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Abstract—In his later writings, William Twining has been developing the notion of general jurisprudence, the aim of which is to integrate all theoretical approaches to law in a coherent whole. Central to the undertaking is the relationship between analytical jurisprudence and empirical evidence. Twining is critical of analytical jurisprudence for not adequately taking account of empirical evidence. While he has established a suitable framework within which to develop general jurisprudence, the argument in this essay is that the social understanding of law, which is an essential part of general jurisprudence, cannot be achieved by starting with analytical jurisprudence, but needs to be approached through the methodology of interpretive social theory along the lines advanced by Max Weber. This approach has two main advantages: it enables the social understanding of law to be fully integrated into general jurisprudence, and it shows how analytical jurisprudence, rather than being in opposition to social understanding, can contribute to it.

Keywords: concept, description, general jurisprudence, Hart, law, social understanding, Weber

1. Introduction

Among the varied lines of scholarship William Twining has followed in the course of a career spanning more than half a century, the vision of a general jurisprudence occupies a central position. His intention is to unite in a coherent whole all theoretical approaches to law: the analytical and normative, the realist and anthropological, the comparative and the social. His ambition to reach beyond the boundaries of analytical jurisprudence to include those other

†A review of the later work of William Twining, in particular Globalisation and Legal Theory (Butterworths 2000) and General Jurisprudence: Understanding Law from a Global Perspective (CUP 2009) hereinafter referred to as Globalisation and General Jurisprudence respectively.

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approaches to law is practically a vocation, enthusiastically shared with academic colleagues and students alike. My own encounter with Twining has been at the Oxford Centre for Socio-Legal Studies with which he has had a long association, during which he has contributed handsomely in supporting its purposes, involving himself in its activities, and providing advice to generations of students in shaping their doctoral research. Although for Twining the pursuit of a general jurisprudence is a work in progress, it seems fitting as he celebrates his eightieth birthday to reflect on his later work where the foundations have been laid.

While general jurisprudence has many parts and could be approached in different ways, Twining considers the social dimension to be both central and essential to the full understanding of law. Although I have not been able to find a precise statement of what that means, the following reconstruction from the texts captures its three main elements. The first consists in taking account of how law is understood and experienced by those who are engaged with or affected by it. The second is that since law occurs in a great variety of situations and may vary in meaning from one to another, each must be examined. The aim according to Twining is to paint 'a total picture—of the phenomena of law in the modern world',\(^1\) which requires 'many perspectives' rather than a 'black box' approach;\(^2\) it 'needs to work with a number of reasonably inclusive and flexible conceptions of law rather than attempt one master definition or concept'.\(^3\) This takes the enquiry beyond state law to include all other forms of law ranging from informal law to international law. The third and equally crucial element is that only by empirical research can knowledge be gained of how law is experienced and perceived in that multiplicity of situations. Only by entering into them can the concepts expressing law be identified and analysed. Since concepts are the basis of description, they are the building blocks of general jurisprudence, of the landmarks constituting the great jurisprudential map. To omit or neglect the way law is experienced and understood in a multitude of situations across communities and nations is to omit or neglect the social dimension. Jurisprudence without the social dimension is both narrow and sterile, while to include the social dimension requires extensive empirical evidence.

That law occurs in many different contexts and is understood and experienced in various ways seems fairly straightforward, but apparently not to analytical jurists and legal philosophers (using the terms interchangeably), for they are the stumbling block to full inclusion of the social dimension. HLA Hart, whom Twining considers the most important proponent of that approach, both dominates modern jurisprudence and, it seems, casts a shadow

\(^1\) W Twining, *Globalisation and Legal Theory* 88.
\(^2\) ibid.
\(^3\) W Twining, *General Jurisprudence* xix.
over it. Hart did much to modernise jurisprudential thinking, yet, by failing to embrace the social dimensions of law, he inhibited its full flowering. This seems surprising since Hart begins *The Concept of Law* by stating his aim to be ‘to further the understanding of law, coercion, and morality as different but related social phenomena’. Just what Hart meant and how he set about achieving that aim will be considered in the course of this essay, but quite plainly Twining thinks that whatever Hart’s aim he failed to achieve it, producing instead an account that is ‘*a priori*’ and ‘intuitive’. Having characterised Hart in this way, Twining’s goal is to remove the inhibitions and the artificial and unwanted boundaries Hart and his followers have marked out. Only then will the way be clear for an authentic general jurisprudence.

My purpose here is to enter that avenue of ideas about law and society running through Twining’s writings and to suggest ways of building on the foundations he has soundly laid. I shall suggest as the essay unfolds a means for removing the rupture between the two approaches, between analytical legal theory and social understanding, which requires several steps: a slightly unconventional interpretation of Hart that places him squarely within the tradition of social theory, clarification of the nature of social understanding, and building on ideas advanced by Twining. The course I take is unusual for a review essay since I concentrate on two books, neither very recent but both of which unite and advance the strands of thought in earlier work. The first, *Globalisation and Legal Theory* came out in 2000; the second, *General Jurisprudence: Understanding Law from a Global Perspective* in 2009. The justification is that this is as much a review of a set of ideas and arguments as of specific publications.

### 2. Three Themes

Three themes frame the enquiry into the social understanding of law. The first in Twining’s own words: ‘law is an infinitely complex subject and understanding law is an endless and inevitably collective enterprise, a quest that will know no closure’. It must be approached from ‘a multitude of standpoints and perspectives’. No wonder Twining is drawn to Italo Calvino’s account of a city as complex, elusive, and paradoxical, for law according to Twining is just like that. Both law and cities are encountered by participants and observers ‘with different vantage points, concerns, perspectives, and experiences’. The ways peoples and groups, nations and regions, organise themselves are endlessly

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2. ibid, Preface.
variable, yet law in some sense is always present. We encounter the same
diversity of experience and understandings of law within a society, from lawyers
and judges to police officers, welfare administrators and merchant bankers, not
to mention the ordinary citizen. Globalisation, as a core concept in contem-
porary thought, adds to the complexity and variability and becomes a central
idea in Twining’s later work: ‘in an era of globalisation, we are under increasing
pressure to focus on the whole universe of legal phenomenon’.10 Globalisation
breeds ‘cosmopolitanism’: ‘nearly all legal studies are inevitably more or less
cosmopolitan’, which means that not only does law cut across national
boundaries but ‘a wider range of phenomena’, such as non-western legal
traditions and ‘different levels of normative and legal relations and ordering’,
are brought within its compass.11 That law comes in different shapes and sizes,
does not fit any consistent pattern, and turns up in the unlikeliest places, are
familiar refrains to the student of law and society, for that surely is how society
is and law being part of it follows suit. In studying the social dimensions of law,
diversity is celebrated rather than concealed and the most obscure corner of
society is potentially revealing. Much socio-legal research reflects the pattern:
studies of traditional societies, informal social orders, and sets of officials and
professionals, to name just a few, are proof of the many senses of law and how
it is lived. There is neither scope nor motive in this approach for high theory,
for forcing form on fragments, and the mildest generalisations have to be
cautiously hedged.

The second theme, seemingly contradictory to the first, is that, despite the
many faces and forms of law, a general jurisprudence is both possible and
desirable. The idea pervades General Jurisprudence, the more recent of the two
books. It means ‘constructing one or more general conceptions of law that may
be useful for looking at legal phenomena’.12 General jurisprudence means
making ‘total pictures or maps of law in the world’.13 General concepts of law
are the basis of theories of law, which in turn provide ‘concepts for asking
questions, framing hypotheses, and pursuing empirical enquiries’.14 The
formation of concepts has a leading role for they are ‘useful in interpreting,
describing, comparing, and generalising about legal phenomena’.15
‘Conception’ rather than ‘concept’ is chosen to contest the claim of there
being just one concept of law and to allow for different conceptions in different
contexts.16 Conceptual analysis is essential for general jurisprudence but it is

10 ibid 175, 254.
11 Twining, General Jurisprudence (n 3) 56.
12 ibid 103.
13 ibid 184.
14 ibid 107.
15 ibid xix, 117, 228.
16 The concept-conception owes its modern prominence to John Rawls, A Theory of Justice (OUP 1972): the
concept of justice appears in practice in different conceptions. But notice for Rawls behind a conception is a
more general concept. Twining does not explain his understanding of the concept-conception distinction. He has
no need to because he does not think there is one general concept. The distinction itself is, I think, questionable.
not enough; it must include description of legal systems and practices: ‘describing common features of the form, structure, and content of legal systems’. Concepts are ‘the tools of description’. It might at first glance appear bewildering how this all fits together in Twining’s writings. Yet, in my view, it is based on a profound insight into social understanding in general and how it can be used to build a jurisprudence integrating all kinds of law.

The sequence is this: (i) first form concepts: rules, conventions, authority for instance; (ii) use the concepts to describe types of legal phenomena: state law, non-state law, canon law, international law and so on; (iii) from which draw generalisations: all legal orders have rules and institutions, rules are interpreted in a context of understandings and conventions, etc. Out of this enquiry emerges a general jurisprudence the many elements of which form an integrated whole. Among the many issues such an ambitious undertaking raises, I shall concentrate on the methodological sequence, in particular the formation of concepts, their relation to empirical evidence, and their use in understanding social practices.

General jurisprudence, according to Twining, requires several methods of enquiry: analytical, normative and empirical. Since these terms are open to different meanings, brief clarification may be useful as to how they are used in the two books under review. Analytical jurisprudence is concerned with ‘the construction and elucidation of concepts’. Analytical jurisprudence, as the more traditional term, now is often replaced by legal philosophy; for present purposes they are taken to mean the same thing and are used interchangeably. Normative jurisprudence ‘deals with values and the closest relations have been with ethics and political theory’. The third approach to jurisprudence, the empirical, ‘covers any general questions (that are not purely analytical or normative) about legal phenomena in the real world. Empirical jurisprudence, which Twining describes as a ‘rough category’, is closely tied to the social understanding of law, as described above. Since empirical jurisprudence includes conceptual elucidation, there is a link to analytical jurisprudence. A lot of time could be spent examining these

For ‘conception’ we may substitute ‘concept’. Some concepts of justice are general and minimal of content, others are particular and ripe with content.

18 Twining, General Jurisprudence (n 3) 37.
20 Twining, General Jurisprudence (n 3) xviii.
21 Twining, Globalisation (n 1) 190; Twining, General Jurisprudence (n 3) 13.
22 See further Twining, General Jurisprudence (n 3) 21.
23 ibid 13.
24 ibid.
definitions, but it is not necessary for the purposes of this review because, for the social understanding of law, the distinctions among them are of neither significance nor utility. One of my purposes is to show that both the analytical and the empirical are part of that larger task.

Old borders need to be re-drawn, according to Twining, and all three approaches absorbed into one methodology, because ‘most theoretical enquiries’ involve all three.\(^{25}\) All sites of law occurring in a world globalised and cosmopolitan should be included, each site consisting of ‘ideas’ and ‘institutionalised social practices’.\(^{26}\) ‘It is useful’ writes Twining, ‘to conceive of law in terms of ideas (including rules) and of institutionalised social practices (involving actual behaviour and attitudes as well as ideas)’.\(^{27}\) While it is not quite clear what ideas include but go beyond rules, the general point is plain: general jurisprudence must include the way law is perceived and experienced by all who are engaged in making, applying, and enforcing it, as well as all who are subject to or affected by it. Here we have the agenda for general jurisprudence, for a jurisprudence that embraces all legal phenomena where that term is taken in its broadest sense. Drawing on Karl Llewellyn’s notion of ‘law jobs’, Twining proposes, tentatively, a ‘conception’ useful in understanding law from the global perspective.\(^{28}\) This conception of law as a ‘species of institutionalised social practice’ is not intended to be the conception of law or even his conception of law; its basis and its utility are confined to viewing law from the global perspective. Other perspectives, whether state law, non-western traditional law or informal legal orders, need other general conceptions, although what they might be is left open.\(^{29}\) General jurisprudence is not after all out of step with law’s having many forms and faces, but to capture them all several conceptions are needed. This does not rule out the scope for generalisation within each type of law and legal experience, and just as law is irreducibly plural in its faces and forms, it follows that generalisations must be correspondingly so.

A third theme is that general jurisprudence has to be empirical. Law is a social phenomenon the understanding of which, like any social phenomenon, requires empirical knowledge. Empirical knowledge, that is, of ‘actual legal institutions, processes, rules, etc’.\(^{30}\) The need for empirical knowledge forms part of the ‘central thesis’ of the later work: as the scope of general jurisprudence widens and becomes cosmopolitan to include all those legal sites referred to, it ‘needs a more empirical orientation at the core of legal scholarship’\(^{31}\). Why the need for empirical knowledge should be more pressing

\(^{25}\) ibid xviii.
\(^{26}\) ibid xix.
\(^{27}\) ibid.
\(^{28}\) ibid 117.
\(^{29}\) ibid 56.
\(^{30}\) ibid 55.
\(^{31}\) ibid 56.
as the range of legal phenomena increases is not clear; if empirical knowledge is essential to general jurisprudence, it will be so whatever the range. But the central thesis stands: an adequate general jurisprudence must have an empirical foundation.

The central thesis rests on two pillars: one requires empirical research in forming concepts, while the purpose of the other is to build an ‘empirical science of law’. As to the first, analytical legal philosophers, whose leaders are HLA Hart and Joseph Raz, are guilty, according to Twining, of working: ‘in almost complete isolation from contemporary social theory and from the empirical research of socio-legal studies, with little overt concern for law in action’. Whether this is an accurate description of analytical jurisprudence is questionable. Hart and Raz but many others, including contemporaries such as Julie Dickson, John Gardner and Leslie Green, as well as great figures from the past such as John Austin and Jeremy Bentham, all draw in some way and to some degree on empirical knowledge of law. I hope to show in the course of this essay that such a sharp division between analytical jurisprudence and empirical knowledge cannot be sustained, that drawing the battle lines in this way hinders rather than advances Twining’s ambition for a general jurisprudence. As for the empirical science of law, we are said to be a long way from reaching it. Apart from a few unsatisfactory attempts, generalisation about law based on empirical research has barely begun. Until we have ‘a stock of precise, refined, testable, general hypotheses that have the potential to be developed into evidence-based generalisations’, general jurisprudence is incomplete.

The social understanding of law turns out to be the foundation of general jurisprudence. By what method is it to be achieved? Twining starts with the analytical legal theory he attributes to Hart, accepts it is an essential element of general jurisprudence, then condemns it as un-empirical and of scant use to a social perspective. An alternative to this rather puzzling approach, the one I propose here, is to start not with analytical legal theory but instead with the classic method of social understanding, by which I mean the interpretive method in which Max Weber occupies a central place, a place similar to that of Hart in jurisprudence in the 20th century. The interpretative method was not invented by Weber nor has it stood still since; yet he remains the formative figure in its modern exposition. The virtue of this approach is the positioning of the social understanding of law within the wider tradition of social enquiry. It shows how legal theory contributes to and forms part of the

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32 Twining, Globalisation (n 1) 190; Twining, General Jurisprudence (n 3) 56.
33 Twining, General Jurisprudence (n 3) 258 ff.
34 Twining, Globalisation (n 1) 36; Twining, General Jurisprudence (n 3) 24.
35 Twining, General Jurisprudence (n 3) 260.
38 Giambattista Vico is the major earlier figure: G Vico, New Science (first published 1725, Penguin 1944).
social understanding of law rather than being an opponent of it, while in the process clearing up a persisting puzzle about Hart.

My starting point is Twining’s contention that analytical jurisprudence isolates itself from a more thoroughly social approach. The contention centres on the nature of concepts, and on how they are formed and used in social understanding. While sharing Twining’s view that concepts are the currency or tools of social understanding, and the basis for classifying types of law and legal experience, they are, I suggest, best approached through the method of Weberian interpretation rather than from that of analytical legal theory. The Weberian approach, which I here modify in some aspects, has two stages: the first is to identify the concepts implicit in social practices (Stage I), the second to use such concepts to reflect back on social practice to test to what extent it matches the concept and to what extent evidence is left over from which to construct other concepts (Stage II). A complete account would go further and explain the origin of concepts in the historical and material conditions of society (Stage III).

Since the ideas of Hart are for Twining a point of reference, I show how Hart’s approach to concept-formation fits the Weberian method, indeed could be seen as a fine example of it. The result of this analysis is a scheme of understanding integrating three types of enquiry: conceptual analysis, generalised description, and localised understanding of law. It provides the framework within which to continue Twining’s quest for a general jurisprudence that is sound in method and socially authentic.

3. Alleged Shortcomings of Analytical Jurisprudence

In understanding the point of a social perspective in understanding law, it helps to consider the shortcomings Twining and others find in analytical jurisprudence. The main target is Hart, whose lectures inspired Twining as an Oxford undergraduate, but whose writings, The Concept of Law in particular, later disappointed. ‘Hart’, writes Twining in the earlier book, ‘re-established links with philosophy and provided some powerful tools of analysis of potentially wide application’.39 The link is ‘conceptual elucidation’ which is vital ‘in any approach to the understanding of law’.40 It is ‘the key to reviving general jurisprudence’ and is essential to social and normative explanation of law.41 Analytical concepts are useful in ‘interpreting, describing, comparing, and generalising about legal phenomena’.42 Hart is commended for declaring that the concepts of The Concept of Law are of use not only to analytical jurisprudence but also to ‘descriptive sociology’.43 In the globalised,

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39 Twining, Globalisation (n 1) 35.
40 ibid 36.
41 ibid 39.
42 Twining, General Jurisprudence (n 3) 443.
cosmopolitan world, the identification and clarification of concepts are crucial to knowledge and understanding of the many forms of law.

In the more recent book, *General Jurisprudence*, Twining’s enthusiasm for Hart wanes. Though his position in defining modern jurisprudence is secure, Hart and others of like mind fall short on two counts: one is the range of legal phenomena thought worth investigating, the other a flawed method in failing to take account of empirical research. As to the first, Hart advances knowledge of concepts such as rules, including the rule of recognition, what it means to accept rules, and how different kinds of rules combine to form a legal order. This is valid and useful but the range is too narrow; it is restricted to the law of nation states and leaves out non-state law. The questions Hart asks come from lawyers’ practice and are too narrow; they neglect ‘discourse about law’ by which Twining means: ‘talking about law across legal orders, jurisdictions, levels, traditions, and cultures’. From that discourse, a new set of concepts appears, such as institutions, corruption, torture, lawyers, disputes, courts, jurisdiction and unmet legal needs. This is not so much a criticism but a plea to legal philosophers to cast their analytical gaze over a host of concepts essential to a cosmopolitan world. The rejoinder could be that Hart and Raz, together with numerous other jurists, have done much more than Twining allows, including refining concepts in criminal law, causation, authority, obligation, rights, and much else. If is added more recent work by legal philosophers on the philosophical foundations of the common law, on criminal law and criminal justice, on constitutional and administrative law theory, and on concepts of international law, the conclusion must be that there now exists a huge corpus of conceptual–philosophical analysis ranging across the legal spectrum. There is always more to do, especially if, as Twining suggests, we are engulfed in law as never before, where there is ‘high priority for general analytical jurisprudence with a broad agenda’, a priority legal philosophers might contend they are doing their best to meet.

It is one thing to tell legal philosophers they need to do more, quite another that what they are doing is not much use and is done badly, which is the tenor of the second charge. Conceptual elucidation, at least the kind certain legal philosophers do, turns out not to be as pivotal to general jurisprudence as Twining claimed in earlier work. In Twining’s words: ‘a priori, intuitive analysis of concepts divorced from empirical knowledge of actual legal institutions, processes, rules, etc. will not add much to our understanding of law’. Putting
aside for the moment whether this is an accurate account of analytical jurisprudence in general, and of Hart’s in particular, it is a relief to learn that conceptual analysis is not wholly condemned; it is still ‘a necessary part of empirical and normative enquiries about law’.49 The concession comes with a sting: ‘such analysis needs to be sensitive to advances in our empirical knowledge of the real world’.50 Behind the soothing ‘sensitive to’, we find the cue to the main contention: the concepts of analytical jurisprudence cannot stand apart from and are ‘vulnerable to the demand of a posteriori (ie empirical) theory construction’.51 Although not subscribing to the full force of this ‘naturalist’ approach, Twining insists that analytical jurisprudence and empirical legal studies need to be more closely linked.52 Hart’s achievement in redefining analytical jurisprudence would have been even more impressive had he not ‘proceeded in almost complete isolation from contemporary social theory and from work in socio-legal studies’.53

Hart embraces the idea of law as a social phenomenon in a certain limited sense in his general theory of law, but, according to Twining, he and others fail to follow through on their insight in this regard. They fail adequately to realise the central role that empirical evidence and social theory must play in understanding law. In doing so, Hart and Raz ‘failed to resolve the tension between emphasising that law is a social phenomenon and refusing to consider it empirically’.54 This understanding of the social and empirical context of law should not be downplayed, or worse, ignored, for if it were, the resulting concepts would be not merely incomplete but misleading. Exhortation to be ‘sensitive to’ empirical knowledge becomes an imperative: ‘Philosophers who wish to understand legal phenomena need to equip themselves with local knowledge.’55

4. Stage I: Concept Formation from a Social Perspective

What philosophers should do with local, empirical knowledge is the problem. Neither Twining, nor fellow critics sharing his views regarding the critical role of empirical work in understanding law, make clear how conceptual analysis and empirical knowledge relate to each other.56 The intuition that they do so is never made concrete, one reason being that the relationship between the two, between analytic and synthetic knowledge, is itself a complex philosophical

48 Twining, General Jurisprudence (n 3) 55.
49 ibid 56.
50 ibid.
51 ibid 55. Twining relies on B Leiter, Naturalizing Jurisprudence (OUP 2007).
52 ibid 56.
53 ibid 57.
54 ibid 58.
55 ibid 59.
56 See Leiter (n 52) and N Lacey, ‘Analytical Jurisprudence versus Descriptive Sociology Revisited’ (2006) 84 U Texas L Rev 944.
issue about which philosophers disagree. Critics of analytical jurisprudence, normally content to wade in the shallower waters of social theory, might wisely avoid the deeper currents of epistemology for which they are not well equipped. The more telling reason is the way Twining and other critics of analytical jurisprudence begin the search for a social understanding of law: they start with philosophical legal theory and wonder why it tells them little about law in society. This is a curious place to start: legal theory concerns itself with the analysis of concepts that occur in social phenomena but it neither pretends to, nor is qualified to, provide the full social understanding of the phenomena in the sense of ‘social understanding’ that Twining and others advocate.

The discipline of social enquiry, on the other hand, of which the interpretive method forms one main stream, is much more suitable as a starting place, since it has well developed methods of enquiry and a long record of research into law in society. Given the goal of social understanding, critics of analytical jurisprudence should feel at home here, yet curiously they rarely engage with it, nor invoke the names of those to whom its modern development is attributable, especially Max Weber. Considering Hart and Weber were not strangers, such neglect is all the more puzzling. That Hart knew Weber’s work we know; that Hart’s method of analysis is essentially that of Weber has gone unnoticed. Rather than assuming that Hart is constricted by a certain kind of philosophical paradigm, let us consider his writings through the Weberian interpretive method. This presents a fresh perspective on Hart, clears up the meaning of the remark that his account could be regarded as ‘descriptive sociology’, and shows how analytical jurisprudence contributes to a social understanding of law.

Weber’s approach is central to social understanding for two reasons: one is his contribution to the interpretive method, the other is the use of ideal types. The interpretive method has two stages. The first is to construct concepts from social action; the second is the use of the concepts to reflect back on social action. ‘Social action’ occurs in an encounter between persons; it is the basic unit of society. Social understanding is acquired by examining social actions, which depend on the meanings the parties attribute to them. Social enquiry is, in Weber’s words: ‘a science concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences’. The assumption is that people’s actions are guided by

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57 For background analysis, see J Hospers, An Introduction to Philosophical Analysis (Routledge & Kegan Paul 1956); F Johnson, Alienation, Concept, Term, and Meanings (Seminar Press 1974).
58 Weber’s name is mentioned eight times in the two books under review but without discussion or application.
59 Amongst Weber’s prolific writings, the following are the main sources of interest for the methods of social enquiry generally and the social understanding of law in particular: Economy and Society (n 37); Max Weber on Law in Economy and Society (M Rheinstein ed, Harvard University Press 1966); From Max Weber: Essays in Sociology (HH Gerth and C Wright Mills ed, Routledge and Kegan Paul 1948).
60 Weber, Economy and Society (n 37) 4.
meanings, so that to understand meaning is to understand action. Weber rejected the idea of an objective social reality outside those subjective meanings.61

Knowledge of meanings is acquired by examining the actions of the parties. Here I shall use the term ‘social practice’ to refer to clusters of social actions. The meaning of a social practice is found by entering the social world and considering what meaning it has for those engaged in it, how they experience, explain and justify what they are doing. Meaning is conveyed through language. To illustrate, a criminal trial is a trial only in the sense that in a community the actors and observers understand a set of actions as a process for determining guilt or innocence pursuant to a set of authoritative standards. The observer can be misled, for the same words, signs, and gestures can have quite different meanings from those assumed. Italo Calvino, an author whom Twining esteems, brings out the point in a strange tale, where at the end of what looks like a criminal trial, with all the usual signs and symbols, the judge, after seeming to convict and pass sentence on the accused, is himself taken out and executed. In presuming without enquiry the event to be a conventional criminal trial, and by failing to consider the meanings the actors attribute to their actions, the observer badly misinterprets what is happening.62

Hart’s approach is that of Weber, whether intentionally or not we do not know.63 Though his name is not mentioned, the elements of Weber’s method of social understanding are there in The Concept of Law. First, consider the nature of Hart’s enquiry: it is an enquiry into law as ‘a social phenomenon’,64 which is made up of ‘social practices’, that is, social actions.65 The social practice central to a legal order is rule-governed behaviour, to overlook which would be to miss ‘a whole dimension of social life’.66 Next, consider the method of enquiry. An external, predictive approach based on patterns of behaviour is replaced by an internal point of view, which means examining law from the point of view of those engaged in it whether as officials or citizens.67 By observing the meaning they give to their actions, how they explain and justify what they do, or criticise or have hostile reactions to the actions of others, the concept of a rule emerges. Further observation of social life reveals rules as a...
key concept, their discovery being comparable, according to Hart, to ‘invention of the wheel’. They should be ‘looked at from the point of view of those who use them’. Rules have a pivotal place in social life only because the participants attribute to them meaning as standards of behaviour. Rules express the way a group ‘regards its own behaviour’. Since a legal system is made up of rules, the social understanding of law requires investigation into ‘how rules function in people’s lives’. Language is the intermediary between thought and action: the meaning of action, the way people subjectively regard an action, such as following rules, is known from the language they use in speech and writing. The method is ‘the interpretive understanding’ of law as a social phenomenon and matches perfectly Weber’s method. Implicit in Hart’s account, as in Weber’s, is the causal connection between meaning and action: the red light is understood as a signal to stop; it is the meaning on which people generally act. Actions typically follow from, are the result of, the way they think about and construct the social world. Between meaning and action, other factors can intervene to disrupt the causal connection, factors that a complete account of social action should include; but the possibility of disruption does not displace the normal causal relationship.

On Weber’s analysis, the meaning of social action is conveyed through ideal types, a term he uses interchangeably with concepts. In his own words: the aim of social explanation is ‘to formulate type concepts and generalised uniformities of empirical process’. From observation of ‘empirical process’, by which is meant social practices, ‘certain empirical uniformities can be observed’. Such uniformities or ‘typical modes of action’ have meaning for those engaged in them; from such meanings concepts or ideal types are constructed. By studying such meanings, the observer uncovers the concepts implicit in them. The study of rebellion, for example, reveals the various meanings it has for the rebels: protest against abuse, a plea for justice, defence of rights. A less obvious meaning implicit in their actions, although one not often noticed, is a concept of constitution. Perhaps they do not use the word,
but from their words and actions the observer may conclude that they are appealing to a sense of constitution, that a concept of constitution is implicit in the meanings they attribute to their actions. The same process of concept-formation is applicable to any social practice and, as we shall see shortly, this is the method Hart adopts in constructing from legal practice the concept of a rule.

The construction of a concept requires the observer, first, to identify the meanings participants give to their actions and, then, from that to formulate a concept. While emphasis is on the subjective meanings of the parties, the observer comes with a vocabulary of concepts on which to draw, for in order to conceptualise meanings as ‘right’, ‘constitution’ or ‘rule’, the observer has to have a prior idea of a right, a constitution, and a rule. The relationship between the two is variable: the observer’s aim is to capture accurately the parties’ own understanding of their actions; but since meaning is conveyed through concepts, there has to be some common ground between the conventional vocabulary of concepts and the subjective meanings of social action.79

On Weber’s approach, to construct a concept is to ‘abstract from reality’,80 from social practice; it is a process of ‘rational reconstruction’.81 Weber describes the process in various ways. He writes: ‘I had in mind Jellinek’s use of the “ideal type”, as something which is thought to be perfect on logical grounds only’.82 Elsewhere he refers to an ‘ideal-typical concept-construction’.83 As Wolfgang Mommsen adds: ‘[Weber] made it abundantly clear that “ideal type” was meant to be exclusively an epistemological tool, and that it in no way embodied reality as such’.84 Ideal types are, in short, constructions in the mind of the observer made by observing the meanings social practices have for the parties. Ideal types-concepts are constructed from social practice but are not descriptions of social practice. After constructing the concept, the next step is to analyse and make clear its elements, ‘to offer a greater precision’ or, as Weber repeatedly states, to achieve ‘complete adequacy on the level of meaning’, an adequacy or precision not likely to be present in the reality of practice.85 The terms are clumsy and rather obscure, and the inherent tension between subjective meaning and general concepts is left unresolved.86 But the main point is clear: concepts are constructed from social practice; construction

79 See further Weber, Economy and Society (n 37) 69 ff.
80 ibid 20.
81 Benton and Craib (n 38) 80.
83 ibid 10.
84 ibid 9.
85 Weber, Economy and Society (n 37) 20.
86 Weber never fully resolves the tension between the ideal type being closely tied to the subjective meanings of the parties to a social practice and the need to have a prior vocabulary of concepts of everyday use. This should not normally be a problem, since the parties draw on that same vocabulary of concepts in giving meaning to their actions. It can be a problem where subjective meanings are conveyed in concepts that do not exist in the
requires a mental process that is different from description; and once constructed concepts enter the realm of ideas in the mind of the observer.

Hart deals in concepts and does not mention ideal types, yet his method for identifying concepts is Weber’s. According to the Preface, the Concept of Law is an essay in analytical jurisprudence because: ‘it is concerned with the clarification of the general framework of legal thought’. Legal thought is conveyed through language, mainly the language of officials and to a lesser extent of citizens. ‘Legal thought’ consists of the meanings officials give to their actions. By studying the way officials talk, the way they explain and justify their actions, the observer detects patterns of uniform behaviour—Weber’s empirical uniformities—in which the concept of a rule is implicit. Earlier jurists had found in the same behaviour evidence of different concepts, such as sovereigns, commands, sanctions and habits of obedience. Such concepts plainly are implicit in law-related behaviour, their extraction and analysis a proper task of both the jurist and the social scientist. Nevertheless, to miss the concept or ideal type of a rule is to leave unexamined a large part of social practice. Armed with a feel for language and an eye for the concepts encased in language, and guided not only by Max Weber but also by Peter Winch whose treatise on social rules had recently been published, Hart saw the centrality of rules in legal thought and action and their explanatory power. Having then identified two kinds of rules, he concludes:

What we shall attempt to show—is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rules and the interplay between them, are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought.

The general ‘framework of legal thought’ of the Preface is now more exact: it consists of ‘the concepts that constitute the framework of legal thought’. Once

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87 How to construct concepts is the subject of controversy among analytical jurisprudents; see eg Finnis’s critique of Hart: Finnis (n 64) ch 1. The various strands of the debate are well examined in J Dickson, ‘Methodology in Jurisprudence’ (2004) 10 Legal Theory 117. One of the key issues here is to what extent the legal theorist ‘has to be able to discriminate between and make evaluative judgments about participants’ self-understandings in order to pick out which are most relevant in understanding law’s important and significant features’: Dickson, ‘Methodology’ ibid 138. This issue confronts the social scientist applying the Weberian interpretive approach as well as the legal theorist. For further discussion, see J Dickson, ‘Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry’ (2015) Jurisprudence (forthcoming).

88 Hart, Concept of Law (n 4) Preface.


91 Hart, Concept of Law (n 4) 81.
the concepts are identified, their analysis can begin. The following pages of *The Concept of Law* are a prolonged analysis of, a meditation on, the concepts that together constitute the general concept of law. The analysis is directed at identifying the concepts, ideas or ideal types present in social practice, analysing and refining them by reason and reflection, and resolving ambiguity and removing uncertainty. The result is a set of concepts constructed by the theorist from evidence of social practice, which once constructed enter a dimension of discourse and reflection distinct from but connected to social practice. Hart would not recognise the description of his method as ‘*a priori* and intuitive’ in the sense that it is made independently of social practice; to label his method as prior to or apart from social practice is a mis-description.

We are now in a position to summarise the relationship between social practice and conceptual analysis. In the first place, far from being plucked out of the air, concepts for the purposes of social understanding are identified in and drawn from social practice. Secondly, as Weber makes plain, to construct a concept is not to describe a social practice; nor is it generalisation from evidence of social practice or the formulation of an average or standard or focal case of social practice. A concept is instead an idea, a construction in the mind of the observer, logically different from, and constituting a distinct realm of knowledge of, the social phenomenon of which it is a concept. Once constructed, concepts leave the realm of the empirical and enter the mind of the enquirer; on this Hart follows Weber. The third point to note is that concepts are constructed at different levels of abstraction, depending on the concept and the purpose of the construction. At one end, concepts are tied closely to a social practice. The peasants revolting in 1381 protested that their rights were violated. The historian engaged in explaining the meaning of the rebellion has to construct a concept of rights as they are understood in that context. Petitions and proclamations, poems and depictions, counter-claims by their opponents and officials, and the records of observers all provide evidence to help the historian form a concept that captures as closely as possible the meaning in the minds of the rebels. Philosophers in general and legal

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92 Concepts that appear to be abstract and remote from social practice on close examination are likely to have their origins in social practice; in time they become the concepts in common use. The possibility of the philosopher constructing in his mind a concept wholly unrelated to social practices seems remote although perhaps should not be ruled out. To be intelligible it would have to be expressed in or make reference to concepts within the common vocabulary.

93 To talk of a central or focal sense of a concept supposes a non-central or non-focal sense of that concept. However, the non-central or non-focal sense of concept C1 is a different concept C2. Central or focal cases belong not to conceptual analysis but to the different discourse of generalised description of social practices (which requires and follows on from a prior construction of concepts). From the generalisation that legal systems generally have features *abcde*, it might be convenient for various purposes to refer to that as the central or focal case of a legal system, knowing that in practice there are many exceptions. This seems to be the sense of central or focal case proposed by Finnis (n 64) 10, when he states: ‘Because the word “typical” may suggest that the relevant criterion is statistical frequency—I prefer to call the state of affairs referred to by a theoretical concept in its focal meaning the *central case*’. There is just one ambiguity: does ‘in its focal meaning’ refer to the theoretical concept or the state of affairs from which the concept is constructed, that is, actual legal systems?
philosophers in particular often have different purposes: they are concerned with concepts at a more general and abstract level. In analysing rights, Raz’s purpose is to construct a concept that catches their core sense, their universal qualities. This requires some knowledge of social practices just in the sense that the concept is used in and derives from a host of social practices; but the link is attenuated and indirect, filtered through language and culture rather than direct engagement with any social practice. How a group of rebels used the term centuries ago is unlikely to be of much interest.

In constructing concepts, Hart was attentive to social practice, focusing on how one group in society, the officials, understand their actions as rule-based. While such attention to practice places Hart squarely within the interpretive method of social understanding, two notes of clarification, perhaps qualification, ought to be entered. First, concept-construction requires a double judgment on the part of the observer: judgments as to which segment of a social practice is to be singled out for consideration, and, once singled out, what concepts are implicit in it. Hart settled on the segment involving courts, lawyers and other officials, within which he judged the concept of rules to be implicit. Another observer of the same segment might conclude differently, for instead of finding implicit a concept of rules as binding standards, one might settle on a concept of discretion within which ‘rules’ are mere guidelines, or perhaps ‘rules’ could be seen as providing a point of focus for negotiation, while to the observer of a more sceptical frame of mind behind the language of ‘rules’ lurk the true motors of action.

Which of these positions, or others, observers take depends itself on their purposes, their interpretation of the meanings of the parties, and the premises from which they, the observers, proceed. The second point to note is that Hart concentrates on just one segment of the social practices of a legal kind. His selection is confined to municipal legal systems and then only the reasonably mature. Within such systems the selection does not consider a whole range of official institutions, such as the police and prison warders, regulatory bodies and welfare providers, not to mention associations within civil society or the experiences of the ordinary citizen. The observer searching through segments such as these will discover that the meanings the parties attribute to their experience of law differ from Hart’s depiction of rule-governed behaviour, sometimes subtly, at other times strikingly.

Finally we should note that between conceptual analysis and social practice, that is, empirical evidence, there is a continuing relationship. In addition to providing the context from which concepts are constructed, social practice is potentially of use in their analysis. The test is whether a piece of empirical...

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94 The concept while closely tied to the subjective meaning of the rebels still has to connect with a vocabulary of concepts common to the society.
96 For fuller description of this method, see J Raz, The Authority of Law (OUP 1979) 104.
evidence reveals an aspect or quality of the social practice that, on reflection, suggests the need to reconsider and perhaps modify the concept. Much depends again on the level of abstraction. The legal theorist concerned with a concept of law of an abstract and general kind could peruse the law reports, devour the socio-legal journals, and digest every bit of empirical data available, yet find them of negligible utility in refining the concepts. While the possibility should not be ruled out that further investigation of social practice might uncover illuminating insights, the reality is that recent conceptual analysis, such as Hart’s revision of Austin or Raz’s of Hart, or the counter-claims of Ronald Dworkin and John Finnis, all of which are contests over the concept of law, has its origins in reflection on familiar aspects of practice rather than deep empirical research. The social scientist concerned with the less abstract and less universal concepts of local knowledge—in Iceland or Micronesia, among prison warders, the rebels of 1381, the tribes of Papua New Guinea, or the ranchers of Shasta County—needs more detailed knowledge of social practices. But the logic of the relationship between concepts and evidence of social practices remains the same: evidence is potentially of use in refining, reconsidering, and perhaps modifying the concept.

5. From Concepts to Descriptions and Avoiding Confusion Between Them

We can now consider a challenge to the core of conceptual analysis, a challenge that aroused interest in socio-legal circles and on which Twining draws. But first let us take stock of the argument so far. My purpose in the previous section is to clarify the construction and character of concepts working within the Weberian framework of social analysis. The argument at its simplest has three parts: concepts are constructed from reflection on social practice; to form a concept is to abstract from social practice; and evidence of a social practice may be of use in refining concepts. Central to the analysis is a distinction between concepts and description of social practice: concepts are constructed from social practice but they are not descriptions of a social practice. With this analysis in mind, let us now consider the challenge to the nature of concepts.

Brian Tamanaha recounts that in Micronesia the legal system is ignored by the population.97 This is said to run counter to Hart’s concept of law of which general obedience is a necessary feature.98 Tamanaha goes on to challenge Hart’s claim that a necessary feature of the concept of law is officials’ accepting

97 B. Tamanaha, A General Jurisprudence of Law and Society (OUP 2001); discussed in Twining, General Jurisprudence (n 1) ch 4.
98 Some of Tamanaha’s analysis is directed at refining the concept of law and is properly philosophical; other parts draw attention to practices that are inconsistent with or exceptions to Hart’s concept of law as if that were enough to destroy Hart’s analysis. That is a mistake. Those parts are a lapse from philosophical analysis and are properly seen as descriptions and observations about the features of legal systems in practice: see the discussion in Tamanaha (n 98) 133 ff.
the law as binding. If this means that officials must have a ‘moral commitment’ to the system, it rules out the possibility of a corrupt legal system where officials act for reasons of self-interest. Although Hart clearly did not mean that officials have a moral commitment to the legal order, let us suppose for the purposes of the argument that he did. The question then is whether the existence of a corrupt system in practice invalidates Hart’s concept of law. Tamanaha continues the demolition by stripping away each of the elements of Hart’s concept, discarding each as contingent rather than necessary, that is to say, they might or might not be a feature of all legal systems, they are not essential to something being law. Both Tamanaha and Twining conclude that, because there is likely to be a legal order missing one or other of the essential elements of the concept, the concept is invalid.

In this conclusion they are mistaken. The mistake follows from the conflation of conceptual analysis, on the one hand, with the average or standard case of a legal system, on the other hand. Describing distinctive features of law across legal systems and then drawing conclusions as to their common features is a distinct kind of knowledge that should not be confused or conflated with the analysis of concepts. For Weber the distinction is crucial. After explaining ideal types, he writes: ‘It goes without saying that in addition [to formation of concepts] it is convenient for the sociologist from time to time to employ average types of an empirical statistical character, concepts which do not require methodological discussion.’ ‘Average types’ are different from but depend on ‘ideal types’: ideal types (concepts) are the blocks with which to build average types. Twining’s definition captures the connection: ‘general descriptive jurisprudence [goes] far beyond conceptual clarification to describing common features of the form, structure, and content of legal systems’. For ‘common features’ we may substitute ‘average types’. Twining’s statement follows Hart who earlier wrote that:

there is a standing need for a form of legal theory or jurisprudence that is descriptive or general in scope, the perspective of which—is that of an external observer of a form of social institution—which in its recurrence in different societies and periods exhibits many common features of form, structure, and content.

Here Hart sows ambiguity: the external observer might be searching for guidance in formulating a concept of law, or, alternatively, the aim might be to identify the common features from which to conclude that legal systems, the average or standard case of a legal system, generally have ‘common features’ abcde.

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100 Weber, Economy and Society (n 37) 20 (emphasis added).
101 Twining, Globalisation (n 1) 37.
102 Hart, Concept of Law (n 4) 16.
We have here two different kinds of knowledge with different logical structures. To find in an actual legal order some feature inconsistent with, a corruption of, or an exception to, the concept of law does not render the concept invalid or wrong. It does not because, as should now be clear, a concept is not a generalisation from empirical evidence. An inconsistent feature at the empirical level is a reason at best for reconsidering, potentially revising, the concept; odd or unusual cases in the realm of experience ought to be taken into account in the domain of concepts, just because such cases are cause to pause, to consider whether the conceptual analysis needs revising. Theorists ought to direct their minds to corrupt, defective, exceptional, or marginal legal systems, but, having done so, are likely to conclude, as Hart concluded, that they make no difference to the concept. That there exist such variations in practice does not affect the concept of which they are variations. If, on the other hand, the claim is that all legal systems have features \textit{abcde}, the absence of any one feature invalidates the claim. Generalised claims about a social phenomenon, being empirical claims, are, to take a term pleasing to Hart, defeasible, while Weber, the social scientist aware of the variability of social phenomena, was content to work with the average or standard case and resisted further generalisation.

6. Stage II: The Kernel of Social Understanding

In the two books under review, we are often reminded by Twining of how important concepts are to general jurisprudence. Hart and other legal theorists are commended for the contribution they have made to conceptual analysis, but then, as we have seen, they are said to fall short in formulating concepts without paying enough attention to the empirical observation of social practices. That there should be such divergent views on the character of concepts is puzzling and invites further enquiry. In accepting the invitation, I have advanced in the preceding sections an approach that appears to remove the obstacles to a coherent and integrated understanding of concepts. This has been done, as I need hardly remind the reader, as Stage I within the Weberian interpretive method. We now proceed to Stage II which entails placing the concepts back into their social context to see to what extent they fit or account for a social practice or a segment of it, and what parts or segments remain unexplained. Stage II takes us to the kernel of social understanding.

Hart’s account again serves as a useful point of entry to the issues. He expresses the hope that \textit{The Concept of Law}, though designed for ‘students of jurisprudence’, may ‘also be of use to those whose chief interests are—in sociology’. The book may be regarded as an ‘essay in descriptive sociology’. He goes on to explain how enquiry into language brings to light ‘many important distinctions, which are not immediately obvious, between types of

\textsuperscript{103} ibid Preface.
social situation and of relationships’ and ‘the way the two depend on a social context, itself often unstated’. He concludes by citing JL Austin’s aphorism that we may use ‘a sharpened awareness of words to sharpen our perception of the phenomena’.104

The portrayal of his approach in this way has been questioned, but if viewed through the Weberian frame of social understanding, it makes good sense. Recall the two stages of the interpretive approach: first to identify ideal types (concepts) by considering social action (social practices), a task Hart undertakes by tracing language through to the social practices to which the concepts refer: second, to re-examine the social practice to test the extent to which it fits the concepts. If for example the concept is rational action, evidence of the social practice is analysed to see how it measures up to the demands of rational action and the extent it departs from or falls short. In Weber’s words:

In all cases, rational or irrational, social analysis both abstracts from reality and at the same time helps us to understand it, in that it shows what degree of approximation a concrete historical phenomenon can be subsumed under one or more of those concepts. For example, the same historical phenomenon may be in one aspect feudal, in another patrimonial, in another bureaucratic, and in still another charismatic.105

In this passage of outstanding importance, Weber makes plain that a set of social practices, ‘concrete historical phenomena’, are likely to contain several concepts. The passage further makes plain that the same phenomena may be open to different interpretations, allowing the same segment of practice to support several different concepts, as we noted earlier in relation to Hart. And, finally, each concept corresponds to and provides understanding of one segment of a social practice, leaving others to be subjected to the same process of concept-formation. The accumulation of concepts deepens our understanding of the total phenomena, although it is never complete for there is always the chance of meanings being missed by incomplete evidence or in the face of evidence going undetected.

Enquiry into the social foundations of constitutions and the place of the people illustrates the approach. The first concept to appear from the historical evidence is that of ruling and being ruled: the people are ruled by the few, where ‘being ruled’ is essentially a passive state of obedience. A record of laws and declarations, treatises and petitions, points to the ruling-being-ruled concept as central to constitutional thought and action. Using the concept to reflect back on constitutional practices, it becomes clear that, while some segments fit nicely, much is left unaccounted for so that the place of the people is not quite the passive state of being ruled. Other evidence points in the

104 All quotations here are from the first two pages of the Preface of The Concept of Law ibid.
105 Weber, Economy and Society (n 37) 20.
opposite direction: in place of being ruled, the concept emerges of ‘self-rule’, of the people ruling themselves. Constitutional theorists, perhaps inspired by the ideal of self-rule, are disposed to conclude from the evidence that it is the social foundation of modern constitutions, abandoning in the process the abundant evidence of being ruled. A more complete understanding of constitutions requires both concepts and there is no need to choose between them.

They do not, however, exhaust the evidence: a body of constitutional thought and action remains unexplained; aspects that fit neither self-rule nor being ruled remain. From the remainder a third set of concepts, normally unnoticed, emerges, according to which the people occupy a more complex and nuanced position, more than passively being ruled, less than active self-rule, that is best described as guardians or ‘keepers of the common good’.106 As keepers of the common good, the people, while to some degree accepting rule and to another degree ruling themselves, at the same time lay claim to a distinct role in interpreting the common good and ensuring it is advanced by government. We now have three sets of concepts, each contributing to the social understanding of constitutional thought and practice, so that to single out one as the explanation while neglecting the others would be a distortion, just as it would be premature to conclude that understanding is now complete, for more evidence might require other concepts to add to the already suggestive three.

The logic of Stage II is now plain: from evidence of social practice a concept is formed; the concept is analysed and refined; it is then used as a frame of interpretation to see to what extent social practice fits the concept; from the segments left over, another concept emerges, which in turn is used to survey the evidence to see what fits and what remains; and so the process goes on as long as there are segments of social practice unaccounted for and evidence to work on, a point unlikely ever to be reached. The basic tenet of the Weberian approach is that social understanding consists in the identification and accumulation of the concepts implicit in social practices: concepts are the currency of social understanding or, in Twining’s words ‘the tools of explanation’.107

On this approach, Hart is right in suggesting that The Concept of Law is of potential use to social enquiry. The general concept of a legal system, consisting of several features, is used to reflect back on the social practice of law in order to learn to what extent the evidence fits and to what extent some is left over, within which other concepts may be implicit. The concept of rules and rule-governed behaviour could be tested to see to what degree in different contexts, such as that of courts, administrative bodies, regulatory agencies,


107 Twining, General Jurisprudence (n 3) 37.
practice measures up to the concept and what remains. We know from
empirical studies that there is more to legal decision-making than strictly
applying the rules. From evidence of the unexplained aspects, other concepts
can be constructed, such as social conventions, a sense of justice and morality,
economy of resources, and bureaucratic attitudes, to mention just a few
potential candidates.\textsuperscript{108} This is exactly the point of empirical research: to dig
deeper and deeper into evidence of a social practice to uncover the less obvious
and often concealed concepts without which understanding of the practice
would be incomplete.

Here Hart the philosopher and Weber the social scientist part company.
Having constructed a set of concepts from the social practice of law, using
language as the route to social practice, Hart could claim for his account social
authenticity in the Weberian sense. He saw and signalled how his concepts
could be used at Stage II of the method, that is, to determine to what extent
social practice fits the concepts, but he had no interest in entering that stage
himself, his ambitions being confined to constructing, analysing and refining
the set of concepts he found in a specific segment of social practice. For Weber,
the social scientist, committed to as complete knowledge of society as possible,
the two stages go together, the pursuit of one without the other producing only
partial understanding of social practice. Concept-construction, analysis and
refinement are, as Twining often points out, an essential element of social
enquiry; but concepts then have to be reflected back onto social practice to
determine how much fits and what is left over, since any concept covers only
one segment of the social practice, and as we have seen any one segment may
be open to different interpretations. In the study of constitutions, the concept
of ruling and being ruled leaps out from social practice in much the same way
as the concept of rules leapt out for Hart. Yet reflection back on social practice
shows that other segments are left unaccounted for, in the same way that the
concept of rules does not account fully for decision-making in legal contexts.
Unless other concepts implicit in social practice are drawn out and placed
beside rules, and the interaction between them analysed, the resulting
understanding of decision-making will be partial and potentially distorted.

To summarise, the Weberian interpretive approach aims at a full under-
standing of society through the study of social practices and the construction of
concepts, an approach perfectly suited to those relating to law. The logic is as
follows: take a social practice $>$ construct a concept $>$ test the evidence of the
social practice against the concept $>$ isolate what evidence remains $>$ construct
another concept $>$ repeat the process until all evidence is fitted to concepts.
That Hart limited his enquiry to the first stage of the Weberian approach, the
construction of one set of concepts, is hardly a criticism for that is the part of

\textsuperscript{108} For good examples of empirical studies that fit this approach, see G Richardson, \textit{Policing Pollution} (OUP
interest to philosophers. In depicting his essay as descriptive sociology, he plainly understood the second stage, while leaving its execution to others with the motivation and the skills for empirical research.

7. Generalised Description

Generalised description of law occupies the heartland of the general jurisprudence Twining advocates. Generalised descriptions of different forms of law are the landmarks of the imagined map that includes the formal and informal, national and local, regional and global; in his words: ‘the whole universe of legal phenomena’. But, he goes on, before you can map you need concepts: ‘maps presuppose concepts and reliable, systematic data’. To describe a social phenomenon is to single out the most important features, for the description of which we need concepts. We have no way of describing anything except through concepts, or, put positively, concepts are the language of description. A mature legal order, according to Hart, consists of the concepts of primary rules, secondary rules, a rule of recognition and so on. The same process of description could be applied to legal contexts wherever they occur: in England or Russia, the European Union or international institutions, among the highlanders of Papua New Guinea or the Trobriand islanders. The selection of characteristics (common concepts) requires judgment by the observer as to which, within a particular social practice, are the most important. Just how objective the process is or whose point of view counts are, as previously noted, matters of debate among social scientists and legal theorists.

To move from the description of one legal practice to generalised description of all such practices, or all of a certain kind, such as those in developed nations or in traditional societies or in the global sphere, means moving from the description of one to descriptions of several or many or all of that kind. But notice that generalised description loosely used conceals the distinction between a claim about the average or standard case and a claim about all cases. The claim that all cases of a certain type have common features abcde, being an empirical claim, would be invalidated by one exception. We know that in practice not all mature legal systems have all features abcde, some may be lacking, additions may appear. Generalised description as generally understood, implicitly acknowledging that empirical claims are subject to exceptions, means identifying common features of a social phenomenon and drawing general conclusions, knowing that in practice exceptions and deviations occur.

To promote a description of a selection of legal orders into a necessary truth, or even a general claim about all legal systems, is a common error.

109 Twining, *Globalisation* (n 1) 175.
110 ibid 190.
111 Dickson, ‘Methodology’ (n 88).
Here Tamanaha’s type of asset-stripping hits its true target in showing how claims, based on all legal systems having common features, collapse on finding just one deviant. Micronesia has the usual features of a legal system except the general obedience of the people and so to that extent it is a deviation from or corruption of the standard case of a legal system. A poorly functioning legal system, or one lacking some common feature, is still in some sense a legal system, but falls short of the standard case. There may come a point at which a system is so lacking common features that it is judged for some purpose not to be a legal system. The safer course is to be content with the more moderate claim, based on experience of a selection of them, that mature legal orders usually, normally, standardly, averagely have common features $abcde$. The temptation to take the further step of deeming that to be the central or focal case of mature legal orders is understandable and may be justifiable, as long as it is no more than the empirical generalisation that most have those features.112

The difference between generalised description of legal phenomena and the concept of law is easily missed. Suppose the theorist concludes from reflection on social practices that concepts relating to structure, identity, existence, authority, and content113—let us call them $abcde$—are common features of legal orders. From there the road forks depending on the theorist’s intentions, one branch stopping short with generalised description, the other leading on to a general concept of law. The more ambitious theorist ventures beyond generalised description to conceptualisation, that is, from the average or standard case of law to constructing a general concept of law. Concepts $abcde$ have this dual role: one is to form the elements of description of the standard case, the other the basis for concluding that from those concepts, taken together, a general concept of law or legal system can be constructed. The first is based on an empirical claim about the features of law as it occurs in certain societies, while the other is the construction of a concept, which, as we have seen, has its foundation in social practice but is not an empirical claim about such practice. The difference is subtle but significant, the boundary between them not plainly marked so that it is open to being crossed and re-crossed unsuspectingly.

Returning to general jurisprudence, the enterprise occupying Twining’s attention, we can now see how it consists of clusters of concepts, each cluster capturing one standard type of law or legal order. In other words: from reflection on a wide range of social practices concerning law, concepts $abcdefg$ are constructed; a judgment is then made that concepts $abcde$ constitute one reasonably distinct social phenomenon, legal order type $X$; $abcfg$ another legal order type $Y$; and $acdfg$ a third legal order type $Z$, where $X$, $Y$, and $Z$ are mature, traditional and informal legal orders respectively. The groupings are

112 See further the extended discussion in R Dworkin, Justice in Robes (Harvard University Press 2006).
113 Analysed in Galligan, ‘Legal Theory’ (n 20) 984–88.
approximate and the overlap variable, each open to being broken down into sub-groups. Generalised description of legal systems is bound to be limited and superficial: limited as to the range of common features, superficial in not being able to include the ways different types of legal systems, while having common features, in other ways differ. To single out the common features of all legal systems or a section of them, whether mature or immature, customary or informal, national or international, the theorist has to jettison many of the qualities and characteristics that make each unique and interesting. Take courts: being charged with the administration of justice, they must be counted among the essential features of developed legal systems. That they have some features in common is hardly in dispute; that they also differ in many ways as to their history, structure, personnel and procedures, for the purposes of generalised description is largely irrelevant.

Moving from generalised description to comparison, we see that the differences among legal systems now count as much as if not more than similarities. Siting in society the differences, tracing them back into socio-legal history, and extracting the ideas without which they make no sense, is the core of the comparative method. To illustrate, we need go no further than Mirjan Damaska’s study of the adversarial and inquisitorial procedures, where the Anglo-American perspective is compared with the continental.114 Cited with approval by Twining, the study begins by noting that: ‘Not all differences in the institutional setting and in the forms of justice are visible at first sight. Some lurk behind superficial similarities and can be discerned only on close inspection’.115 The method and the kind of knowledge it leads to are different from that of singling out common features for generalised description. The one takes us deep inside the society, linking law, legal practices and legal ideas to social, political and economic ideas and structure. The other, by being limited to common ground and generalisation across legal orders, must linger on the surface and omit much that lies below.

8. Stage III and Conclusion

Whether general jurisprudence is feasible remains an open question. In putting forward one model of what it might be like, Twining has pioneered a new line of enquiry in understanding law. Others have toyed with a notion of general jurisprudence, but nobody before has managed to create a framework feasibly capable of integrating the different approaches to theoretical understanding. In the deceptively simple, almost banal, formula that concepts are the tools of description, lies a profound insight into the understanding of any social phenomena including law. In this review, having adopted that insight as the

114 M Damaska, The Faces of Justice Authority and State Authority (Yale University Press 1986).
115 Ibid 1.
starting point, my purpose has been to draw out and develop its inner logic. This has required some realignments; it has also required recourse to the method of interpretive social theory, the argument being that a critique of legal philosophy is not the best starting point for the social understanding of law. All this takes place within the bounds of the axiom: concepts are the tools of description.

Here I have avoided the larger issue, engaging instead with the relatively small but vital question of the relationship between analytical jurisprudence and empirical evidence. Rather than berating legal philosophers for not being empirical, a charge they tend to find, if not incoherent, at least puzzling, an alternative is to frame the question within the tradition of social inquiry drawing on the Weberian interpretative method. Analytical jurisprudence, especially Hart’s version, instead of being depicted as an obstacle or as laying a false trail down which stumble seekers of the social, is naturalised and enters the mainstream of social theory. This is more a preliminary exercise of clarification than a full social account, the successor to which—Stage III—should be to turn attention to the interpretive approach itself and, given the focus on meaning, ask how meaning is acquired, which is to ask about the origin of concepts. Stage III must await another occasion, but considering how essential it is to the social understanding of law, I conclude this essay with a sketch of its contours.

Meanings, while in one sense subjective to the parties, have their origins in the social context, the social arenas, spheres, and situations we inhabit and though which we pass in the course of a life: family and friendship, relationships and religion, work and leisure. Persons and groups understand and experience life, not in a social void, but through a prism shaped by ways of seeing the world (the cognitive), guided by social conventions (the normative), and constrained by pressures within that segment of society to conform to its precepts (the regulative). Daily life means passing through a patchwork of such social spheres, each providing a context for thinking about, interpreting, and experiencing a segment of social life, each generating conventions to guide action. Social spheres have different densities, exerting stronger or weaker influence on action, occurring at different levels from the elemental to the frivolous, overlapping and intersecting, partly compatible, partly in tension. The pattern is: social spheres generate meaning, which then guides action, while action reflexively strengthens meaning. The route to deeper knowledge of society and therefore law lies in tracing social spheres, and hence meanings and concepts, to their historical roots.

If social spheres are a source of meanings (ways of thinking) and conventions (ways of acting), we need to consider how social spheres come about in the first place. The question is whether we can move beyond case studies, each a

116 Explained in Galligan, Law in Modern Society (n 20) ch 6.
snapshot of how one sector of society experiences and interprets law, to deeper foundations. Giambattista Vico, anticipating Weber, and Marx and Luhmann, and many others, proposes a method of explanation, a New Science, focusing on the participants, on their intentions and purposes, and on the institutions and modes of social life they create. In calling it a science, Vico means the discovery of ‘fundamental principles of truth’, which translates as discovering the concepts forming the foundations of society. The new concepts serve as a frame of reference through which to study society in all its parts, among which law is integral. The means is philology: it allows us ‘to see in reality the institutions we have contemplated as ideas’. Philology is used in a particular way: it is the means for observing ‘the creative authorship and authority of human volition, from which we derive our common knowledge from what is certain’. For philology, we would now substitute empirical research, for philologists are ‘grammarians, historians, and critics’ who study ‘languages and deeds, including both their domestic customs and laws, and their foreign wars, peaces, pacts, travels, and trade’. No source of evidence is beyond the philological pale: literature and inscriptions, poetry and myth, customs and traditions, all hold clues to the character of law, all help us to understand how people thought about and experienced law. Here are the origins of subjective meaning and evidence of how we have come to think about, mould and experience the social world in the way that we do.

History is central to the enquiry, because the science of any social phenomenon, including law, begins where the subject matter begins. Vernacular language and popular traditions are evidence of the customs and institutions of a people. Social forms and practices of one age are built on the backs of earlier ages. Each epoch inherits a language, a conceptual vocabulary and a set of understandings, which, no matter how archaic, cannot be ignored, for they contain the origins and convey the point of prior forms and practices. In the notions of need and utility, the material world emerges as a force in the formation of social spheres, social conventions and subjective meaning. Law serves as an example. It passes, according to Vico, through stages in step with deeper material movements. After divine and heroic stages came human government, whose hallmark is recognition by the people of a sense of natural or civic equality. Natural equality has to compete with the equally natural struggle between patricians and the people.

As the struggle between the two orders escalates in early Roman history, the people, who begin without juridical status, by force of numbers win concessions from the patricians, concessions as to rights to property and to

117 Vico places himself in the method of Francis Bacon, of ‘contemplating and seeing’, the first being philosophical, the second philological. By this method ‘the authority of my philological proofs is confirmed by the reason of my philosophical proofs; and the reason of my philosophical proofs is confirmed by the authority of my philological proofs’: New Science (n 39) 131.

118 ibid 79.

119 ibid.
marriage, until finally they have full and equal juridical status, which follows in
Roman Law from being granted citizenship. Juridical equality is fundamental in
accepting that ‘our rational nature, which is our true human nature, is equal
in all’. More than a millennium later, English peasants rebelling against
similar deprivation and oppression invoked the same concept of juridical
equality, almost certainly not knowing its origins, yet assuming its importance
as a point of reference and taking it for granted as foundational to modern
constitutions. That a concept so basic to constitutional thought was forged
in conflict over material matters is a prime instance of how need and utility
shape social consciousness. Here we have a glimpse of the next stage of social
understanding, of how to progress beyond meanings to their historical and
materialist origins; but that is the subject of a future essay.

120 ibid 20.
121 On rebellion, see P Zagorin, Rebels and Rulers 1500–1660 (2 vols, CUP 1982); A Wood, Riot, Rebellion, and
Popular Politics in Early Modern England (Palgrave 2002). On social contexts and social meanings in conditions of