierarchical model.[203] What follows is a revised concept of legal systems, and one that does not claim to exhaust all instances of law. It presents a concept of the legal system that highlights key similarities between domestic law and IL to present a *prima facie* case for accepting IL as law. Although it begins from domestic law to get the claim off the ground, it does not take domestic law to be the ideal example, only an indisputable one. Two requirements are presented in this defence of a thinner concept of a legal system.

First, insofar as legal systems are a type of law, they must render human behaviour non-optional. This results in primary rules. What this does not require is coercion or centrally organized sanctions. The most general ideas about law require some form of guidance, and that its dictates be obligatory (although even this basic requirement was neglected by the pluralism of Tamanaha). There is not much that can be said to defend this claim, and it reveals the difficulty inherent in describing a social institution. But as was argued in the previous chapter, some claims based on experience and observation of the phenomena are necessary to get the endeavour off the ground, with changes made as needed.

[203] Culver and Giudice, 30.

This constraint can be actively accepted or not. If norms are actively accepted, they will guide behaviour even if there are no external punishments to deter noncompliance. This was, it will be recalled, Koskenniemi's oversight with respect to IL – he neglected the possibility that states can be bound by norms even in an absence of policing bodies. If not actively accepted, the norms can still be followed out of a sense of obligation, a respect for the rules of law as a whole, or a fear or reprisal. And finally, the constraint may not be accepted at all. Ultimately, however, law must make claims to restrain behaviour, and while it often succeeds in changing behaviour, if and how it does so can vary.

Second, it is required that legal systems be composed of a union of primary and secondary rules. The first reason is that in the absence of the strong community ties that allow for diffuse laws to exist, a system allows for the *validity* of the norms. The secondary rules of identification provide a source of validity to what otherwise allows for Hart's "gunman writ large." If law is to be distinguished from brute force or *political* actions, legal validity is required, and it is the result of the norms govern what would otherwise be a mere collection of norms. The second and related reason is the practical benefits that result from such organization: the problems of uncertainty, resistance to change, and inefficiency in execution of its norms. The reasons are largely those of Hart. It is, additionally, difficult to conceive of a "system," with its requirements of stability and organization, without the secondary rules playing that supervisory role.

What must be demoted from the necessary are supremacy, comprehensiveness and openness. This is not to say that these features cannot be a part of IL, only that they need

not be. Supremacy has been addressed in length here. There is much factual motivation for rejecting it as necessary: the confusions surrounding supremacy claims in the EU; the medieval, colonial and post-colonial periods when pluralism among läw was common; the haphazard application of the 'law on the books' and the native norms of Yap. These ongoing examples throughout history make the truth of the supremacy claim difficult to defend across the board (even if it is frequently claimed). It is true that some IL does appear to be supreme, such as the *jus cogens* law Weil addresses in length. And there are often claims of supremacy on behalf of IL. But supremacy is not necessary in practice. Even if supremacy claims are found in IL, such as in the EU, such claims need not be made on behalf of all IL. This results in a pluralist conception of legal systems – multiple legal orders, and in this case systems, can coexist if there are no requirements that the systems monopolize certain spheres.

It was suggested in the previous chapter that the institution and concept of law might have changed drastically over time. But such data is a reminder of law's previous forms, and the conceivability of very foreign forms of law. It also serves as a reminder that the concept may in fact be undergoing another serious change where it sheds its close connection to the state, which has driven many of the claims of supremacy. The demotion of the supremacy requirement is not, however, too radical a claim; notable mainstream theorists even consider it. Andrei Marmor has argued against its necessity:

> Those who maintain that the law must, as a matter of its essence, claim such supremacy over other normative domains, face a very serious problem regarding the history of law. It is arguable that medieval legal systems, for example, had no such claims to supremacy. On the contrary: positive law was seen as an exception to customs, traditions, religion, and in general, social practices long in force. Thus the law, as a relatively exceptional normative source, could only intervene within

the narrow space left open by these other normative sources.[204]

With the rejection of the requirement of supremacy fall the requirements of comprehensiveness and openness. Without the claims to have the right to supreme authority there is no need to have the right to be the authority in all spheres, and vice versa. And without requirements of supremacy and comprehensiveness, it is unnecessary that foreign norms only be allowed to have effect if under the permission and supervision of the native system.

This conception allows for a larger subset of international norms to be understood as law, not politics, and in a manner that provides a principled, inclusive baseline. This is to be expected by embracing a pluralist perspective – removing the overly strict requirements of comprehensiveness and supremacy can accommodate a plurality of legal systems of various forms. As such, even if the EU were at the mercy of its member states on some issues, that need not disqualify it as law, because it can still be a system without being supreme. Or if the EU were in fact exercising supremacy over its member states, that need not mean that it has subsumed its members as subsystems. As well, this thin standard for the legal system can accommodate the relevant norms of NGOs and other non-state actors, so long as their behaviour is constrained by the legal system, just as those of citizens and states are, and recognized in some minimal way by other systems to allow for their inclusion under the secondary rules of organization.

This comes to resemble a Hartian picture, but one that is less demanding in its most basic form and with a pluralist bent that Hart may have been wary of. The

[204] Marmor, Andrei. *Positive Law and Objective Values*. New York: Oxford Clarendon Press, 2001. Print. 40.

sophisticated theories surrounding the legal system as affiliated with the state still have their place, but their application is appropriate for a narrower class of laws. Contra Hart, there are rules at the international level that need not compose a simple "set" but can be part of a system. But even with this thin understanding of legal system, there is the danger of falling into a set of necessary and sufficient conditions. It is tempting, but there may not be any single concept of a legal system, as there probably is not for law.[205] But this concept may be a sufficient tool to capture more instances of IL and in a way that does not describe it components as merely free-floating laws or part of a simple set.

IV. Is this Legal System Unrecognizable?

A possible objection is looming here. The argument presented thus far is a cautious one, claiming that it may be that the legal system, appropriately modified, may aid in the understanding of some, but probably not all, IL. This is the same line of reasoning used against the realists' collapse of the legal and the political, and in the pluralist rejection in the utility of a concept of law - it may simply be that abandoning the "legal system" is too premature. But there exists a thorough defence that the legal system's utility has peaked, and if one strays from the traditional conception of the legal system too radically, there is not much benefit left to maintaining the title. It may be argued that the label is at this point misleading, and that so much of what has made the

[205] It is possible that there will be necessary or sufficient features with respect to a particular concept geared towards a particular goal, while those same conditions will not be applicable to other, equally reasonable, concepts attempting to capture the same phenomena. Such a depiction appears quite viable, but renders such conditions contingent on the goal, and seems a less full-blooded sort of necessity or sufficiency than Plato, for example, might require. Thus, such conditions are not truly necessary or sufficient.

legal system a useful analytic tool has been abandoned, that the connection is not even helpful.

Much of this same evidence used here, and more, is interpreted by Culver and Giudice to argue for exactly that claim, that the legal system is not the conceptual tool to understand IL, especially the EU. Analyzing the same work of Dickson's, they argue that the benefits of the 'legal system' are outweighed by the shortcomings and mischaracterizations it brings. They explain:

> Legal systems which no longer claim to be comprehensive, supreme, and open are far removed from the dominant analytical understanding of legal systems as state legal systems, and further, focus on legal systems draws attention away from, albeit inadvertently, the nature and diversity of interaction between institutions.[206]

They instead approach law as resulting from the interactions among institutions, rather than the hierarchical and limiting discussions of the interactions among legal systems.

They advocate a "narrative conception" of law, which rejects necessary and sufficient conditions, or even a single correct conception of law, in lieu of a descriptive-explanatory account of a set of phenomena over time, according to the changing goals and standards of the relevant observers, that picks out even the least "intense" instances of legality.[207] This is in contrast to the rigidity of a rule of recognition that preemptively marks off the boundaries of a legal system, but also to the unchecked standards of pluralism. The legal system is only one type of legal order under this concept, albeit a particularly organized legality with wide recognition of its institutions.

As an example of their new perspective, they utilize Dickson's observation that

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206 Culver and Giudice 74.
207 *ibid.* 110-12.

state courts do much of the work, interpreting and applying, the decisions of EC law. They act as EC courts, she writes, with so much overlap that the utility of assigning the norms to individual systems falls into doubt. For Culver and Giudice, the issue is significant, and may mean that the question of which norms belong to which systems might no longer be a fruitful sociological question to ask.[208] But where they detract from conventional theory is that they claim that the similarity between the EU and domestic law is due to its historical roots, but ultimately, the EU law just might not form a system. They argue:

> Unlike law-states of the kind amenable to hierarchical, official-based analytical approaches, the European Union appears to lack the sort of systematic unity visible in the law-state via identification of core institutions responsible for maintenance of the minimum natural law content of the system. Instead this responsibility seems to be distributed amongst Member States...[209]

Although the EU displays hierarchy, there is just as much "horizontal inter-relation and interdependence," which lead them to agree in its characterization as a *sui generis* legal order.[210] They add:

> The contingent identity of the European Union as an agglomeration and variegation of legal institutions is emphasized rather than undermined by observation that its roots in systemic state law are being gradually overgrown by European Union institutions of law and legal institutions, which replace comprehensiveness, supremacy, and openness with comprehensiveness, interplay, and overlap, as seen in its relations with less-than-member states whose legal institutions are nonetheless in mutual reference with European Union legal institutions.[211]

This is not, they admit, the answer Dickson, or other proponents of a Razian system, are

[208] *ibid.* 163.
[209] *ibid.* 166.
[210] *ibid.* 167.
[211] *ibid.* 168.

after, but that is the point. That the EU is not a form of law that is best described as a legal system is the most plausible one on their account, and one that sheds light on the broader inappropriateness of the concept of the legal system.

Two questions arise in regards to this account: first, whether this account is effective, and second, regardless of the merits of their proposed alternative, whether the traditional legal system really is an outdated tool, whose failings demand a radical reevaluation of the sort Culver and Giudice offer. One concern regarding their theory is the little emphasis it places on distinguishing between law and other social normative orders. A framework that picks out even instances of low-level legality is comprehensive, but it leaves the borders of law unsettling ambiguous. While focusing on higher "intensity" instances of legality may answer the many intuitive cases, the theory lacks precision in identifying *uniquely* legal norms. That may not be a priority for them, as it is in this project, as the attention paid to the distinction between the legal and the political attests to. They in turn counter that such an account cannot provide the definite sources that a positivist approach requires to mark law off from other social orders, but the view advanced here only commits itself to the likelihood that the sources of law must be expanded, and not the view that there might not be any definite boundaries to what are considered legitimate sources. This is indeed a topic of lively debate. But it does raise the question of whether Culver and Giudice were premature in rejecting the concept of the legal system as a central aspect of 'law.' The response is cautious: perhaps. Looking at the EU, many of its key characteristics can be explained with reference to its obligatory dictates, and its union of primary and secondary rules. The thin concept of legal systems

will allow for its norms and the framework which gives them a legal home. It includes the treaties that led to its formation. It includes the source of validity that separate the laws of the EU from the political dictates of powerful but non-legal bodies. Rather than looking at the confusions wrought by attempting to trace the supremacy of its bodies, the requirement should be dropped, and with it other thick requirements. This will in fact preserve many of the key insights of the traditional 'legal system,' too much of which are liable to be lost in its more complete rejection.

A reduced concept of a legal system is versatile. It does suffer one drawback compared to the theory presented by Culver and Giudice: it may not account for all instances of law, especially with respect to IL. But it appears that their theory may suffer in the opposite direction, including phenomena that may better be left under 'social normative order.' There will remain laws that form sets of primary rules, but not system, and this account does not examine that possibility. But if the legal system remains a useful tool, and remains an important enough concept in legal theory, then it is worth attempting to salvage it in the face of new and changing phenomena.

Conclusion

A thinner concept of the legal systems allows for a fruitful analysis of IL as law. While this interpretation draws significant explanatory aid by linking IL to domestic law, it does not treat domestic law as an ideal. It instead uses domestic law as a starting point from which to highlight the similarities between the two, and accepts that while significant differences exist, those features represent the contingencies of the different ways law occurs. The concept provides a principled way to distinguish law from politics,

but also to keep distinct what makes law different than other social norms. The obligatory nature of its norms, and the additions of secondary rules to the primary rules, however, do represent a basic similarity between the two, and while that may not be the same relationship between other forms of law, it is an important baseline for the study of international and similarly supernational law.

Conclusion

This project has argued for the inclusion of IL under 'law.' It has presented a *prima facie* case for IL by reducing the requirements of the 'legal system' such that at least some IL can be accommodated within its framework. In this way, it avoids the inflexibility of Koskenniemi's account, which drove him to declare IL as completely reducible to politics, and also the anti-analytic inclusivity of Tamanaha's account, would accepted IL as law, but at the cost of abandoning analyticity and the utility of the concept. And while this defence of IL has relied on the law of the nation-state as a foundation to which to draw similarities, it has not accepted that whatever the central features of domestic law are, those are central features of all law. Thus, the reduced concept of the legal system has attempted to distill those features of both domestic and international law that are foundational to both, while admitting that many important, but contingent, features remain to be explained in both.

But this project has only addressed part of the problem it itself set up. It has not addressed the relationship between many other candidates for inclusion under 'law' which may not be best explained through the legal system. There remain other less "systematic" international "laws" which may not even meet this threshold. It remains a topic to be investigated whether such rules must be housed within legal systems to be considered law, as Raz demands, or if they can be free-floating laws, as Hart described all international laws fifty years ago.

Moreover, while this project that appealed to domestic law to provide the foundation for international law's inclusion under 'law,' and has argued subsequently that

this allows for the reevaluation and revision of the concept as a whole, many similar investigations could be done with other candidates for inclusion. Canon law is an example referred to in this work. Thus, while this project offered a partial examination, more work remains to be done.

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