Preface

In the early summer of 2014, Brian Z. Tamanaha, William Gardiner Hammond Professor of Law at Washington University (St. Louis, Missouri, U.S.A.), stood on the platform of the Sky Hall of the Boissonade Tower[1] at Hosei University in Tokyo, Japan, to deliver the 11th Kobe Memorial Lecture. This event was originally established to commemorate the 13th IVR World Congress held in Kobe 1987, and has been sponsored by the Japanese Section of the International Association for Philosophy of Law and Social Philosophy (IVRJ) in collaboration of Japan Association of Legal Philosophy (JALP). The Kobe Lecture has been held every three years since, and the list of invited lecturers, all of whom are the globally acclaimed scholars of jurisprudence, political or social philosophy, include Ronald Dworkin, Ralf Dreier, Joseph Raz, Will Kymricka, Randy Barnett, Emilios Christodoulidis, Ulfrid Neumann, Cass Sunstein and David Miller.[2]

1. The Lecture

In his lecture boldly entitled "Insights about the Nature of Law from History,"[3] Professor Tamanaha gave the audience a lucid account of what he sees as a well-balanced, comprehensive view on law. He started with a criticism of the general trend of late-twentieth-century legal philosophy, which has mainly revolved around two dominant schools – the legal positivism and the natural law theory – but has almost entirely ignored another approach once regarded as being quite as important as the other two.[4]

Tamanaha's aim was to rehabilitate this third branch, which encourages more empirically informed studies, focusing on a close interaction between law and its social and historical conditions. Though this branch has rarely been recognized as a unique, methodologically consistent "school," according to Tamanaha, it actually constitutes "a common core that runs through historical jurisprudence, sociological jurisprudence, legal realism, and several modern theories – ultimately traceable back to Montesquieu."[5] Tamanaha associates himself with this tradition, labeling it "social legal theory."

From Tamanaha's viewpoint, the recent debate on legal theory, especially as developed within analytical jurisprudence, has been misguided because it is unduly limited in scope. Today most legal positivists construct their theory through an intuitive approach to law, which results in a concept of law often limited by their own

1 This 27-storey building was named after a French legal scholar Gustave Émile Boissonade de Fontarabie (1825–1910), one of the most influential foreigners in Meiji era who helped to draft much of the Japanese civil code. Some contributors to this volume refer to him. See, 83 and 92.

2 All the past lectures were published in ARSP, some in the form of a Beiheft together with several papers by Japanese scholars.

3 Brian Z. Tamanaha, Insights about the Nature of Law from History, See in this volume, 17–45.

4 Tamanaha, The Third Pillar of Jurisprudence; Social Legal Theory, 56 *William & Mary Law Review* 2235 (2015).

5 Tamanaha, Insights about the Nature of Law from History, *op. cit.*, 17.

finite experiences and habits, not to mention their generalizations about Western legal systems. In consequence, when presenting their theory as "universal," they naturally exclude from their conceptual schemes other notions of law that lack certain "essential" features, while trivializing their social and political significance. Thus, for example, international law or primitive customary law is often thought to fall short of their standard concept of "law." In the absence of a normative system with these features, any society should be regarded as having no "law." In contrast, Tamanaha proposes a familiar and compelling working hypothesis, namely, *no* society exists without its own law. He once even refused to impose any substantive criterion of law onto any society, asserting as he did that law is what most members of the society regard as "law."[6] In his view, it is not legal scholars but ordinary people who determine what law is.

On the basis of this hypothesis, Tamanaha examines a vast amount of anthropological, archeological and historical data as related to various forms, functions and ideals of law, each of which have taken shape in accordance with diversity of human life. While law must always be suited to the most basic and common human needs, it transforms and develops in various ways, at the same time as it interacts with its social, political and economical settings. Even if it is not fully institutionalized or systemized (i. e. lacking a certain monopoly of organized coercive powers or legislative/judicial authority), there are circumstances under which it may still fulfill an adequate function as law. Accordingly, from this viewpoint, "[s]harp distinctions cannot be drawn between law and custom, morality, etiquette, religion, and so on, in these early social groups because low levels of social differentiation did not have the horizontal normative variations present at higher levels of social complexity."[7]

Tamanaha's historically and culturally ingenious standpoint also enables us to see law from two opposite sides, with one describing it as necessary condition, as well as a beneficial product, of the coordinated, harmonized whole (functionalist theory), and the other highlighting the coercive – sometimes oppressive – side of law that controls and subordinates people in the interest of their political rulers (conflict theory). Most legal scholars choose one over the other. Thus legal positivists, for example, generally take the former perspective, while critical legal scholars take the latter. However, Tamanaha thinks we should take account of both sides for a full and precise understanding of law.

In short, Tamanaha recommends us to expand our theoretical exploration of law, that is, from conceptual or functional analysis of the modern state legal system to a broader approach to its various forms and dynamics, taking into consideration its historical and cultural backgrounds. According to his view, the scope of contemporary legal theory, especially analytical jurisprudence, has often been all too restricted by the needs of institutional autonomy or conceptual distinctiveness of law, thereby separating itself from moral, religious, traditional, or customary norms. Although we cannot deny that such restrictions have so far provided us with various

6 "Law is whatever people identify and treat through their social practice as 'law' (or *droit*, *recht*, etc.)." Tamanaha, *General Jurisprudence of Law and Society* (Oxford University Press 2001), 166, "if sufficient people with sufficient conviction consider something to be 'law,' and act pursuant to this belief, in ways that have an influence in the social arena" *ibid.*, 167.

7 Insights about the Nature of Law from History, *op. cit.*, 28.

significant insights into modern state legal systems, they have certainly hindered us from exploring larger or richer domains of law in diverse human lives.

2. Aims & Significances

Tamanaha's Kobe Lecture is, in a sense, a long-awaited restatement of his concept of general jurisprudence. He was working on this theme energetically from the late 1990s to the early 2000s,[8] but seemed to have abandoned this project for more than ten years.[9] Yet here he is offering us an utterly fresh exploration of the fundamental question, "what is law?" from a more historically enlightened viewpoint. And though Tamanaha has only given us a glimpse, he is sure to provide us with another unique perspective on, or at least an alternative approach to, the quest for a general theory of law as more appropriate and persuasive for our age of pluralism and globalism.

His contentions may especially be illuminating for us Japanese legal scholars. First, they are interesting as a warning against the general tendencies of contemporary (analytical) jurisprudence, and the more so because we have already been so deeply infused with them, sometimes as if they were the only promising path to a meaningful concept of law.

In fact, until a few decades ago, many Japanese social scientists – including legal scholars – made huge efforts to establish a development theory of law (and society) under the strong influence of modernization theory, or, more particularly, of Marxist theory, which inevitably required attentive examination of the interaction between law and the circumstances of a particular society. However, it now seems that Japanese scholars have become less and less interested in this subject since great economic growth was achieved in the second half of the twentieth century.

Secondly, Tamanaha's radically pluralistic legal theory will encourage us to see the experiences of present-day Japanese society and its law in quite a different light. As one of the oldest "developing" countries, Japan has gone through very rapid, comprehensive and fundamental changes in her political, economic, social and legal systems during the past 150 years. This has been commonly understood as a process of diligent and zealous imitation of, and catching up with, Western civilization, and has often been considered a great success. But today we know all such thinking to be too simplistic, not to say naïve. With respect of law, the "transplantation" of law cannot be accomplished by a mere transportation of it from one place to another, or by simply duplicating legal institutions and practices of "civilized" countries in "primitive" or underdeveloped societies. Tamanaha's theory compels us to take a closer look not only at the way Japanese society has absorbed and molded Western legal systems, or struggled – and sometimes even failed – to adapt to these systems, but also at the conventional benchmark for the "transplantation" of law, which might even lead us to a redefinition of the significance of the rule of law.

8 Its main achievement was, Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Clarendon Press, 1997), and *A General Jurisprudence of Law and Society*, *op. cit.*

9 Of course, in a way all his endeavors – his studies on legal instrumentalism, legal realism and theory of the Rule of Law – can be understood as parts of this venture.

Of course, these reconsiderations are not only of specific concern to Japanese society but may evoke a much wider such concern, because it is quite common for laws not to be homegrown but, rather, to be imported from foreign institutions and cultures, and transplanted into the country.

After Tamanaha's Lecture, three Japanese legal scholars – Professor Itaru Shimazu (professor emeritus at Chiba University, ex-president of JALP), Professor Ryuichi Nakayama (Osaka University) and Professor Kiyoshi Hasegawa (Tokyo Metropolitan University) – commented on its turn. They were all interested in Tamanaha's unique third-way pursuit of general jurisprudence and how his pluralist view can be applicable to the modernization of Japanese society.

In "From the Viewpoint of Private Law: A Comment on Professor Tamanaha's Paper,"[10] Shimazu starts by agreeing with Tamanaha's criticism of legal positivism, which has presumed that modern Westerners intuitively think about law as if it were "common to human in general," but adds that Tamanaha's radically pluralist approach misses a most important feature of law, that is, "private law *as nomos*," as F. A. Hayek has put it. Shimazu then considers the experiences of Japanese society during the nineteenth century, emphasizing how radically her culture and institutions were changed. He goes on to argue that the "success" of development and modernization of the legal system in Japan through those years was prompted primarily by the positivist understanding of law, which is essentially state-centered and "disconnected from indigenous social norms,"[11] without the slightest understanding of *law as nomos*.

Nakayama's "On Legal Instrumentalism After Fukushima: A Comment on Professor Tamanaha's Lecture"[12] is almost in complete sympathy with Tamanaha's socio-historical approach and with his critical attitude towards the dominant trend of today's philosophy of law, while suggesting that analytical jurisprudence – at least as Hart understands it – might have been more productive in collaboration with a socio-theoretical approach. Nakayama also approves Tamanaha's candid assertion of the law's oppressive aspects and of his warning against the proliferation of legal instrumentalism, which regards law as a means deployed for any purpose. Nakayama points up that a special kind of unrestricted legal instrumentalism has been traditionally embedded in Japanese, not to say East Asian, legal culture, and has become dominant since the nuclear plant disaster in Fukushima in 2011.

Hasegawa's commentary entitled "Brian Tamanaha's Conception of Law and His Critiques of H. L. A. Hart's Theory of Law"[13] raises several questions about Tamanaha's empiricist interpretation of Hart's concept of law. According to Hasegawa, Tamanaha criticizes Hart's legal theory for confining itself too much to the modern state law model and for failing to allow the possibility of the other forms of law, which should surely count as "law" in many a modern society. However, Hasegawa observes that, while Hart's concept of law also includes some non-state laws, Tamanaha's thoroughly pluralist conception of law might be ultimately misleading on account of its ambiguity as to the key notion of "society" or "people." Hasegawa

10 See in this volume, 49–56.
11 *Ibid.*, 55.
12 *Ibid.*, 57–62.
13 *Ibid.*, 63–70.

contends that as long as this ambiguity persists, his project of social theory of law will remain too vague to be instructive, especially to legal scholars.

3. Other Sessions

Besides the Kobe Memorial Lecture, IVR Japan held several seminars at a variety of venues during Professor Tamanaha's stay in Japan to allow audiences throughout the country to have an opportunity to absorb a wide range of his scholarly endeavors.

In Sendai, Professor Hiroshi Kabashima (Tohoku University) organized at his university a relatively small but intimate and lively discussion session on topics concerning the history of legal thought in the U.S.A., especially Tamanaha's studies on legal in-strumentalism and on the legal realism movement.

One of its participants, Professor Michihiro Kaino (Doshisha University), contributes an article, "Brian Tamanaha's Historical Study and His Concept of Balanced Realism,"[14] which offers detailed examination of Tamanaha's studies on this subject, with a special focus on his *Law as Means to an End* and *Formalist-Realist Divide*[15].

Kaino basically accepts Tamanaha's eye-opening discovery that legal realists did not invent the criticism of legal formalism in the U.S.A. in the early twentieth century, but that such criticism can be traced as far back as to the judges and legal scholars of the second half of the nineteenth century. In *Formalist-Realist Divide*, Tamanaha maintains that mainstream legal thinking in action was always something that could be described as "balanced realism," which is moderately rule-bound and framed by judges' shared understanding of their society. Kaino carefully examines the scope of this argumentation and points up its connection to Tamanaha's more recent ideas on his social theory of law, which might be seen as a version of historical jurisprudence.

One of the most important turning points in Tamanaha's thinking has been his work as a judicial administrator of the Yap Republic in the early 1980s. It was, as he himself admits, an overwhelming experience that urged him to reconsider not only every assumption of conventional legal theory but the basic schemes behind the practices of legal assistance. Thus, his general jurisprudence and his law and development studies[16] are the two-fold results of this involvement.

The Nagoya seminar at Chukyo University took up the latter theme to examine the virtues and vices as well as the conditions and difficulties inherent in legal assistance and legal reform in the developing countries. It was there we invited several Japanese practitioners and scholars who have had prominent roles in the practice of legal assistance, so that they could discuss with Tamanaha himself his rather harsh criticism of the theories and practices of such projects today.

14 *Ibid.*, 71–79.

15 Tamanaha, *Law as Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006), *Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2009).

16 See, Tamanaha, The Lessons of Law and Development Studies, 89 *The American Journal of International Law* 470 (1995) ; Tamanaha, The Primacy of Society and the Failures of Law and Development, 44 *Cornel International Law Journal* 209(2011).

Two contributors were present at this seminar. Professor Hiroshi Matsuo (Keio University) has long been engaged in Japan's legal assistance programs in a number of Asian countries. Citing many examples from Japan and other Asian countries in "The Possibility of Legal Development through Legal Assistance and the Future of Law and Development,"[17] Matsuo describes in great detail the long and complex process of legal development and legal assistance, whereby he contends that present-day practices of legal assistance consist of carefully managed dialectic processes that are a long way from the crude unilateral imposition of an unalterable set of statutes and principles. Despite accepting Tamanaha's general claim that sound legal development occurs only when it is supported by an internal understanding of, and a concern for, the context of interrelated elements of a society, he argues that legal assistance from foreign countries can, and sometimes actually does, help to support this process. While Tamanaha seems to be quite skeptical of such a possibility, Matsuo strongly advocates both its possibility and its desirability.

In his "Legal Assistance and Legal Development,"[18] Professor Takehiro Ohya (Keio University), who has also been deeply involved in assistance projects, suspects that Tamanaha's strong skepticism might lead to a kind of quietism or inertia. Again, referring to the modern history of Japan and her colonization of other Asian countries in the first half of the twentieth century, Ohya suggests that, even if it sometimes appears to be forceful and one-sided at the outset, external engagement with the internal and spontaneous process of legal development might in the end be inevitable or even desirable if we want to avoid tragic social division and conflict, or the brutal intervention of other countries.

Finally the Kyoto seminar at Doshisha University was concerned with all these topics, thereby making discussions more intense and comprehensive. Four papers covering this seminar are included in this volume, each of which considers the wide range of problems posed by Tamanaha from each writer's distinctive point of view.

In "How to Deal with the Multiplicity of Law: Comments on Professor Brian Tamanaha's Theoretical Challenge to Legal Positivism,"[19] Professor Ko Hasegawa (Hokkaido University) finds, primarily from a Dworkinian interpretivist perspective, several theoretical weaknesses in Tamanaha's conceptualization of law and its methodology. Thus he suggests that Tamanaha's social theory of law would fail to provide a reasonably constructed conception of law that would integrate the diverse features of law into a coherent and consistent whole, while benefiting from the multiplicity of perspectives of empirical studies. Without eliminating these shortcomings, Hasegawa contends, Tamanaha cannot succeed through his project to lay an effective foundation for the rule of law.

Professor Keisuke Kondo (Kyoto University) attempts to vindicate the project of analytical jurisprudence or the philosophical approach to law in opposition to Tamanaha's standpoint. In his "Rescuing Legal Philosophy: Comment on Tamanaha,"[20] Kondo scrutinizes this criticism by dividing it into two parts – one concerning the conceptual scheme of legal positivism (internal criticism), the other concerning the political effects of its claims (external criticism). Although he concludes that

17 See in this volume, 81–88.
18 *Ibid.*, 89–95.
19 *Ibid.*, 97–104.
20 *Ibid.*, 105–113.

both of these are untenable, Kondo nevertheless declares Tamanaha's specific arguments to be basically plausible, such as his comments on the excessive concern among contemporary legal philosophers with the 'state law' model. Thus he suggests ways of overcoming the shortcomings of such a concern while acknowledging these scholars' philosophical perspective.

Although Tamanaha's commitment to ethical or political issues is not always clear from his writings, Professor Tomohiko Shiina (Aomori Chuo Gakuin University) endeavors to clarify this point in his "Social Legal Theory and Progressive Politics"[21]. Thus, after acknowledging that Tamanaha's understanding of law has always been accompanied by a kind of instrumentalism—"[l]aw is a coercive instrument for purposive human use in realizing any ends, good and evil"[22]—and that he accepts it as a quite undeniable fact, Shiina wonders what purpose Tamanaha thinks law should be used for. And then, having carefully examined Tamanaha's writings, he identifies a progressive ideal, namely, the notion of "egalitalian social justice," which is always implicit in Tamanaha's social theory of law.

In "Doubting Doubts, Rescuing Beliefs: Brian Tamanaha and Reflections on Philosophy of Law,"[23] Professor Kosuke Nasu (Kyoto University) tries to approach Tamanaha's core commitment via a somewhat unusual route. Thus, by surveying the various topics Tamanaha has discussed over the years, Nasu notes a skeptical attitude permeating his writings, and considers their characteristic qualities. What he finds is that Tamanaha's skepticism has been generally directed not only against mainstream jurisprudence and its criticism but also against his own convictions, and that it serves as an unbiased sieve that sorts out truly reliable views from unreliable ones. Nasu labels this attitude "reflexive skepticism" and considers its implications for the future of the intellectual and political ethos of Japanese society.

4. Afterthoughts & Acknowledgements

Looking back over these lectures and seminars, I cannot help admiring Professor Tamanaha for the unfailing seriousness and sincerity he has exhibited throughout these sessions. Despite a rather overbooked schedule,[24] he made every effort to engage participants in free and vigorous discussions. Before each talk, which was freshly prepared for the particular session, he always constructed elaborate answers for questions or comments put to him by the designated panel right up until the opening. His lectures were always clear, thoughtful and encouraging, which made our discussions all the more interesting and instructive.

We have now gratefully received Tamanaha's latest response[25] to the commentaries summarized above, and are delighted to include it in this volume. Here Tamanaha recapitulates his scholarly endeavors as "a theoretical approach that captures

21 *Ibid.,* 115–121.
22 *Ibid.,* 116.
23 *Ibid.,* 123–132.
24 Besides the events mentioned above, he attended four seminars as well as various meetings dealing with different topics at different venues in Tokyo, Nagoya and Osaka in two short weeks.
25 See, Tamanaha, The Orientation of the Social Legal Theory in this volume, 133–143.

and conveys what law is in the world."[26] As he repeatedly emphasizes, it is not law itself but, rather, *law in the world*, namely, every form of law in various societies with their own culture and history that is always at the center of his concern.[27] For Tamanaha, empirical research is indispensable for his particular aims, revealing as it does sundry aspects of law in "the dynamic interaction of law within society, influenced by the past while continuously moving through the present, never standing still."[28]

His responses to the ten commentaries encompass a variety of topics – interpretation of H. L. A. Hart's theory, dissatisfaction with contemporary analytical jurisprudence, dangers of legal instrumentalism, possibilities (and difficulties) of legal assistance, and so on. Tamanaha is honest enough to admit to the weaknesses and limitations of his arguments, at the same time as he deigns to clarify his ideas. I will, however, refrain from going into further detail and simply leave it to our readers to make up their own minds about what they will have read here.

At this juncture, let me on behalf of IVR Japan express our deep gratitude to all those who were involved with the 2014 Kobe Lecture and the subsequent seminars. First of all, I would like to offer my heartfelt thanks to Professor Tamanaha and all the contributors to this volume, as well as to the designated discussants of each session, for their stimulating presentations and discussions, whether spoken or written. I am proud to present the fruit of our meetings in these pages.

I would also like to express my gratitude to all the organizers and coordinators of the venues, especially Hirohide Takikawa (Rikkyo University), Hiroki Takahashi (Komazawa University), Madoka Torisawa (Kanto-Gakuin University), Tatsuji Ohno (Hosei University), Hiroshi Kabashima (Tohoku University), Akira Goto (Aoyama Gakuin University), Takahiro Doi (Chukyo University), Hidehiko Adachi (Kanazawa University), Seiko Murabayashi (Aichi Gakusen University), Shintaro Suzuki (Aichi Gakuin University), Makoto Usami (Kyoto University), Michihiro Kaino (Doshisha University), Nozomi Hayakawa (Momoyama Gakuin University), Tsukasa Takahashi (Osaka Bar Association), Takeshi Tsunoda (Kansai University), Akiko Nozaki (Kyoto Pharmaceutical University), and others who supported us at every stage of our events. My sincere thanks go to the universities that kindly provided us with venues, and to the two organizations that helped IVR Japan to set up all these events, namely, the Japan Clinical Legal Education Association, and JALP, whose President, Hiroshi Kamemoto, led the executive board in their constant cooperation and support.

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Kosuke Nasu (President of IVR Japan)

26 *Ibid.*, 133.

27 "To understand law, these approaches [sociological jurisprudence and historical jurisprudence] insist, one must apply an empirical lens to observe law in social-historical context"[*ibid.*, 134.]; "…Hart's work centered squarely on law, while I preferred to locate law within society"[*ibid.*, 134.]

28 *Ibid.*, 135.