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REVIEWS

How to Theorise Law in a Transnational Context

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A review of Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, 2010), 225 pp, ISBN-13: 978-0754674689.

In his book *The Concept of Law from a Transnational Perspective*, Detlef von Daniels expounds 'the relevance of a thorough reflection on the concept of law for an improved perception of the phenomena we face in a globalized world' (Preface). Starting from the discrepancy he observes between legal theory and legal practice and, more specifically, between legal philosophy whose focal point remains state law and lawyers and political scientists who have shown the growing importance of transnational law (1), the author aims to bring legal philosophy up to speed with the socio-political reality of law. He endeavours to explain, in other words, how one ought to be theorising the concept of law in a transnational context, ie in circumstances which the author defines loosely as those of law developing beyond or below state law and including, besides domestic law, European and international law, on the one hand, and private legal regimes, on the other (1, 54).

Published in 2010 and based on the author's doctoral dissertation, the book was among the first monographs published in English to venture into the now burgeoning field of the analytical philosophy of transnational law.[1] In taking seriously the need for legal philosophy to encompass law as a complex domestic and transnational phe-

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1 See eg Samantha Besson and John Tasioulas (eds), 'Introduction' in *The Philosophy of International Law* (Oxford University Press, 2010) 6–13; Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010) (for an excellent review, see Wil Waluchow, 'Legality's Frontier' (2010) 1(4) *Transnational Legal Theory* 575); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009).

nomenon, it will definitely become a reference in the field. The book provides both a substantive discussion of the main jurisprudential difficulties raised by the transnationalisation of law and a methodological proposal as to how to conceive 'general jurisprudence' or general 'legal theory' (1, fn 1) in circumstances of transnational law. The author, who is a philosopher versed in law and legal philosophy and trained in both the German and Anglo-American traditions of legal philosophy, is ideally situated to provide such an account. He starts by identifying the weaknesses of the existing jurisprudential framework in both traditions when faced with the transnational reality of law (1), before proposing revisions of that framework at the level of both individual theories of law (Jürgen Habermas' and Herbert Hart's) and general jurisprudence. According to von Daniels, what he proposes as a 'hermeneutic reconstruction of Habermas and Hart is … a way to save jurisprudence as a philosophical discipline' (4).

The book is written in a concise and elegant fashion. It comprises three parts that—as pointed out by the author—can be read independently of one another if needed (Preface). The first and second parts discuss and revisit the jurisprudence of Jürgen Habermas and Herbert Hart from a legal pluralist perspective. The successive and constructive critique of those two authors stemming from two distinct traditions in legal philosophy as a first step is illuminating in developing a transnational legal theory. Faced with the shortcomings of both theories, the author argues that general legal theory *à la* Hart needs to be recast so that it can account for transnational legal practice and social history (171–5), while critical social theory *à la* Habermas that claims to take transnational law more seriously needs to be sharpened by apprehending general legal theory and the concept of law itself (169–71).

The third part of the book, however, is the most innovative. Here, the author starts by explaining how the strengths of both theories ought to be combined and how one should work on the historical reconstruction and the conceptual analysis fronts at the same time (2, 179). Von Daniels then proposes his own hermeneutic approach to law in a transnational perspective (181). He contrasts it with other recent attempts at developing a general jurisprudence that would be capable of accounting for the transnational phenomenon (Brian Tamanaha's at 191–7 and William Twining's at 197–203). While von Daniels sees both authors as endorsing the same project as his and acknowledges that their differences are minimal, he regards them as insufficiently philosophical: Tamanaha conflates philosophical analysis with the recordings of folk concepts, whereas Twining's account lacks the idea of a philosophical tradition (203). The key, for von Daniels, is for general jurisprudence to become self-conscious as a philosophical tradition among others and this requires 'a critical hermeneutics of all our traditions' (203).

It is to that argument that this review is devoted. Two sets of comments are made: first, pertaining to the method of general jurisprudence; and, second, to its main substantial tenets.

THE METHOD OF GENERAL JURISPRUDENCE

Like others' recently, von Daniels' proposed theory of transnational law is squarely situated within the realm of general jurisprudence (1, fn 1). As such, it encompasses both conceptual and normative questions about law in a transnational context where domestic law is no longer the only form of law and where the implication is no longer necessarily that forms of law which do not fit the conceptual criteria of domestic law are not law, but maybe that those conceptual criteria themselves need to be revisited.

As a result, the proposed legal theory differs from philosophical approaches to transnational law only, ie transnational law approached *qua* topic in special jurisprudence,[2] and in particular from the many accounts of legal pluralism that have already started filling entire bookshelves. Legal plurality is, of course, a feature of current transnational legal practice, but not one whose elucidation may take place without going into the core conceptual issues of general jurisprudence nor one whose elucidation may settle questions of general jurisprudence and in particular the concept of law in a transnational context. In order to fully understand legal plurality, one needs to revisit the concept of law itself and it is not enough to assume that the one that has been developed for municipal law may be adapted to fit pluralistic relations to other forms of law arising in a transnational context.

One of the benefits of this kind of general-jurisprudence approach is to trigger a reflexion about how best to do jurisprudence in a transnational context. Von Daniels' answer is that it should combine the strengths of conceptual analysis with those of historical and socio-political observation, on the one hand, and that this is best done in a hermeneutic framework that situates one's philosophical endeavour within existing traditions of legal philosophy, on the other. His own account is based on a combination of the conceptual perceptivity of the Hartian framework with the socio-historical sensitivity of the Habermasian one.

Given how central these meta-theoretical claims are to the success of von Daniels' substantive proposal, and because they sound important and promising at a time when political theory as well is becoming less ideal and more institution-tuned, one may regret the lack of detailed treatment in the book of those claims made about legal philosophy in general. I will take the two main features of the proposed theoretical account in turn, albeit in reverse order.

First of all, critical hermeneutics of all legal philosophical traditions. It remains unclear why Habermas and Hart provide the main traditions in which von Daniels' account is developed. A complete hermeneutic critique should start, it seems, by justifying that choice. Not only would it have been possible to choose alternative legal accounts from the twentieth century, but von Daniels' critique of Joseph Raz and Ronald Dworkin as successors in the Hartian tradition (183–91) are brief and not entirely convincing.

2 See also Besson and Tasioulas (n 1) 7.

Aware of the importance of transnational legal practice, not only have both authors now started to work on transnational law,[3] but Raz has also demonstrated in his recent work on human rights theory how the conceptual analysis of law may be reconciled with the project of best accounting for the international legal practice of human rights.[4] As to Dworkin, one should not underestimate the strength of his interpretive account of law *qua* normative practice, and this even more so as that account has become a growing reference in recent international legal theory in view of the important role fulfilled by international adjudication in the development of the decentralised international legal order. More generally, the critique of Raz's 'scientism' in the book (187) is too strict and at any rate too quick. One would need to know more about what von Daniels means exactly by scientism in legal philosophy and about what he thinks turns legal philosophy into a scientific project in the first place. In short, what would be needed to make those arguments about the future of general jurisprudence pertinent would be an idea of what theory of science underpins the book, on the one hand, and its notion of philosophy and what makes legal philosophy 'philosophical' (203), on the other. Explaining this would seem even more important as it is the lack of 'philosophical' dimension that von Daniels criticises in the main competing account of general jurisprudence he identifies, ie Twining's.

Secondly, socially attuned conceptual analysis. One would need to know more about the ways to reconcile conceptual analysis, and especially that of a normative concept like law, and socio-political observation and historical interpretation in von Daniels' proposed theory. After all, for a long time, the standard approach to transnational law was to say that transnational law was becoming more like domestic law and hence that, if we waited long enough, our concept of law would encompass transnational legal practice.[5] Rushing to adapt the concept of law would therefore risk falling prey to descriptive sociology, which is not adequate in the case of normative practice like the law where normative theorising and practice go hand in hand. The author rightly identifies a gap in this respect in his revised Hartian framework, and suggests that one may fill it by reference to normative foundations (175–9). Too little is said about those foundations, however, and especially about how their discussion is part of legal practice itself *qua* normative practice and what this in turn means for the conceptualisation of law. It is at this stage in the argument that a discussion of Raz on the normativity of law, and the relationship between moral reasons and the law, would have been interesting, as it is precisely this gap in Hart that Raz aimed at filling—and without falling into the traps

3 See eg Joseph Raz, 'Sovereignty & Legitimacy: On the Changing Face of Law, Questions and Speculations', second Frederic R and Molly S Kellogg Biennial Lecture in Jurisprudence, 5 October 2011, Library of Congress, Washington, DC, www.youtube.com/watch?v=VMC9u7PZZCo (accessed 26 July 2012).

4 See Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31.

5 See Besson and Tasioulas (n 1) 8–9.

of a Dworkinian account that von Daniels rightly identifies.[6] Again, more generally, a few meta-theoretical indications about what distinguishes legal philosophy from social theorising on empirical social data and hence on what distinguishes the relationship between theory and practice in legal philosophy from other social sciences would have been welcome in a book that has (legitimate) meta-theoretical ambitions.

THE SUBSTANCE OF GENERAL JURISPRUDENCE

In terms of substance, von Daniels' theory of law in a transnational context may be summarised as follows. Unlike Hart, von Daniels understands law as a regime of primary rules without secondary rules. Of course, secondary rules may exist *qua* institutionalising practises but their existence is not confined to the practice of law (113–6). Furthermore, they do not have the identifying role they have in the Hartian model. When they do exist, however, a legal regime (112) may be regarded as a legal system (130). Inspired by Hart's treatment of international law as primitive law (87), the proposed model of law without a system is more adapted to the transnational context and inclusive of many forms of law. Of course, von Daniels adds certain conditions (101): the primary rules have to be multilateral, decisive and justice-apt.

Scope precludes addressing all aspects here, but two deserve a detailed commentary: von Daniels' treatment of international law and his discussion of legal pluralism.

First of all, international law. Von Daniels takes up Hart's discussion of the primitive nature of international law and revisits it on the basis of his focus on primary rules only, and at the exclusion of secondary rules, in order to turn it into the proposed concept of law (101). Since for von Daniels the existence of law does not require the existence of secondary rules, the problems Hart identifies for the legality and even the systematicity of international law are no longer at issue and municipal law is no longer the yardstick for international law (146). Various forms of international institutionalisation may indeed be identified (145–9, 154–6).

There are many things one may say about this approach to international law. To start with, international law has changed radically in the last 50 years and a lot of what Hart saw as missing then is now given in international legal practice in any case.[7] Moreover, von Daniels seems to be misreading Hart in places, especially on the idea of a union of primary and secondary rules not being a condition for law to exist *qua* legal system (143). Finally, and most importantly, it is crucial to distinguish between the concept of law and that of a legal system in Hart. While Hart was concerned with international law not being a legal system but only a set of legal rules—even though the absence of an international rule of recognition did not detract from it being law in a primitive

6 See, for a discussion of the normative dimension of the philosophy of international law, Besson and Tasioulas (n 1) 13–19.

7 See *ibid*, 9–13.

sense—von Daniels does not detect some of the difficulties with the Hartian approach to international law. One of the difficulties with Hart's account of international law is precisely that he does not distinguish sufficiently between the question of whether there are a substantive rule of recognition for international law and criteria for the validity of rules of international law (which there actually are[8]), on the one hand, and the question whether there is a system of international law, on the other. Even though Hart may have been wrong on the former, this should not have led him to conclude anything as to the latter question. A merely formal and redundant rule of recognition would indeed be enough, on his account, to vindicate the existence of a legal system in the Hartian framework, and such a redundant rule of recognition existed in international law in his time (eg Article 38 of the ICJ Statute). By overlooking this, von Daniels does not, as a result, pay sufficient attention to this hiatus between substantive validation and systematicity through the existence of a formal rule of recognition in Hart's framework. And this, in turn, affects his treatment of secondary rules in general. Of course, all this does not yet mean that international law necessarily fits the other institutional conditions for there to be a legal system, but this is not a point on which the Hartian framework can be of any help. Von Daniels' rejection of the Razian elaboration of the notion of a legal system, however, deprives him of the benefit of those theoretical resources.

Secondly, legal pluralism. Von Daniels' answer to the question of how to account for the co-existence of many legal regimes outside an encompassing legal system is 'linkage rules' (153–66). This third category of rules should be conflated neither with primary nor with secondary rules. They facilitate the validation by one system of rules within another, allow for the enforcement by one system of the rules stemming from another and enable the recognition of rules of one system by another. Those rules enable us 'to analyze and describe the relations between various systems' (166). The mutuality of linkage rules may lead to the situation where 'all legal systems are interwoven into a net of legal systems' (163). Mutuality is not necessary, however (164). Importantly, von Daniels considers that linkage rules do not require an internal point of view, but only a descriptive theory that sustains a 'distinction between the official legal discourse and unofficial legal regimes' (163–4).

There are difficulties with von Daniels' insistence that linkage rules be considered as objective rules that may be described by legal theory independently from the internal point of view of participants and institutions. This fails to convince on both substantive and theoretical counts.

First of all, from a substantive perspective, it seems strange to use a Hartian framework that links the unity of a legal system to the practice of its institutions and participants in order to then isolate that practice from linkage rules—even if the latter are distinct from secondary rules and in particular from rules of recognition in von Daniels' revised Hartian framework. Moreover, the picture is problematic in integrated

8 See eg Samantha Besson, 'Theorizing the Sources of International Law' in Besson and Tasioulas (n 1) 163–85.

legal orders where domestic institutions always function as those of many legal regimes and systems at the same time and not alternatively. Resorting to the internal perspective then seems unavoidable. The equivalence in rank of legal norms within a pluralist legal order may better be explained, in legal positivist terms and, more specifically, in Razian terms, by reference to the co-existence of various rules of recognition with distinct validity criteria, on the one hand, and to the absence of ranking rules in all legal orders, on the other.[9]

From a theoretical perspective, secondly, legal pluralism is often used as a descriptive concept and hence presumably in order to qualify an empirical fact. It is important, however, to distinguish the mere plural*ity* of legal norms from legal plural*ism*. Legal pluralism indeed implies making some kind of normative statement about how the legal validity and legal authority of that plurality of norms ought to be organised. These cannot merely be described. True, practices around them or even the legal actors' cost/benefit calculus and attitudes may be, but not the legal norms' validity and authority themselves. What this means, therefore, is that one should provide a normative argument for legal pluralism and not merely describe it. Regrettably, this has not been done very much in legal pluralism scholarship, except for a few cases that are usually critical to the existence of legal pluralism.[10] Of course, this normative onus on theories of legal pluralism raises the broader issue of whether legal theory can ever be purely descriptive. My answer would be that it cannot. Legal positivism, which is the kind of legal theory endorsed here and in von Daniels' book, is itself normative *qua* legal theory. And legal pluralism, as part of legal positivism, needs to be argued for normatively. It is important, therefore, to provide a normative defence of legal pluralism within the realm of legal positivism. Von Daniels goes one step in the right direction by complementing the Hartian account with normative foundations (175–9), but he does not draw the full implications of this move for legal theory itself that he regards as being descriptive (153–4, 162–5).

Nothing discussed in this review should detract from the novelty and strength of von Daniels' pioneering book in the field of analytical general jurisprudence. These few comments should rather be read as flags to the many fascinating questions identified in the book and, when those questions have not been sufficiently addressed by the author, as pointers within a research agenda for the years to come.

9 See Joseph Raz, *The Concept of a Legal System* (Clarendon Press, 2nd edn 1980); NW Barber, 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306, 322.

10 See eg Samantha Besson, 'European Legal Pluralism after *Kadi*' (2009) 5 *European Constitutional Law Review* 237–64; Alexander Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 *European Journal of International Law* 985–95; George Letsas, 'Harmonic Law: The Case Against Pluralism and Dialogue' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, forthcoming 2012); Samantha Besson, 'The Truth about Legal Pluralism', review of Nico Krisch's *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2012) 8(2) *European Constitutional Law Review* 354–61.