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A Critical-institutional Theory of Social Order

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Introduction

Point of Departure: The Question of Questions

In the fields of jurisprudence, legal sociology, and legal anthropology the nature of law is one of the most debated questions, even though, already at the beginning of the twentieth century, some scholars claimed it to be unsolvable. In 1938, Max Radin made a mockery of those whom, among his colleagues, still showed interest in defining law by saying that "[t]hose of us who have learned humility have given over the attempt to define law" (Radin 1938, 1045). In effect not only has there been disagreement on how to define law. There has also been a great deal of disagreement as to the proper target of such an inquiry. Some theorists have almost exclusively focused on rules. Some of them have argued that what characterises law is the fact that legal rules, unlike every other type of rule present in society, are backed by coercion, are enforced by some type of legitimate authority, and are generally meant to secure social order. Others have put emphasis on the institutional character of law so as to argue that the speciality of legal rules rests on their being part of a complex institutionalised practice. Finally, others have stressed the processual side of law, which they see as a specialised machinery meant to settle disputes, channel powers, and accommodate social change. In sum, the label 'law' has been employed for covering quite different phenomena, which only bear feeble resemblances to each other.

The theoretical complexity of defining law is one of the main reasons why, as also Brian Tamanaha has recently remarked (2001, xiii), in the last decades few legal thinkers have tried to outline a comprehensive core conception of law. Yet, despite the decline of grand theories, the debates about the nature of this pivotal component of social life are far from decreasing. Indeed, the question of what distinguishes law and the inquiries into the features that make it so special are now returning to the fore in new ways and with new intensity. Actually, the incisive socio-political changes that are impacting upon our global world are progressively tearing into pieces most of the basic tenets of traditional jurisprudential approaches. As I will argue in the following pages, today, more than ever, legal theorists are trying to provide new conceptual devices able to capture the dynamics of a social

reality that is quite different from that in which the foremost thinkers of the twentieth century were situated. Today the legal field is characterised more and more by the rise of alternative normative sources and hybrid regulatory phenomena, which in the past were straightforwardly relegated to the domain of the social, whereas at present they claim to be included in the domain of the legal. The present book can be seen as a contribution to the ongoing attempt at deciphering what these changes are bringing about and how they are reshaping the legal field. At the same time, this book claims to be a vindication of the role of legal theory, which can and should play a crucial role in this wide-ranging enterprise.

The Question of Questions in an Era of Transformations

Needless to say, any theoretical inquiry is rooted in the background of a specific geo-historical context, whose social, political, and cultural conditions inescapably come to affect the set of presuppositions from which theorists move. Accordingly, this influences the way in which such theorists interpret their own conclusions in relation to the limited set of variables and criteria on which they focus. This is *a fortiori* true as to studies on legal phenomena which are undertaken amidst the epochal changes that are gradually reshaping our social world. Law is undergoing a series of transformations that turn out both to alter its traditional configuration and to remould our perception of it. In the 1960s, Herbert L.A. Hart could present the discordances over what law was as an outcome of an academic contraposition over a rather definite reality (the state legal order). In his introduction to *The Concept of Law*, he simply defined as devoid of mystery the quasi-legal status of non-state laws. In contrast, today such a reality is becoming more and more the matter of an ongoing debate among legal scholars. Nowadays a quite less definite reality (that is, a plethora of normative entities that are prospering below, above, and beyond national states) is challenging most of the theories of law produced in the last couple of centuries and is bringing into question the traditional boundaries separating the legal from the quasi-legal, the non-legal, and even the illegal. As a matter of fact, since the last decades of the twentieth century, the political-legal actor that was deemed to be the legitimate holder of an unquestionable *official lawfulness*, that is, the state and its legal order, has increasingly had to face with insidious competitors questioning both its legitimacy and its monopoly on official lawfulness. Through different pathways and with different trajectories, a great amount of indigenous, informal, sectorial, and functional (both substate and suprastate) laws have started to claim their portion of officiality and to demand an ever-greater autonomy to exert justice through their own means and methods. This is why, as Carol Greenhouse (1998, 63) observes, the chief problem of legal and political theory at present "is the contested nature of states' claims regarding the legitimacy of official law".

The doubts and questions that surround the state's claims on legitimacy primarily stem from the fact that today its sovereignty seems more and more an empty shell. It is a platitude to recall that the origins of modern law are deeply entrenched with

the origins of modern national states and their normative supremacy. As I have argued at length elsewhere,[1] modern legal orders – as essentially distinct from medieval legal orderings in methodologies, technologies, and categories –, were made possible by the conquest of the legal field by state governments. States centralising tendencies accelerated the erosion of the common (though multilayered) legal framework that for a long time had allowed several local laws to co-exist. The new central government rendered the medieval integration of *ius commune/iura propria* into a chaotic overabundance of conflicting local laws. They employed the uncertainty and instability yielded by this legal particularism as a plausible justification for the extraordinary revolution by which they turned out to present themselves as the unifying factor for all sub-state social entities located in their jurisdiction: each of these social entities was called upon to rule out the elements that were in conflict with the will of the sovereign. In this way, political rulers managed to have the pre-eminence over the legal specialists (be they judges, jurists, or professors of law), who became (especially in the countries of civil law) 'state officials'. The myth of the monist legal system had been created. The complete takeover of the legal field was crucial to the centralisation of power and competencies. The corresponding revolution in legal ideology was at least as important for the creation of modern states as the spread of numeracy for the development of natural and social sciences.

Yet, in the last decades, many factors have gradually contributed to dismantling the image of law that I have just sketched. Among them, two are particularly interesting, the first related to the developments in various fields of legal study, the second related to the actual changes that have occurred in the global scenario.[2] Firstly, in the second half of the twentieth century, an impressive amount of studies and inquiries in many fields of legal and political research have cast light on the historical, contingent, hegemonic, and even despotic character of state legal orders. Both historians of Western political organisations and scholars of non-Western and post-colonial countries have argued that state legal orders (be they Western or non-Western) have emerged as artificial products with a patchwork character. They have been able to affirm themselves only by downgrading and de-legalising all the pre-existing types of legal orderings and, in this way, have successfully managed to impose a *canon of official lawfulness*, which today can no longer be taken for granted. Secondly, at a more pragmatic level, social and economic globalisation is significantly

[1] See Croce (2009).

[2] I would like to make it clear from the very outset that my book is not intended to analyse the way legal theory is changing in response to globalisation. I am rather referring to these ongoing transformations (both pragmatic and theoretical, as I will explain shortly) insofar as they have contributed to bringing to light some of the flaws of traditional jurisprudential approaches that focus almost exclusively on state law. This is why I will say nothing about the so-called "global legal pluralism" (see e.g. Berman 2009 and Michaels 2009) and will pay scant attention to supra-national, transnational, and international legal phenomena that in the last years have stimulated interest in re-conceptualising state law to fit these phenomena. For a thoughtful analysis of these emerging theoretical streams, see Twining (2010).

impinging upon the role and the shape of state legal orders. Although, contrary to what a recent vulgate has contended, states are not disappearing, they are adapting themselves to the changes that are taking place above and beneath them, to such an extent that they have even served as key channels of socio-political transformation. In this reading, globalisation can be better understood as the accretion of a multifaceted set of sub-national processes, whose main effect is that of eroding the traditional division (once crucial to there being a state) between what is public and what is private. The collapse of the private-public divide is now favouring the withdrawal of the public domain and the parallel expansion of the private one, which gains power through the absorption of traditional state authorities. In this articulated dynamic, many types of indigenous ordering (from ethnic and religious groups to multinational corporations and nongovernmental organisations) are both entering the ambit of public policy-making and creating new areas of private jurisdiction.

As we can see, in the global scenario that has emerged out of the fall of the Berlin Wall, the state has not only to face the traditional normative sub-state entities, whose autonomy and independency had been harmed by the rise of the modern systems of states. The proliferation of alternative sources of normative power along with sub-state and supra-state regimes of justice is considerably increasing the hybridity of law, which can be no longer considered as a personal property of national states. It is easy to offer a rough sketch of the different instances of law demanding to exert jurisdiction on different geographic areas and/or on specific sets of subjects. There is a global law which is comprised of regulatory systems operating at different levels, such as trade, finance, environment, nuclear energy, fishing, agriculture, food, postal services, intellectual property, energy sources. There is an international law in the classic sense of relations among sovereign states integrated by treaties and charters of fundamental rights. There is the regional law of organisations such as the European Union and the African Union. There are transnational laws regulating specific sectors of social reality, such as merchant law, copyright law, internet law, or governing the life (or part of the life) of specific populations, such as Islamic law, Hindu law, Jewish law, Canon law. At the same time, traditional national jurisdictions are more and more fragmented because of the rise of sub-state jurisdictionally-autonomous federal or provincial entities, such as Quebec or Catalonia. Finally, there is an array of non-state laws and folk laws that are being recognised by the state law of many post-colonial countries.[3] This new scenario induces us to see the emerging global legal order as an intertwined web of jurisdictional venues, in which global, international, transnational, state, sub-state, and non-state laws are fated to coexist.

These momentous changes are inevitably affecting how legal theorists think of law and talk about law. This rising trend is epitomised by the book by William Twining, *General Jurisprudence*, which the author himself depicts "as a plea for a less parochial jurisprudence" (Twining 2009, xiii). His "central concern is with the development of adequate ways of expressing law and talking about law", which in his view can only be obtained by elaborating a "wider conception of law that goes

[3] For more precise and more detailed taxonomies, see Menski (2006) and Twining (2009).

beyond municipal or state law and covers all levels of legal ordering". Twining's core concept of law is based on a much "wider range of concepts than traditional analytical jurisprudence" in such a way to include "global, transnational, international, regional, municipal (including national and subnational), and local non-state" legal orderings (*ibid.*, 39). Such an extensive revision of legal theory, according to Twining, should break once and for all with the myopic tendency that has long identified state legal orders (that is, a particular and transient shape taken by the millennial practice of law) with the broader phenomenon of law.

This fracture with the traditional ways to understand law and its relation to society is full of consequences. In a nutshell, What happens to law when its ties with the state and its monopoly of legitimate violence are being severed? This is what Twining calls the 'problem of the definitional stop': "If one opens the door to some examples of non-state law, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on" (*ibid.*, 369). In the present book I will contend that this question is absolutely central and that yet there can be remarkably different ways to tackle it, which lead to remarkably different conclusions. As I will explain in detail in the book, some scholars deem the distinction between legal rules and other social rules either as an abstractive construal of positivist state-centred theories, or else as a factual consequence of historical political arrangements. Such scholars say that nowadays the growing pluralism of normative orders makes this distinction outdated and exhort legal theorists to dispose once and for all of the fictitious idea that law is something separate from ordinary life. In reality, they conclude, the legal and the broader social are so intertwined that no distinctive line among good manners, religious precepts, and positive legal rules can be drawn. In contrast, there are scholars who believe that such a distinctive line, although difficult to find, exists and is constitutive of law's nature. They claim that the legal practice actually possesses some specific qualities that make its products unique and normatively prior to the products of other types of normative orderings, and that legal theory is the proper field in which these qualities must be identified and examined.

In my opinion, the first stripe of scholars convincingly demonstrate that, whether or not the distinguishing line between the legal and the social domains exists, today the inquiry into the nature of law requires a novel theoretical approach and more adequate tools of analysis, freed from the tacit assumption that law is only what the state wants it to be. At the same time, however, the profound changes that I mentioned above require legal theorists to take the pragmatic bearings of their conceptual proposals into due account and thus to pay due heed to what is involved in expanding the domain of the legal. In fact, what is at stake in this quarrel is not a mere clarification of the meaning of law; nor does it merely lead to a better understanding of a familiar institution. What is at stake here is the *stock of symbolic power that is inevitably linked to the term 'law'*. Enlarging the domain of the legal, as I will argue in this book, always involves a re-allocation of power and legitimacy. Defining something as law, and, more in general, defining something as something entails the power to say what must be included and what excluded, what belongs to

a genus and what does not, what should be recognised as having certain prerogatives and prior claims and what should not. This is why defining cannot be merely seen as an analytical job, in that, as Pierre Bourdieu stresses, categories have the

> the etymological sense of collective, public imputations (*katègoreisthai* originally meant to accuse someone publicly), collectively approved and attested as self-evident and necessary. As such, they contain the magical power to institute frontiers and constitute groups, by performative declarations [...] that are invested with all the strength of the group that they help to make (Bourdieu 1990, 170).

As a consequence, the inclusion of religious, business, or nongovernmental normative entities, which once were considered as non-legal, into the realm of the legal, and, even more significantly, the dissolution of the very idea of the legal as a special field of society, inevitably exerts pragmatic effects on social reality. The qualifier 'legal' bears with itself a claim to independence, autonomy, self-government, which is not necessarily associated to the much more extensive qualifier 'normative'. This is the reason why the battle around the use of the term 'legal' starts off as partly and necessarily theoretical, but then becomes political more quickly than other conceptual battles.

In this book I cannot discuss these pragmatic effects.[4] Nonetheless, I will try to cast some light on the crucial importance of the question as to what law is and its relation to society while pursuing two different but related aims. On the one hand, I will argue that the pluralist challenge must be taken seriously. I will show that most of the traditional attempts to pin down the specific properties of law have fallen short. This should compel us to recognise that law is a far more articulated and multifaceted phenomenon than the state legal order and that 'legality' can be neither considered as the exclusive property of a given social entity (such as the modern state) nor confined to a narrow lapse of time (such as Western modernity). On the other hand, I will claim that the plurality of laws cannot be confused with the plurality of normative entities, and that 'legality' is a special subset of the broader field of social (or 'jural', as I will call it later) normativity. I will provide the ground for holding that, even though legal entities and normative ones have many traits in common, the legal is a very particular field of society and that it is up to legal theory (appropriately supported by other approaches and methodologies) to identify its distinguishing marks. Yet, as I will argue, this does not imply the conclusion that in a given geo-historical context there can be only one law. As the history of both premodern European countries and colonial realities show, there can well be more than one type of law claiming to exert a jurisdictional supremacy on a given territorial area and/or on a given set of subjects. However, it is my contention that this does not mean that every group, association, and/or field, which produces rules of its own, can be straightforwardly considered as legal, despite the influence on official law they can wield. In brief, the main proposal of this book will be to justify the claim that, albeit we cannot by any means deny the existence of a plurality of legal orders, we cannot simply accept the conclusion that every normative ordering is in itself legal.

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[4] I deal with this topic in Croce (2011b). More in general, see Roberts (2005) and Heydebrand (2007).

In other words, I will argue that we need a highly pluralistic theoretical approach, which however may be able to help determine what distinguishes the legal from the broader social and, therefore, whether or not something can be defined as legal.

Theoretical Backdrop

In the ten chapters comprising the present book I will tackle four main issues: the nature of law, the nature of normativity, the relation between law and society, the borders between legal and non-legal normativity. Such a far-reaching inquiry will necessitate a multi-sided and interdisciplinary approach. My arguments will draw on studies developed in the fields of jurisprudence, legal sociology, legal anthropology, but also social theory, history of law, and history of ideas. Although I do think this conceptual strategy to be indispensable to the achievement of my aim, I cannot omit that each of these fields adopts a specific approach and follows a rigorous methodology, which, more often than not, cannot be easily translated into the approach and methodology of the others. This is why I want to clarify the scope, the aims, and the methodology of my work carefully.

In my opinion – and this is one of the main claims of my book – there is no point in accentuating the divide between legal theories that prospered inside the state and those that today are emerging as a reaction to the undeniable legal centralism of the former. Rather, it is important to understand and stress the extraordinary affinities among some theoretical paradigms, which at first sight seem to be at odds with each other, whereas in reality reach very similar conclusions about the nature of law. A thoughtful and pondered integration among them can not only show that significant authors, in spite of their different conceptual argot, have actually dealt with the same problems and have noticeably contributed to elaborating workable solutions; an integration among them can also amend and reinforce such solutions, and can also make sense of some of the puzzles that they have left unsolved. More specifically, I will canvass the proposals of some exponents of three leading schools of thought, or fields of study, who have remarkably contributed to a better understanding of legal phenomena. The mentioned schools are *legal positivism*, *legal pluralism*, and *classic legal institutionalism*. Especially in Parts I and II, I will examine what some of their leading exponents have argued about the nature of law and its relation to society. Yet, my objective will not be a detailed exegesis of these scholars. I will rather try to assess and compare their thinking on the nature of law and on the way it affects social reality in order to think *with*, *against*, and *beyond* them.

In Part I, I will mainly consider legal positivism. I will first explain the reason why some of its leading representatives (such as John Austin and Hans Kelsen) have been so preoccupied with defending the idea that law is a set of coercive rules issued by state officials. However, this will be instrumental in the examination of what I deem to be one of the most impressive as well as intriguing attempts to define the nature of law, that is, Hart's 'practice theory'. In my view, Hart's is the most robust and at once most instructive attempt to produce a positivist conception of law. By

exploring his proposal, I will pursue a twofold aim. On the one hand, I will suggest the limits of a positivist understanding of law. On the other hand, I will develop what I will call a 'rule-based model', which is a crucial, although not sufficient, step towards the definition of the core nature of law. In trying to achieve such a twofold aim, I will show that Hart has provided the ground for a pluralistic understanding of law, although he himself was reluctant to support it.

In Part II, I will focus both on legal pluralism and on legal institutionalism. I will start off by examining the conclusions of Part I so as to understand whether or not the impasse of the rule-based model is a conclusive reason for us to accept that the line distinguishing the legal from the social is a theoretical construct, which has no actual counterpart in reality. This will be a suitable pathway to enter the variegated world of legal pluralism. I will briefly examine three kinds of pluralism and the types of reasons they offer to sustain that the law is an intrinsically plural phenomenon. In particular, I will focus on Eugen Ehrlich and Santi Romano (first type), Sally Falk Moore and Marc Galanter (second type), Sally Engle Merry and Brian Tamanaha (third type). I will examine how they deal with the dilemma of the definitional stop and the ways they suggest for solving it. In doing so, I will argue that, despite their generally declared anti-positivism, some of these authors precisely arrive at the conclusions reached by Hart and that therefore their proposals are affected by the same problems affecting the rule-based model. As a possible way-out, I will first call attention to the proposals of Adamson Hoebel, who sets forth a view of law that, if properly amended, is fully compatible with legal pluralism and is immune to its main defects. This analysis will allow me to turn to legal institutionalism, some of whose exponents have put forward a sound hypothesis on law, which is able to combine an institutional view with both legal positivism and legal pluralism. I will argue that the cradle of this institutional view was the Italian legal culture of the first half of the twentieth century, of which Santi Romano and Widar Cesarini Sforza were prominent representatives.

The analyses developed in the first two parts of the book will be instrumental in identifying two necessary but insufficient elements for capturing the core nature of law, that is, the *formal structure* and the *selective nature* of law, which I will concisely address in the next section. To these elements, in Part III I will add a third necessary one. To achieve this, I will draw on very different kinds of analysis: from legal sociology and legal anthropology to the history of law. This wide-ranging approach will allow me to pay due heed to the various aspect of the legal domain. It is worth mentioning that, in Part III, I will mostly look at the processual side of the legal practice. In doing so, I will claim that law is not only a special set of rules, with a given structure and a given function; indeed, the legal field is above all a theatre of interaction and discussion for social subjects to change social reality by applying the rules and categories of the legal field.

To develop this complex strategy, it is vital that legal philosophy, legal sociology, legal anthropology, and legal history may be brought together, so as to appreciate the many aspects of law from very different angles. By way of this multidisciplinary approach, I will be able to provide an image of law as a dynamic space, which retroacts on social reality in a very special manner. I will portray law as a discursive

contest, in which social subjects can renegotiate their surroundings and revise widespread social meanings. In my opinion, only this wide-ranging view can make sense of the role of law in the construction and maintenance of social order.

At the same time, I believe that in order to develop this view of law and to capture how law affects social reality, one should also concentrate on the much broader phenomenon of social normativity. This is why, although philosophy and other kinds of approach must proceed hand in hand, the role of the former cannot be undervalued. In effect, today there is a widespread tendency to sociologise and historicise the philosophy of law. This tendency can be useful inasmuch as the reference to factual circumstances helps uncover some of the tacit presuppositions of traditional legal philosophy, such as the identity between the law of the state and *the* law, which too many philosophers in the last two centuries have taken for granted. It is undeniable that the recent experience of modern state – which appears rather brief if compared to the millennial history of law – has moulded the perception of legal phenomena in such a way to establish the mentioned identity. In contrast, as I have already said and as I will explain in more detail in the book, many studies in the fields of legal history and legal anthropology have contributed to disproving this biased tenet. Nevertheless, it is my claim that legal philosophy cannot be seen as ancillary; let alone as unnecessary. Among other things, legal philosophy, at least as far as I understand it here, is an essential reflection over the conditions that allow to define something as legal. Legal philosophy is called upon to justify the argumentative conditions allowing to assess certain statements about law as meaningful and others as meaningless. Legal philosophy is the laboratory in which important conceptual tools are produced in order for legal scholars to talk about their subject matters. Such tools serve as an indispensable component of a broader lexicographic apparatus, which all legal scholars employ every time they use terms such as law, legal, legality, legal validity, and so on. It is my opinion that, to account for the composite phenomenon of law, legal scholars cannot merely look at social reality and describe the way it works. In every description of law, and even more profoundly, in every description of reality, many conceptual categories are at work, even without legal scholars being aware of that. More in particular, as I will argue in the book, in order to differentiate between legal rules and generally social rules – as well as in order to deny that such a difference exists – one should previously determine what a rule is, which role such rules play in social life, and even how rules are connected to knowledge and interaction. Short of robust conceptual tools, developed in the field of legal philosophy (and philosophy in general), no legal scholar can answer these questions in a convincing manner.

Because of this, I believe that any sound inquiry into the nature of law should be based on very different types of analysis, which may integrate and amend each other. My own inquiry will be devoted to analysing the nature of law by understanding the particular way law shapes social reality. As I will briefly explain in the next section, the final argument of my book will be that law is a special trans-sectional venue, with some specific properties, in which subjects can renegotiate social reality. I will provide a specific image of law, its set of rules, its categories, and its language as functionally instrumental to the construction and maintenance of a special area.

In this area, social subjects – who inescapably live in a highly fragmented and fractured social world – can enjoy an *as if*, in which they are forced to adopt the same categories and to apply the same rules in order to provide a shared account of social reality. To justify such a hypothesis, I will previously examine the way rules work in social life, the different types of rules, the different types of practices that such types of rules contribute to building, and other relevant topics. This is why I believe this book to be a contribution in the field of legal philosophy, with the final aim of enlarging its horizons and overcoming some of its traditional impasses.

The Book: Structure and Aims

As I have so far argued, I mean this book to contribute to the understanding of what law is and its role in the ordering of society. At the same time, it is also a plea for rethinking legal theory and its role in the analysis of legal phenomena. It is important to regard these aims as strictly related in order to decipher a contradiction that may seem to be affecting my purpose. In fact, on the one hand, I will support the hypothesis that law is a very special field, whose inner nature is intrinsically connected to its being distinct and separate from every other field in the social theatre. On the other hand, I will argue for a pluralistic view of law, or rather, a comprehension of legal phenomena claiming that social reality is characterised by the constant possibility that two or more laws can operate side by side in the same geo-historical context. How can one say at one and the same time that the law is something unique and special and that it can always be plural? My gamble is that we can cast some light on law's being a plural phenomenon precisely by capturing its special nature. To achieve this, I will focus on social and legal normativity trying to show that distinguishing them from one another is crucial to a thorough comprehension of both. In this regard, Frederick Schauer (2004) correctly notices that we cannot simply accept as a trivial assumption that law is a "limited domain". It will be part of my argument in this book that a solid inquiry into the nature of law requires a careful analysis of the difference between social and legal normativity, of what really distinguishes them, and of the degree and value of this distinction (what Schauer calls the 'how much'). In saying this, I am convinced that "[w]hen we ask whether law is slightly or greatly a limited domain we thus ask a question whose answer takes us far towards understanding what law does and how it does it" (Schauer 2004, 1916). My analysis also aims to investigate whether the distinction between legal and social normativity and the separation between the legal and the social domains are the mere product of some sort of social differentiation and specialisation, or whether, on the contrary, it is a constitutive element of law, which qualifies the very same nature of law. In the following pages I will address the kind of analysis I will undertake throughout the book and, in doing so, I will also provide a brief synopsis.

The title brings up the two poles of my general argumentation: *law* and *social order*. It also reveals my fundamental conviction about the nature of law. Law is self-sufficient, although in a particular sense, that will become clearer chapter by

chapter. But I would like to clarify in advance that, in my view, 'self-sufficiency' is not the same as 'autonomy'. The two terms may overlap and in effect they tend to be confused both in the everyday language and in the special languages of social sciences. I think it is important to differentiate them inasmuch as we want to understand the way in which law relates to social order. As far as I can say, most of the legal thinkers who were interested in law's being a special sphere of social reality have tried to establish if and how law is autonomous or semi-autonomous from what it is designed to regulate, govern, control, or discipline: in a word, from *society*. In this reading, studies concerning law's autonomy have started off by two premises: firstly, that law develops according to an inner logic, which is quite independent form the broader logic of social development; secondly, that the set of legal rules is always characterised by a gap in relation to the several non-legal entities populating the social, which produce many kinds of regulations of their own.[5] I reject these premises not so much because they are flawed, but because in my opinion they do not provide a workable point of departure for understanding the nature of law. I believe that a simple basic divide between law and society is untenable. Such a dyadic view, law/society, is a theoretical construct, a mode of representation. The complex relation between them can hardly be represented by any simple dyad. This is why I refuse any bare contraposition, such as law and culture, law and society, law and morality. Not only is there no single law. But above all there are no single society, culture, and morality. I am committed to, and my book will try to justify, a *radically pluralist standpoint* seeing human activity and its numerous productions as intrinsically plural and multifaceted. Society is a set of intertwined social practices, institutions, organisations with no single centre from which they radiate. As I will argue at the end of my book, this pluralistic understanding of social reality throws some light on the role of law in the geo-historical context in which it is at work.

My pluralist vantage point, however, does not rule out the possibility that we can find reliable conceptual criteria that may help us understand and assessing the difference (that I believe to exist) between what I will generally label as 'the social' and 'the legal'. Indeed, this is one of the main goals of the present book. This explains why, in Parts I and II, I will mainly concentrate on how the prominent authors I have mentioned above have tried to uncover and conceptualise the line separating these two realms. At the same time, I will pay much heed to the way in which the pursuit of this line has significantly affected the outcome of their theoretical inquiries. As I said above, mine will not be an exercise in literature reading. In fact, I will interpret their proposals and suggestions (sometimes contrary to their self-interpretation) in such a way as to show that they deal with the same kinds of problems and offer highly compatible solutions, which in my view should be integrated in order to provide a much stronger theoretical account. In Part III I will offer my own view on the problems discussed in the preceding parts. In doing so, I will capitalise on my personal interpretations of these authors and will further elaborate and strengthen the theory emerging out of their integration. But now I can offer a sketch

[5] See also Tomlins (2007, 46).

of my general argument. I will adopt the problem of autonomy/self-sufficiency and the relation between the social and the legal as basic guidelines.

The issue of autonomy has been widely debated in the field of legal theory. For example, in the ambit of jurisprudence, Brian Bix (2003) has provided a concise view on what legal autonomy means and implies. He argues that the idea of legal autonomy is based on the fact that legal reasoning and legal decision-making are self-sufficient as compared to other forms of reasoning or decision-making. More in general, Schauer (2004) convincingly claims that legal positivists, and in particular the pioneers of this school of thought, expended significant efforts in trying to portray law as something distinct from the social. He praises their struggling to understand law as a 'limited domain' that has many relationships with morals, politics, religion, and other spheres of social reality, but remains separate from them all. Schauer mentions the works of Hobbes, Bentham, Austin, and Kelsen in order to prove that legal positivism emerged precisely as an attempt to stress law's being different from seemingly similar domains. I will start off by arguing that this reading is sound. Still, I will devote many pages of Part I to showing that positivists were not only concerned with the independence and autonomy of law, but also with the independence and autonomy of legal theory. Still, in arguing so, I will not provide neither a historical nor a conceptual reconstruction of legal positivism. It will be my purpose to demonstrate that positivism, as a theoretical enterprise, collapsed precisely when one of its leading representatives, Hart, resorted to shortening the distance separating both the legal from the social and (I would say: consequently) conceptual analysis from sociological inquiry.

In Chap. 1 I will argue that Austin and Kelsen, whom I take as basic prototypes of two different ways of elaborating a positivist view of law, were primarily intent on setting the borders of jurisprudence. Austin's insisting on the fact that the subject matter of jurisprudence must be positive law was instrumental in defining the borders of this new science: he believed that legal theorists are called upon to provide criteria for determining whether something is legal or not. According to Austin, they must simply ascertain if what is under scrutiny is the command of someone who is habitually obeyed by the bulk of the population and which has no habit to obey anybody else. Kelsen thought that this view turned out to render legal theorists into sociologists called upon to scrutinise effectual reality in order to verify if such commands are socially efficacious. He thus proposed a 'purifying' amendment to legal positivism. Legal theorists must provide a description of law as it is, regardless of whether it is concretely obeyed. It should not surprise us, therefore, that sociologists of law and their tendency to match the social and the legal domains were the main target of Kelsen's criticisms. In his view, law can only be understood if we think of it as a separate domain and if legal science provides specific conceptual categories that may account for what a legal order is and how it differs from other types of social ordering. In short, Austin's drawing the borders of jurisprudence and Kelsen's defending the pureness of legal theory were crucial steps towards the constitution of an autonomous discipline and towards an understanding of law as a limited domain.

Of course, such an enterprise could not be totally free of defects. The main flaws were an high degree of theoretical abstractness and quite a counterintuitive

implausibility of some basic tenets. This is the reason why I believe Hart's thought to be so important. As a respected representative of the positivist school, who however has ever tried to eschew its abstractness, Hart constitutes at one and the same time *the apex* and *the collapse* of the positivist enterprise. As I will argue throughout the book, the legal positivist Hart manages to provide one of the most robust theories of legal pluralism. Just in trying to show that law forceful pluralist institutionalism is a limited domain,[6] Hart proves that law is a plural phenomenon. This is why my concern will not be with Hart's theory of law *per se*, but with the lesson we should learn from his struggling to refute many of the paradoxes which several positivists authors incurred. In Chaps. 1, 2, 3, and 4 (comprising Part I) I will seek to show that, in the very same attempt at confuting some conclusions of these thinkers, Hart turns out to jettison legal theory as a separate field of study and, more importantly, to jettison law as a separate sphere of social reality. Part I will be entirely dedicated to examining the striking paradox I am discussing here: one of the soundest justifications of law as a special sphere of reality leads to the conclusion that such a sphere is not special at all. My basic line of argument will be that Hart elaborates a very robust conception of normativity (in particular the conception that emerges out of the original version of *The Concept of Law*, which I will address as a book highly influenced by Ludwig Wittgenstein's teaching and by the philosophers of ordinary language). By analysing and, at least to some extent, revising some of the theoretical pillars of Hart's book, I will argue that his conception of normativity does account for the role that rules play in everyday (not legal) life and that, as a consequence, his model of law is by no means a model of law, but a sound analysis of rule-governed contexts in general.

In this kind of inquiry I will take Hart as a basic prototype of all theorists who try to justify the law with no recourse to other elements but law's own formal structure. In effect, Hart programmatically disposes of *coercion* and *morality* as two typical, although opposed, ways of accounting for the nature of law. He purports to demonstrate that law, at least from a conceptual and foundational vantage point, is thoroughly separate from other spheres of reality, such as politics (and its monopoly on coercion) and justice (and its ties with conventional morality). Hart believes that, if we really think of law as separate from other spheres of reality, we must avoid recurring to aspects, such as coercion or moral elements, that belong to non-legal spheres. He is persuaded that what he calls 'rule of recognition' is really able to distinguish what belongs to the legal domain and what to the larger domain of the social. In examining Hart's lines of reasoning, it will be my concern to demonstrate that the relevance of his fascinating attempt at justifying a fully autonomous legal domain is not confined to analytical jurisprudence. Indeed, the vindication of what I will call a 'rule-based model' would exert many beneficial effects on other fields of studies, in which, as I will illustrate, many thinkers have striven to capture the

[6] I agree with Schauer when he claims that "[m]uch in Hart's work might be understood (though perhaps not by Hart) as assuming that law is [...] a limited domain" and he believes that "rules of recognition distinguish the norms or sources (or anything else) of the law from the norms and sources available in the larger society" (Schauer 2004, 1917).