The Concept of Law from a Transnational Perspective

The aim of the book is to bring together the fruits of different traditions in legal philosophy and employ them with an eye to developing a systematic thesis on the concept of law. The respective strengths of each tradition can thus be used to elucidate the phenomenon in question. The underlying question is how current phenomena of transnational law are best understood by legal theory. The traditions dealt with are, on the one hand, Jürgen Habermas's critical theory and, on the other, H. L. A. Hart's analytic jurisprudence. The thesis is that the key to a fruitful dialogue and comprehensive understanding is to appreciate that the concept of law is not state-centered and must reflect relationships to other legal systems.

Jürgen Habermas's theory has been chosen as a foil for developing the problem, for he claims to "reconstruct" social processes against the background of a normative theory. A close reading of *Theory of Communicative Action* and *Between Facts and Norms* demonstrates, however, that Habermas cannot redeem his claim, for in both cases his concept of law is too restricted. In his historical perspective traditional phenomena of transnational law, such as the law of the Roman Catholic Church, the guilds, or business associations are systematically disregarded in favor of a state-oriented interpretation of history. In his fully developed legal philosophy he has to take the "legal code" as a given. Since he presupposes only state-like forms of associations, Habermas is unable to analyze further what kinds of groups can constitute themselves in this way and how their possible interrelations are to be conceived. The consequences of this presupposition for Habermas's further political analyses are shown in the course of discussing three areas of transnational law: human rights jurisdiction, economic integration, and autonomous legal regimes. Because the critique of Habermas is based on a systematic point, it not only exhibits an idiosyncratic failure but also reveals a fundamental problem that has been overlooked by Habermas and his followers in current political theory.

It is at this point that H. L. A. Hart's analysis of the concept of law comes into play. Although Hart writes from an altogether different standpoint and his theory does not cover the same range of topics, it nevertheless lends itself to the modest aim of offering an conceptual analysis of the concept of law, something Habermas had to assume as a given. This is the common point that serves to link the two authors, and it serves at the same time as the key to understanding current phenomena of transnational law. After some methodological clarifications I reconstruct Hart's

analysis developing four theses: (1) It is possible to speak of law at the level of primary rules for it is possible to distinguish legal rules from other kinds of rules (especially moral rules and rules of etiquette). (2) Secondary rules institutionalize practices. As a consequence, legal systems evolve; they need not, however, be municipal legal systems. (3) Legal systems can either rely on conditioned force or on unconditioned force. Relying on conditioned force means that the ultimate sanction is the exclusion from the system, whereas sanctions in systems relying on unconditioned force can be enforced against the will of a person. As legal systems are not necessarily bound up with unconditioned enforcement different legal system can coexist even on a single territory (e.g., church law and state law) and relate to each other. (4) For the possibility of distinguishing different legal systems from the point of view of descriptive legal theory, it is necessary to introduce a third kind of rule (in addition to Hart's primary and secondary rules), which I call "linkage rules." To clarify the notion of linkage rules and establish its place in the legal system, I review Hart's account of international law and his discussion of Hans Kelsen's theory of the unity of national and international law. The ensuing picture makes it possible to conceive not only of established or official legal systems such as states or international treaty regimes but also of unofficial ones. It is thus a suitable framework for analyzing transnational phenomena.

Finally I also show how the argument features within the wider jurisprudential literature dealing with law from a transnational perspective. I characterize the discipline of jurisprudence as being trapped in a false alternative between 'scientism' (analytical jurisprudence) and 'moralism' (Dworkinian theory). Afterwards, I defend the hermeneutic approach pursued throughout this book by showing that two recent extensions of this tradition both fail to re-establish general jurisprudence as a philosophical discipline.