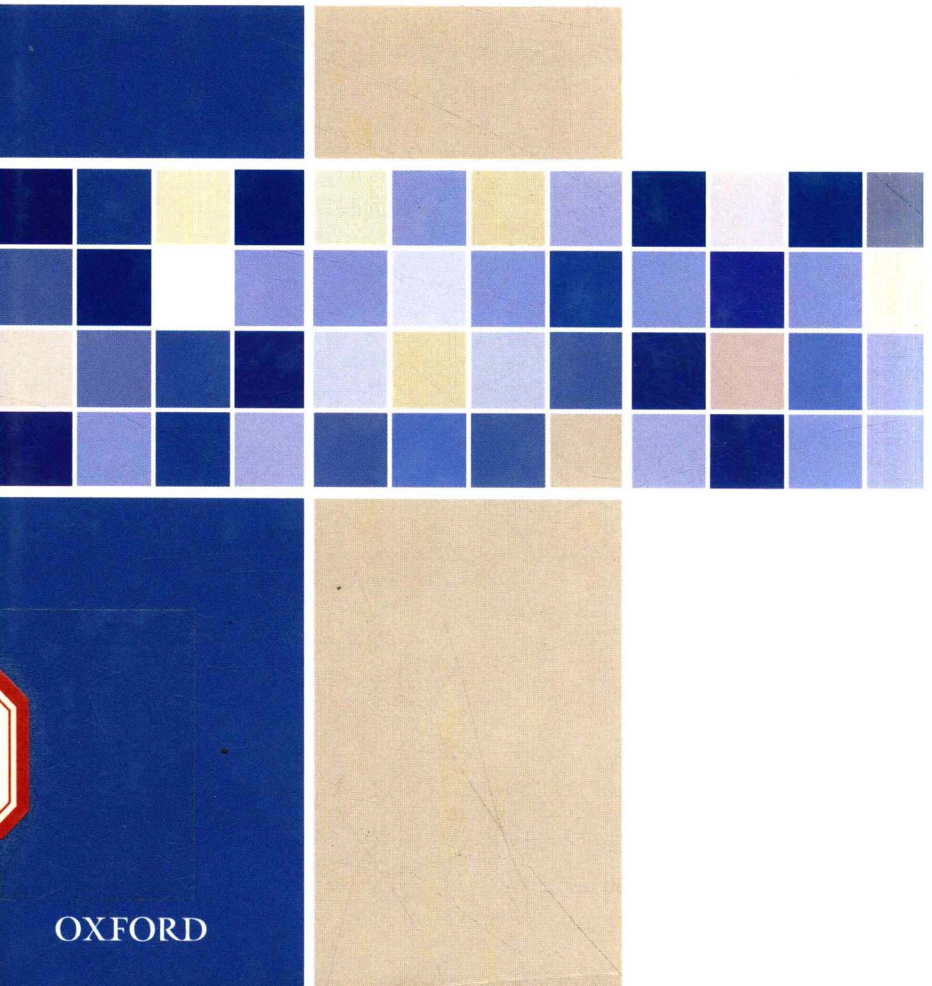
LEGALITY'S BORDERS

AN ESSAY IN GENERAL JURISPRUDENCE

KEITH C. CULVER AND MICHAEL GIUDICE



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INTRODUCTION

Analytical legal theory has long taken as its central focus the experience of the law-state, and the success of analytical theories of law has been measured by their ability to explain the phenomenon of the law-state. Yet this focus and conception of success may be forced to change as the place of the law-state in our experience of law is changing, from the United Kingdom's devolution of power to Scotland, to integration of European law-states to the point of consideration of a shared constitution, to the rise of super-national legal institutions such as the International Criminal Court. The goal of this book is to revive the tools of analytic jurisprudence for a new set of theoretical challenges posed by the flourishing of novel forms of legal order.

IMBALANCES IN ANALYTICAL LEGAL THEORY'S APPROACH TO PRIMA FACIE LEGAL PHENOMENA

We are far from revolutionary in pointing to a range of social phenomena that challenges the utility of approaches to legality that depart from the law-state as the fundamental instance of legality. Within the analytical approach both H.L.A. Hart and Joseph Raz are aware that the law-state is at the very least an institution with many forms, and that we have not given enough attention to understanding how the idea of "legal system" provides explanatory unity to understanding legality in the law-state and in phenomena not easily dismissed as outliers beyond the scope of our attention. Hart, for example, recognized in the closing chapter of *The Concept of Law* that colonial and post-colonial eras brought unanticipated developments of legal phenomena, raising "fascinating problems of classification" for theorists attempting to understand such devices as "[c]olonies, protectorates, suzerainties, trust territories, confederations"[1]—all variants of sovereignty with associated legal systems or subsystems of various kinds.

1. H.L.A. Hart, The Concept of Law 220 (1994).

Raz has argued that although an understanding of legal system is crucial to an understanding of law, attention to legal system has been lacking:

> All four problems of the theory of legal system have for the most part been neglected by almost all analytical jurists. It seems to have been traditionally accepted that the crucial step in understanding the law is to define 'a law', and assumed without discussion that the definition of 'a legal system' involves no further problems of any consequence.[2]

Although Raz's remark was made in 1970, we accept its enduring probative value—even though Raz's subsequent writing perhaps inadvertently drew attention away from the problems of legal system and toward individual or constituent aspects of legal systems. He famously argues that legal systems are to be understood as claiming supreme authority to issue norms comprehending the whole of social life, all while remaining open in the sense that complementary social practices can be adopted for special legal purposes.[3] Yet his subsequent work takes up very little of the themes of supremacy, comprehensiveness, and openness, focusing instead on the nature of authoritative reasons for action, often concretized in discussion of the force of particular kinds of norms in practical reasoning.[4] More recently Raz has acknowledged that interest in the identity of legal systems has simply shifted elsewhere since Austin and Kelsen focused on the question:

> John Austin thought that, necessarily, the legal institutions of every legal system are not subject to—that is, do not recognize—the jurisdiction of legal institutions outside their system over them. (I am somewhat reinterpreting his claim here.) Kelsen believed that necessarily constitutional continuity is both necessary and sufficient for the identity of a legal system. We know that both claims are false. The countries of the European Union recognize, and for a time the independent countries of the British

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2. Joseph Raz, The Concept of a Legal System 24 (1970). Earlier Hans Kelsen expressed a similar view: "Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system. It is impossible to grasp the nature of law if we limit our attention to the single isolated rule." General Theory of Law and State 4, (A. Wedberg trans., 1961).

3. Joseph Raz, Practical Reason and Norms 150–154 (1990).

4. *See, e.g., Id.* and Joseph Raz, The Authority of Law (1979).

> Empire recognized, the jurisdiction of outside legal institutions over them, thus refuting Austin's theory. And the law of most countries provides counterexamples to Kelsen's claim. I mention these examples not to illustrate that legal philosophers can make mistakes, but to point to the susceptibility of philosophy to the winds of time. So far as I know, Austin's and Kelsen's failures were not made good. That is, no successful alternative explanations were offered. In spite of this there is no great flurry of philosophical activity to plug the gap. Rather, the problem that their mistaken doctrines were meant to explain, namely the problem of the identity and continuity of legal systems, lost its appeal to legal philosophers, who do not mind leaving it unsolved. Interest has shifted elsewhere.[5]

Shifting interests and waning appeal might justify changes in fashion, but they seem rather thin as reasons for analytical legal theorists to ignore important questions raised by new and changing prima facie legal phenomena for understanding of legal systems. The burden of Raz's observation has not been entirely ignored, even though the challenge he offers has not been taken up in any substantial way. Jeremy Waldron recently suggested that:

> Those international lawyers who do bother to read Hart's chapter on international law usually come away with the impression that Hart, like Austin, did not believe there was any such thing as international law. That is not quite correct, but Hart did say that international law is like a primitive legal system—all primary norms and no secondary norms. And that was wrong in 1960 and it is certainly wrong now . . . This is another example of an area where Hart's own carelessness or indifference has been imitated rather than compensated for, by his followers. Those who regard themselves as working to protect and develop Hart's legacy have shown little interest in subjecting Hart's claims about international law to any sort of careful scrutiny or revision. The neglect of international law in modern analytic jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour . . .[6]

To describe these remarks as strong stuff is likely an understatement. Yet the firm tone of Waldron's remarks is likely justified by the fact

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5. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 11 (J. Coleman ed., 2001).

6. Jeremy Waldron, *Hart and the Principles of Legality*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 68–69 (M. Kramer et al. eds., 2008).

that so much time has passed from Hart's tentative engagement of borderline phenomena of legality, to Raz's recognition of the shortcomings of analytical approaches to legal system, and to the current situation in which only a few widely read figures such as Neil MacCormick are making real inroads into manifestations of legality at the edges of the familiar model of the law-state.

These observations leave us at a critical turning point. Prima facie legal phenomena give reasons to doubt the adequacy of at least extant analytical explanations of the nature of legal system and the conditions for inclusion or exclusion of social phenomena within particular legal systems or subsystems. Far from this observation arriving as a surprise to analytical theorists, it appears that there is longstanding recognition of the need to account for these troublesome phenomena at legality's borders. What is worse, there is recognition among analytical theorists that for whatever reason they have continued to fail to take up the challenging "issue of the hour" as Waldron puts it. What should be made of this? Here we part ways with Raz's suggestion that the "winds of time" are to blame for analytical legal theory's neglect of the problem of the relation between legality and legal system. Our diagnosis is much less optimistic. What Raz sees as neglect is in fact much worse: it is simply a symptom of an underlying inability of dominant analytical approaches to capture legal phenomena outside the model of the law-state.

Our diagnosis can be framed quite simply. Current analytical approaches to legality and legal system exhibit a kind of explanatory imbalance which deprives those approaches of the capacity to respond to novel law-like social phenomena. Although analytical jurisprudes have constructed rich and deep theories of the distinguishing features of individual legal norms, significantly less attention has been devoted to accounts of legal systems which house individual norms. Two particular aspects of norm-level investigations have exacerbated this imbalance. First, analytical theorists in the Hartian tradition have failed to recognize that accounts of Hart's notion of an official-operated rule of recognition require both structural and functional parts: while we have rich structural explanations of the logical features of the rule of recognition, little attention has been given to whether it can actually function in a way that allows it to carry out the promised task of distinction of valid legal norms of a system from

other normative claims. We contend that it does not, and moreover that it cannot, since as we argue in detail in Chapter 1, the official-dependent rule of recognition contains insuperable problems of circularity and indeterminacy in its account of the nature and identity of officials, and these problems deprive the rule of recognition of its promised explanatory power. Legal officials make a special constitutive contribution to the rule of recognition since their practices of norm-creation, application, and enforcement are system-constituting and system-defining practices. Yet without an adequate account of who the legal officials are, and how their identity might change, a necessary precondition for a theory of legality and legal system is unsatisfied. Second, and more generally, the analytical approach contains an imbalance between the descriptive and explanatory parts of its account of legality and legal system. A great deal of effort has been devoted to elaboration of the explanatory part, provided as an account of what is conceptually or logically possible for a system of norms. Much less effort has been given to the descriptive part, understood as the attempt to test conceptual explanations of legal governance against observationally-available evidence. The presence of this imbalance is evident in the paucity of analytical theories' explanation of their connection to observational evidence, and to adjacent areas of inquiry into life under law. As we argue in Chapter 3, employment of evidence tends to proceed without reference to a general account of the nature of evidence, requirements for reliability of that evidence, and so on, required to support the explanatory part of the analytical theory of law. What appeals there are to evidence amount to surveys of data intuitively relevant to elucidation of "our concept" and similarly obscure objects, whose explanation is not clearly connected to moments of greater ambition involving elucidation of more than local practices.

NEW PHENOMENA

Yet the imbalances just identified are perhaps most demonstrable in the failure of analytical legal theory to address prima facie legal phenomena in a variety of emerging contexts. Prima facie legal phenomena fall under four admittedly provisional categories which rely for

their utility on their conventional meaning within law, political science, and legal theory.[7] We identify and discuss intra-state legality, trans-state legality, supra-state legality and super-state legality, capturing a range of norms and normative orders often spoken of as international law. It should be emphasized that although we write here of these phenomena as exhibiting "legality," we do so only suggestively, as part of our contention that they exemplify social phenomena which pose a serious challenge to the explanatory adequacy of contemporary analytical legal theory. Conclusive analysis of course awaits the results of our arguments contra contemporary analytical theory, and our positive argument for what we call an inter-institutional theory of legality.

Intra-State Legality

Perhaps the most intuitively challenging instances of prima facie legality are found within the law-state, yet nonetheless appear to be meaningfully independent of the law-state and so deserve recognition as "intra-state" forms of legality. Distributed governance arrangements are likely the most familiar intra-state devices for creation of what are sometimes regarded as subsystems of law, a relinquishing of centralized governance authority that nonetheless stops short of full division of sovereignty. In these arrangements historically core legal institutions distribute their authority to relatively distant legal institutions within the system, whether reformed extant institutions or new institutions. Typically this distribution is undertaken to locate decision-making within institutions best suited to making particular decisions—whether geographically or experientially or financially or in some other way best suited. Shared governance is a less familiar, yet increasingly evident form of governance involving collaboration between traditionally or historically central legal institutions and other social organizations of varying complexity and institutionalization, contributing in various plainly evident ways to formation and variation of legal norms. From shared governance we may now be moving to overlapping, relatively independent legal orders of a new

7. For another account, William Twining usefully identifies eight different "levels" of law in General Jurisprudence: Understanding Law from a Global Perspective 70 (2009).

form or kind of order—perhaps sometimes in spite of insistence to the contrary on the part of the central agents in these new orders.[8]

In Canada, for example, federal and provincial governments face complex governance tasks with respect to indigenous "First Nations" peoples, several of whom are still in the process of negotiating land claims treaties, denying Canada's authority and acting in a fashion similar to sovereign states while for the most part remaining *de facto* within the authority of the Canadian law-state. The justice of First Nations claims and the aftermath of colonial practices have left federal and provincial governments very sensitive to the complexity of governance of related issues. One result has been the negotiation of methods of mutual relation between the Government of Canada and First Nations authorities regarding matters such as taxation. For example, the Government of Canada itself acknowledges in the terms of its regulations governing the appointment of commissioners that the newly created First Nations Tax Commission is "a shared governance organization which requires that appointments to the governing body be made by both the Government of Canada and at least one other government or organization."[9] The First Nations Tax

8. For an illuminating account of emerging forms of federalism, *see, e.g.*, Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 Emory Law Journal 1–30 (2007).

9. *See First Nations Tax Commissioner Appointment Regulations*, http://www.fntc.ca/en/supporting-legislation/regulations/first-nations-tax-commissioner-appointment-regulations (last visited October 29, 2009) The role of the First Nations Tax Commission (FNTC) is explained as follows:

Specifically, the FNTC was created to

- assume authority for the approval of First Nation property tax laws made under the Act;
- provide professional and objective assessments of First Nation property taxation under the Act;
- prevent and minimize the costs of disputes by providing a mechanism for hearing the concerns of affected parties under the Act and for promoting the reconciliation of the interests of First Nations and taxpayers;
- set standardized administrative practices for First Nation real property tax administrations created under the Act and provide training to ensure standards are achieved;
- provide education in order to raise awareness of the benefits of First Nation taxation between First Nations and the rest of the country; and

Commission aims generally to reform existing divisions of authority, recognize First Nations governments, and reconcile First Nations interests with other Canadian interests. The nature of this relation is complex, yet whatever final analysis reveals, it is worth considering the possibility that new forms of legal order are being forged.

Trans-State Legality

If intra-state practices such as shared governance are the most intuitively challenging instances of potentially non-state legality, perhaps the most surprising unanticipated developments are found in situations in which apparently non-state agents function like state agents in making general agreements outside the state which nonetheless bind citizens within the state. In situations of this kind, norms claiming peremptory, content-independent force[10] arise as a result of practice or convention and are generally recognized as holding that force without reference to authorization of those norms by any particular law-state.

- advise the Minister on policy issues relating to the implementation of First Nation property taxation powers and on any matter or policy put to it by the Minister.

The FNTC is a shared governance organization which requires that appointments to the governing body be made by both the Government of Canada and at least one other government or organization. In the case of the FNTC, nine commissioners are selected by the Governor in Council on behalf of the Government of Canada, with the remaining commissioner appointed by a body established pursuant to subsection 20(3) of the Act. The *First Nations Tax Commissioner Appointment Regulations*, made pursuant to paragraph 140(*a*) of the Act, identify the NLC as the body to appoint the additional commissioner to the FNTC.

Renowned for its expertise in promoting First Nation law, the NLC is a research centre within the University of Saskatchewan. It is responsible for the Program of Legal Studies for Native People. This program has been widely recognized for its role in increasing Aboriginal representation in the legal profession. The NLC also publishes the *Canadian Native Law Reporter* and since 1997, the *First Nations Gazette*. The *First Nations Gazette* is similar to the *Canada Gazette* and has been instrumental in improving the accessibility of First Nation laws, maintaining confidence in First Nation governments, and improving First Nation taxpayer relations.

10. On the peremptory and content-independent character of legal reasons see H.L.A. Hart, Essays on Bentham 243–268 (1982).

Our example is taken from the complex and increasingly important area of ocean resource governance, and more specifically, in governance of fishing of salmon which migrate across state boundaries and international waters. The Greenland Conservation Agreement provides for a seven-year moratorium on commercial, non-subsistence salmon fisheries in Greenland's territorial waters, from the 2007 season forward. This agreement extends the practice established by a 2002 moratorium. The agreement is signed by the "Atlantic Salmon Federation (ASF) of North America, the North Atlantic Salmon Fund (NASF) of Iceland, and the Organization of Fishermen and Hunters in Greenland (KNAPK), three non-governmental organizations" and "has been endorsed by the Greenland Home Rule Government which will help enforce it. . . ."[11] Several aspects of this agreement are relevant to analytical theories of legality, and their inclusion or exclusion of this phenomenon as an instance of legality or part of a legal order.

In assessing whether the moratorium might represent a legal norm or part of a legal order, it is significant that its proponents are neither governmental bodies nor representatives of government; in fact, the independence of this agreement from the law-state and international law goes much further. The Atlantic Salmon Federation draws its membership from both the United States and Canada and as a transboundary non-government organization is beholden to neither government. The Home Rule Government of Greenland is a devolved authority of the Kingdom of Denmark and lacks authority to enter into international treaties. These and the other proponents have entered into an agreement they describe as a "a private contract"[12] growing out of an agreed practice, relying on social pressure within this group for its effectiveness and having no reference to the laws of any state jurisdiction as the laws of the agreement or the legal locus of dispute resolution with respect to the agreement. The agreement nonetheless extends an effective established moratorium on commercial salmon fishing in Greenland's waters, to the extent that

11. "New Atlantic Salmon Conservation Agreement—Safer Ocean Migration Ensured", http://www.asf.ca/news.php?id=99. (Last visited July 27, 2007).

12. Personal communication with the Atlantic Salmon Federation, July 2007.

where ten years ago 600 license holders fished those waters, now there are none.

Supra-State Legality: The Puzzle of the European Union

The preceding example of non-state legality mentioned the familiar feature of international law: that its existence depends largely on the consent of states. This arrangement preserves the sovereignty of states as a fundamental norm of international law while grounding the force of international legal obligations in states. Voluntary agreement of the sort familiar from international law undoubtedly lies at the historic foundation of the European Union; yet as the Union has evolved it has come to claim that it represents a new legal order, neither a super-state nor an intergovernmental association.[13] But what is that legal order? And what is the relation of that order to explanations of legality as fundamentally systemic in a sense best evident in the law-state? Julie Dickson usefully suggests that the puzzling nature of the European Union can be revealed by asking an intuitively but misleadingly simple question: how many legal systems are there in the EU?[14] As Dickson notes, there are several possible answers: one legal system for every Member-State; one legal system for every Member-State plus one additional European legal system; or perhaps only one, super-European legal system. If there is more than one system—i.e. more than just one super-European legal system—how are legal theorists to characterize the relations among the systems? In particular, since both Member-State courts and the European Court of Justice have claimed supremacy of final authority to interpret and apply European law, can we view either Member-State legal systems or a European legal system as in some meaningful sense derivative, subordinate, or part of the other(s)? Or does this puzzle point us back to giving more serious consideration to the possibility that the European Union's claimed "new legal order" really is something new and different, not usefully reduced to talk of legal system?

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13. Case 26/62 *Van Gend en Loos v. Nederlandse administratie der belastingen* [1963] E.C.R. 1, p. 12.

14. *See* Julie Dickson, *How Many Legal Systems?: Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union* 9–50, 2 PROBLEMA: ANNUARIO DE FILOSOPHIA Y TEORIA DEL DERECHO (2008).

Super-State Legality: Claims to Universality in Peremptory *Jus Cogens* Norms

In mentioning the role of states' consent in the existence of international law we omitted identification of a further element of international law: the relatively small set of *jus cogens* or peremptory general norms of international law. These norms purport to bind states and their authorities independently of any prior consent: both historic and newly created law-states now appear everywhere subject to a sort of substrate of general, peremptory norms which claim to form part of a universally supreme system.[15] These norms have more recently been employed to bind the leaders of states, who might dispute the norms' application to them, as Slobodan Milosevic, former President of Serbia and Yugoslavia, famously did throughout his trial.[16]

A now-familiar range of jurisprudential questions emerges: is the existence of *jus cogens* demonstration that there is one global legal system, in which each law-state is but a subsystem? What distinguishes one subsystem from another? Or are peremptory international norms part of some non-systemic international legal order instead incorporated universally into otherwise separable state systems, so we have "one" international law inside the "many" law-states? Or something else?

STATE-BASED LEGAL THEORY

Analytical legal theory that takes the experience of the law-state as the standard and measure of legality explains the existence and nature of

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15. *Jus cogens*, or peremptory norms of general international law, is clearly defined in article 53 of the Vienna Convention on the Law of Treaties (1969):

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

16. *See, e.g.*, "Milosevic Defiant in Court", http://news.bbc.co.uk/2/hi/uk_news/wales/1420561.stm (last visited Apr. 7, 2008).

non-state types of prima facie legality in the following way: intra-, trans-, supra-, and super-state social phenomena are legal phenomena only to the extent that (i) they share the characteristic features of state law or (ii) are in some way actually supported by or connected to state practice or recognition. Although we shall analyze the quality of state law in detail in subsequent chapters, it is enough at this point to offer a working formulation which combines the views of Hart and Raz: state law exists where there are primary rules of obligation and secondary rules of recognition, change, and adjudication which in combination and in the hands of central law-applying officials claim with a certain degree of success to govern comprehensively, supremely, and openly.[17] On this understanding of the features of state law it is easy to see that other forms of legality must in some way be connected to state practice: if the world is divided without remainder into states which make and practice claims of comprehensiveness and supremacy, little conceptual or normative room is left for novel, state-independent forms of legality to emerge. Yet how well does such a state-based approach actually fare in explaining the novel phenomena sketched above? Here we offer the beginning of a diagnosis which we take up more fully in Chapters 1 and 2.

In examples of intra-state prima facie legality such as the First Nations Tax Commission, application of the state-based approach may be stretched beyond credulity if we say that what marks the legality of this interaction is incorporation of First Nations authorities by Canadian officials' recognition of them. The nature of the relation simply does not bear this out, to the extent that the Government of Canada itself represents the relation as one of shared governance between distinct governments. An adequate theoretical understanding of this situation may need to reach beyond the law-state model of legality and legal system to understand the special characteristics of intra-state legal orders which abut or overlap in various ways the range of other legal orders with which they interact. Put simply, what is the relation between First Nations' legal order and the legal system of Canada? Whatever the answer, it cannot simply presume that First

17. We examine in detail the legal theories of H.L.A. Hart and Joseph Raz in Chapters 1 and 2.

Nations' claims and experience must be read through the lens of the extant and dominant Canadian law-state.

A state-based analytical approach also interprets trans-state social practices such as the Greenland Conservation Agreement in a particular way: the agreement-derived obligation applying to all salmon fishers in Greenland's waters is a legal norm insofar as the Greenland Home Rule government has enacted this norm or endorsed it by authoritative certification, out of the urging of non-governmental organizations (NGOs), and under the authority granted it by the Kingdom of Denmark to govern natural resources. The precise contours of this norm can be assessed by observation of how Greenland's officials in fact handle application of the norm. Little more need be said about this situation on the state-based analytical approach, because the NGOs are just that—non-governmental—and so are not parties to an international treaty, and the Greenland Home Rule government is simply exercising its devolved powers. This conventional analytical view of course expresses a plausible understanding of the situation; yet a kind of distorting selectivity of emphasis seems evident, and that selectivity points to shortcomings in an approach that presumes that a justified ascription of legality to some state of affairs must be a statement about membership in a system of norms associated with an authorizing law-state. In seeking a state-based explanation of the phenomena, the conventional view obscures the special formative role of the NGOs in the agreement, and in turn mistakenly underestimates the contribution of the Greenland Home Rule government in reaching an agreement which falls short of an international treaty, yet seems to be something other than simple incorporation into Greenland law of normative content presented by lobbying from NGOs from within and without Greenland. The effectiveness of the moratorium and its independence from law-states resembles the emergence of a legal order or subsystem from practice—even as a description of the situation in these terms might be surprising to some of the participants. This zone of interstitial, transboundary prima facie legality might, of course, be affected by Danish, Canadian, or U.S. governments' activities in international treaties in this area, but this is a familiar matter: not all legal norms are of equal force, nor are all legal orders, systems, and subsystems of equal force.

As with the case of self-governance in Canada, we are left with a puzzle: what is the legality of effective peremptory norms which